

MEASURE: SB 1508  
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SUBMITTED BY: Russell Strandholm

Tuesday, January 31, 2012

# REGION

## PENDLETON



Hodgen Distributing owner Russ Strandholm, center, holds the 2012 Commercial Recycler of the Year from Pendleton Sanitary Service, Inc, presented by PSSI President Susan McHenry, left, and PSSI Vice President Mike McHenry, right. Photo courtesy Mike McHenry

# Hodgen Distributing wins for recycling

*East Oregonian*

Dealing with 55 tons each month of recycling is a big task.

For its conscientious efforts, Hodgen Distributing won Pendleton Sanitary Service's annual Commercial Recycler of the Year Award.

Hodgen distributes Budweiser

products throughout the area. In 2011, the company recycled 536 tons of glass, 86 tons of aluminum cans, 53 tons of cardboard and 2 tons of plastic, according to the sanitary service's press release. Sanitary service employees voted unanimously for Hodgen.

The company's done an "outstand-

ing job," according to the sanitary service. The annual award honors companies who keep their recycling organized and clean, which helps sanitary service employees do their jobs.

Strandholm appreciated the award. "I feel good," he said, "It's pretty prestigious."



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March 25, 2010 - Transmittal Via Email

Chip Terhune, Chief of Staff to the Governor  
Joseph O'Leary, Legal Counsel to the Governor  
State Capital Building, 900 Court Street NE  
Salem, Oregon 97310

Re: House Bill 3704

Dear Mr. Terhune and Mr. O'Leary:

Thank you for meeting with Jim Markee, Matt Markee and me the other day. I thought it might be helpful to provide a further response to some questions that you raised during the meeting. Please include this letter in the materials provided to Governor Kulongoski.

You asked about the context within which HB 3704 was introduced and what the proponents may be thinking about their antitrust exposure (or lack thereof) relating to this bill. It is clear that the proponents are relying on the *Costco* case as *the* immunity defense to protect conduct that they concede creates competitive restraints in the market. This is set forth in my March 19, 2010 letter to Governor Kulongoski.

The proponents believe in their unilateral restraint theory, perhaps in part, because they believe that the creation, existence and all actions of the OBRC and its membership are compelled by the Bottle Bill mandate. The proponents' written and oral testimony reflect a mindset that the OBRC is an extension of the state. That, of course, is not true. The reality is the OBRC, with its make-up of competitors at different levels of the market and its 95% market share, are private party responses to the Bottle Bill rather than the result of a statutory mandate. As Representative Berger stated at the House Rules Committee hearing on February 15, 2010:

"The Bottle Bill has been a private sector function from the day it was enacted."

OBRC is not the state's counterpart. HB 3704, therefore, would be used as a non-market mechanism to enforce private marketing decisions. Nevertheless, this may help shed light on why the proponents are confusing advancing the OBRC business plan, which is what HB 3704 is designed to do, with advancing state policy.

The Legislative Counsel ("LC") February 19 opinion correctly states that the state action immunity defense is not provided in HB 3704 and that there are antitrust issues with this bill. LC did not take a definitive position on whether the bill or the conduct would violate federal antitrust law. That is not surprising, however, given that LC had only days to prepare the opinion. It also appears that LC was not made aware that the bill's proponents were relying upon *Costco* until after the opinion letter was written. The absence of a definitive opinion on the antitrust risks, therefore, should not be interpreted to mean that significant risks do not exist. Competitive restraints will be imposed and facilitated by HB 3704. The proponents concede that restraints do exist with HB 3704. The issue is whether an antitrust immunity defense would be available to those acting pursuant to HB 3704. *Costco* does not provide that defense.

Chip Terhune, Joseph O'Leary  
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We understand the level of deference that is given to bills that are passed by the Legislature and presented to the Governor for his consideration. We respectfully submit that when the Legislature is not given the complete picture of a bill's legal effects, this fact should be taken into consideration.

The Legislature passed HB 3704 on an incomplete record and without the benefit of a thorough antitrust analysis the bill and its risks. There was an incomplete discussion of the *Costco* case before the Senate Rules Committee. The *Costco* case was not mentioned at all during the House Rules Committee hearings. Nothing was mentioned to either committee about the difference between a unilateral and hybrid restraint or the different consequences depending upon which restraint is present. In fact, the Senate Rules Committee was told that because HB 3704 involves unilateral restraints, state oversight is not needed.<sup>1</sup> It is just the opposite. The lack of state oversight, which is a key component in a state action immunity analysis, is also a key factor in favor of finding a hybrid restraint because it is further proof that there is unsupervised private power in derogation of competition. *Costco Wholesale Corp. v. Maleng, et al*, 522 F. 3<sup>rd</sup> 874, 889 (9<sup>th</sup> Cir. 2008).

The Senate Rules Committee was, instead, given the example of speeding laws to illustrate the state's authority to impose unilateral restraints on its citizenry.<sup>2</sup> While we appreciate that speeding laws can be offered up as an elementary example of the state's powers, that example has nothing to do with restraints on competition and is meaningless in an antitrust context.

By contrast, your office has the benefit of more information regarding the antitrust issues surrounding the bill than LC or any member of the Legislature had.

As with all other materials submitted, I ask that your office and the Oregon Department of Justice keep this letter confidential to the extent allowed by Oregon law, and not disclose it to unauthorized parties in accordance with ORS 192.502(4). I further request being notified of any decision to disclose this letter to third parties a reasonable time in advance of disclosure.

Thank you for your consideration.

Sincerely,



Andrew E. Aubertine  
For the Association of Independent  
Beverage Recyclers of Oregon

Cc: Keith S. Dubanevich, Special Counsel to Attorney General John Kroger

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<sup>1</sup> *Testimony of Paul Romain*, February 19, 2010, before the Senate Rules Committee.

<sup>2</sup> *Id.*



THEODORE R. KULONGOSKI  
Governor

April 8, 2010

The Honorable Kate Brown  
Secretary of State  
136 State Capitol  
900 Court St. NE  
Salem, OR 97301

Dear Secretary Brown:

I am returning Enrolled House Bill 3704 unsigned and disapproved.

House Bill 3704 allows two or more private beverage distributors to form a cooperative in Oregon to facilitate the collecting and processing of recyclable beverage containers under Oregon's landmark bottle bill. Significantly, the measure requires that the cooperative must service a majority of the dealers (the retail sellers of recyclable containers) in the state.

I have long supported efforts to expand and enhance Oregon's bottle bill and increase the overall rate of recycling in Oregon. My concern is that the practical impact of this bill may actually hinder consumer recycling.

I acknowledge that Enrolled House Bill 3704 is a better business model in terms of economics and convenience for distributors and dealers. However, I am concerned that the business model envisioned in HB 3704 will make it *less* convenient for the consumer to recycle. The consumer will be limited in their ability to obtain a refund or credit at the neighborhood retailer. Instead, the consumer will put his or her recyclables in a bag, drive to a redemption center, wait in line to drop off the bag, receive a credit for the recyclables, and then save that credit to use at a later time or travel back to the neighborhood retailer to shop.

In addition to consumer inconvenience, this recycling model would likely require the consumer to have a car, and requires more traveling to and from the redemption center, more time in traffic on our streets, more CO2 emissions, and more time away from home.

The argument that this bill may provide an incentive for distributors and dealers to support an expansion of the bottle bill is a hopeful one. My question is: why isn't such expansion in the bill before me?

The Honorable Kate Brown  
April 8, 2010  
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There are more pieces to be added to this proposal before it will be good public policy that benefits all stakeholders, especially the consumer.

Also, a serious legal concern has been raised about whether HB 3704, in combination with likely actions of competitor businesses, would violate federal antitrust law by restraining competition to the private participants in this industry. If federal antitrust litigation begins, it would be lengthy and expensive, and create a roadblock to beverage container recycling efforts for which Oregon has gained world-wide commendation.

Finally, I write to comment and urge caution on an issue that has arisen with each of the bills I have vetoed today. All three bills proposed changing a long-standing Oregon public policy. I have a serious concern as to whether the Special Session in February provided opportunity for citizens and interested stakeholders to be adequately involved in the development of these proposed policy changes.

The public give-and-take is critical to crafting and amending legislation by allowing all interested parties to be involved in the development of public policy. I believe we must always be open and transparent when we are proposing changes to long-established Oregon policy, especially in a short legislative session.

The Regular Session in 2011 will give all parties, including the public, a more meaningful opportunity to be part of the legislative process.

Sincerely,



THEODORE R. KULON GOSKI  
Governor

TRK:jo/sh

Cc: Senate President Courtney  
Speaker Hunt

September 9, 2011

Oregon Association of Independent Beverage Recyclers  
2404 East "H" Ave  
PO Box F  
La Grande, Oregon 97850

To: Mr. John Anderson (President of OBRC) and all OBRC Board Members

The members of OAIBR would like to make the following proposal to OBRC regarding collection of deposit containers in zone 5 and in parts of zone 1 and zone 4. We feel working together in both zones would be very advantageous to all parties involved.

1. Zone 5 contains 17 accounts with reverse vendors which represents approximately 90% of all returned containers. OAIBR would be willing to pick up all recycled containers in Zone 5 for OBRC and local distributors. Recycle will be divided by each distributor or OBRC by the results from the machine counts. In parts of zone 1 and Zone 4 the Noel Group would also provide pick up service for OBRC. Non reverse vendor accounts would be picked up by each vendor as they are now.
2. OBRC would collect the deposit dollars from all OBRC members in both zones as they do now. Local distributors that currently pay store directly will continue to do so.
3. OAIBR would be willing to collect and process deposited containers (Glass, aluminum and plastic) from all local distributors.
4. OAIBR would process and store all recycled material for OBRC and local distributors. OBRC and local distributors would pay a processing fee at the time of sale of recycle or when recycle is picked up.
5. All reverse vendors need to accept all Oregon deposit containers.
6. In the event any redemption centers are opened in our territories we would be willing to pay our fair share for the redemption center cost. In an effort to insure that the redemption centers met the needs of the consumers of eastern Oregon we would need to be involved in the site selection and planning for each redemption center.

OAIBR is attempting to come to a conclusion for the benefit for all parties involved. Please contact Russ Strandholm at Hodgen Distributing to set up a meeting to discuss the possibility of going forward with our proposal.

Thank you for your consideration

OAIBR Members