

INTERPRETING OREGON LAW

**2009
EDITION**

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PREFACE

Oregon law has come to be dominated by legislation and administrative rules. At last count (in 2007), the 17 volumes of the Oregon Revised Statutes comprised more than 12,500 pages of oversized, double-columned pages of regulations; dealing with nearly every imaginable aspect of public and private life, from abandoned boats and abusive language to zoning and zoos. Every other year (and, more recently, annually) the Oregon Legislative Assembly adds to that total, enacting between 700 and 1,000 new bills into law each session. Many of those laws authorize administrative agencies to engage in further lawmaking in the form of administrative rules, adding another 18 volumes and over 10,000 pages of fine print to the mix.

What this means is that the practice of law increasingly consists of interpreting and applying those statutes and administrative rules. Confirmation of that is as easy as picking up any recent volume of the Oregon Reports, the published decisions of Oregon's appellate courts. On average, more than two-thirds of the opinions are devoted to the interpretation of statutes and administrative rules.

Obviously, it is becoming important for practicing lawyers to become familiar with the rules that are applied in the interpretation of statutes and regulations. In recognition of that fact, the Oregon State Bar has decided to publish this handbook on those rules of interpretation. The authors and editors of the handbook sincerely hope that it proves a useful tool to the bench and bar.

The preparation of this handbook was unique and deserves special note. Under the supervision of Professors Steve Johansen and Anne Villella, of the Lewis & Clark Law School, each chapter was initially researched and drafted by law students participating in an advanced seminar on legal writing. Professors Johansen and Villella then revised the drafts and submitted them to the OSB Legal Publications staff and me for editing. That collaboration represents an enormous undertaking by Professors Johansen and Villella and their students, as well as Linda Kruschke and the Legal Publications staff.

HON. JACK LANDAU
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STATUTORY INTERPRETATION: OVERVIEW OF GENERAL PRINCIPLES

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I. (§1.1) INTRODUCTION

The laws that govern the conduct of individuals and entities in Oregon derive primarily from legislative enactments. Therefore, the lawyer needs a solid understanding of how Oregon courts interpret those laws. This chapter provides an overview of the general principles of statutory construction and the courts' key considerations when presented with an issue of statutory construction. Although subsequent chapters address the evidence the courts consider in the construction of statutes, the rules of construction, and how the courts apply those rules, this chapter provides the foundation for the analysis. Thus, the lawyer should have a solid grasp of the principles and considerations addressed in this chapter before delving into the specific rules of construction.

II. (§1.2) GENERAL PRINCIPLES

This section provides an overview of the framework for statutory interpretation in Oregon. Understanding the principles discussed here is essential to understanding how the courts proceed in their task of statutory interpretation. Section 1.3 discusses the courts' role in interpreting statutes. Section 1.4 discusses the courts' responsibility to discern the legislature's intent. Section 1.5 sets forth the general analytical framework that courts rely on to interpret statutes. Section 1.6 discusses the problem of ambiguity in statutes and the standard the courts use to determine whether a statute is ambiguous.

A. (§1.3) The Courts' Role in Interpretation

The courts, in the construction of statutes, are simply to ascertain and declare what the text and substance of the law is. ORS 174.010. That is, the courts interpret the law, they do not write the law. *State v. Vasquez-Rubio*, 323 Or 275, 282–283, 917 P2d 494 (1996). This flows from the constitutional principle of separation of powers under Article III, §1, of the Oregon Constitution. The judicial branch may not exercise the lawmaking powers of the legislative branch. Or Const art III, §1. Although the constitution articulates the general principal, the legislature specifically articulated the role of the courts in ORS chapter 174.

Oregon courts often cite ORS 174.010, and it provides the general directive with regard to the role of the judge in interpreting a statute:

In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.

Thus, the courts may not rewrite the law, even when lawmakers make a clear error. *Vasquez-Rubio*, 323 Or at 282–283 (courts will not rewrite a clear statute based solely on conjecture that legislature could not have intended a particular result). Therefore, the courts must avoid interpreting a statute in a manner inconsistent with this principle. See §§5.2–5.4 to review cases discussing and applying ORS 174.010.

B. (§1.4) Discerning Legislative Intent: The Courts’ Goal in the Interpretation of a Statute

The courts’ goal in the construction of statutes is to discern the intention of the legislature or lawmaking body. ORS 174.020(1)(a). The principle codified in ORS 174.020(1)(a) focuses on the legal inquiry, and hence the manner in which the judge and lawyer frame the analysis. If, in the construction of a statute, the court’s inquiry focuses on other than the legislature’s intent, the construction is subject to challenge. *See State v. Sandoval*, 342 Or 506, 513, 156 P3d 60 (2007) (court reexamined meaning of previously interpreted statute when prior interpretation was based on preexisting common law, not legislative intent); *State v. White*, 341 Or 624, 147 P3d 313 (2006) (court reexamined meaning of burglary statute as applied in prior case because trial court erroneously applied statute based on assumption about its meaning).

The statutory construction inquiry focuses on the intent of the legislature that enacted the operative words or provision. *Holcomb v. Sunderland (In re Holcomb)*, 321 Or 99, 105, 894 P2d 457 (1995) (“[t]he proper inquiry focuses on what the legislature intended at the time of enactment and discounts later . . . events”). When a court inquires into the legislature’s intent, it may consider, as context, other statutory provisions that the legislature enacted either concurrently or prior to the statutory text at issue. *See Stull v. Hoke*, 326 Or 72, 79–80, 948 P2d 722 (1997). On rare occasions, the courts have examined subsequently enacted statutes as part of the contextual analysis. *See Nibler v. Or. DOT*, 338 Or 19, 22–23, 105 P3d 360 (2005).

In addition, the courts may consider the common law in existence at the time of enactment. *Butler v. United Pacific Ins. Co.*, 265 Or 473, 479 n 3, 509 P2d 1184 (1973). On rare occasions, the courts have also sought guidance from postenactment decisions, but only when other aids to construction did not reveal the legislature’s intent among competing, plausible constructions of the statute. *Nakashima v. Bd. of Educ.*, 204 Or App 535, 555, 131 P3d 749, *adhered to on recons.*, 206 Or App 568 (2006) (citing *Marks v. McKenzie High Sch. Fact-Finding Team*, 319 Or 451, 457–463, 878 P2d 417 (1994)). Furthermore, in interpreting the words of a statute the court may seek “guidance from dictionaries that were in use at the time.” *State v. Perry*, 336 Or 49, 53, 77 P3d 313 (2003). Thus, any inquiry into the legislative intent considers the laws in existence at the time of enactment and focuses on the understanding that the enacting legislature would have had.

Implicit in the inquiry into legislative intent is the court’s obligation to construe the law accurately, regardless of the arguments made by the parties. See *Stull*, 326 Or at 77, where the supreme court expressly stated, “[i]n construing a statute, [the] court is responsible for identifying the correct interpretation, whether or not [that interpretation is] asserted by the parties.” Thus, although the parties may advocate specific interpretations, the court may, on inquiring into the legislature’s intent, adopt a wholly different interpretation or may adopt the interpretation advocated by one of the parties, but based on different evidence of legislative intent. See *State v. Couch*, 341 Or 610, 618, 147 P3d 322 (2006) (court looked to statutory definition of *wildlife* when construing statute even though parties advocated common usage definitions of that term).

C. (§1.5) The Analytical Framework

Oregon courts interpret statutes by applying a statutory construction methodology—or analytical framework—as the supreme court originally articulated in *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 610–612, 859 P2d 1143 (1993) (hereinafter *PGE*), and modified by *State v. Gaines*, 346 Or 160, 171–173, 206 P3d 1042 (2009). Because many of the principles of statutory construction articulated in *PGE* remain relevant to the modified methodology articulated in *Gaines*, this section first provides an overview of the methodology articulated in *PGE* before setting forth the modified analysis in *Gaines*. Under both *PGE* and *Gaines*, the court’s goal in the construction of statutes is to discern the legislature’s intent. ORS

174.020(1)(a). Under both *PGE* and *Gaines*, the court engages in a hierarchical inquiry. As discussed below, in *PGE* the court articulated a three-level inquiry; in *Gaines* the court concluded that amendments to ORS 174.020, a long-standing rule of construction, require a two-step inquiry. In addition, *Gaines* clarified the weight and consideration that ORS 174.020 requires the court to give to legislative history. In all other respects, *Gaines* left intact the interpretive principles of statutory construction that Oregon courts have relied on under *PGE*.

From 1993 until April 2009, the court engaged in the three-level statutory construction analysis articulated in *PGE*. At level one of the *PGE* analysis, the courts analyzed the relevant statutory text as the “best evidence” of legislative intent, along with context. *PGE*, 317 Or at 610–611. See chapter 2 discussing text-and-context analysis. If, after engaging in the analysis of the text and context, the courts concluded that the legislative intent remained ambiguous—that is, capable of more than one plausible meaning—the courts proceeded to level two of the analysis. *PGE*, 317 Or at 611. At level two, the courts “considered legislative history to inform the court’s inquiry into legislative intent.” *PGE*, 317 Or at 611–612. See chapter 3 for a discussion of the legislative history analysis. At level two, the courts considered legislative history “along with text and context to determine” whether, taken together, the ambiguity was resolved. *PGE*, 317 Or at 612. If the level-two analysis did not resolve the ambiguity, then the courts moved to level three, where they considered nontextual maxims of statutory construction to ultimately resolve the ambiguity. *PGE*, 317 Or at 612. See chapter 4 discussing general maxims.

In 2001, in response to the unyielding methodology articulated in *PGE*, the legislature amended ORS 174.020. Specifically, the legislature amended ORS 174.020 to address the restrictive language in *PGE* that the court may consider legislative history “if, but only if” the court concludes that the statute remains ambiguous after an inquiry into the text and context. The legislature sought to require courts to consider legislative history along with text and context without an initial finding of ambiguity, but also to leave the courts “discretion to decide what value to place on legislative history.” *Gaines*, 346 Or at 169. ORS 174.020 has long codified the rule of construction that the court “shall pursue the intention of the legislature if possible.” The 2001 amendment added provisions addressing the courts’ consideration of legislative history. As amended, ORS 174.020 provides, in relevant part:

(1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.