

HOUSE JUDICIARY
SUBCOMMITTEE ON CIVIL LAW AND JUDICIAL ADMINISTRATION

Hearing Room 357
10:00 am Tapes - 19

MEMBERS PRESENT:

Rep. Del Parks, Chair
Rep. Bryan Johnston, Vice-Chair
Rep. Kate Brown
Rep. Chuck Carpenter
Rep. Lisa Naito
Rep. Eileen Qutub
Rep. Bob Tiernan

STAFF PRESENT:

Milt Jones, Committee Counsel
Sarah May, Committee Assistant

MEASURES HEARD:

SB 63 - Public Hearing
SB 66 - Public Hearing and Work Session
SB 70 - Public Hearing and Work Session
SB 76 - Public Hearing and Work Session

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks

report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

TAPE , SIDE A

004 CHAIR PARKS: Calls the hearing to order at 10:03 am

PUBLIC HEARING ON SB 63

008 MILT JONES, COMMITTEE COUNSEL: SB 63 revises limited liability company laws

Witnesses: Jim Mountain, Oregon Society of Certified Public Accountants
Don Douglas, Limited Liability Company Task Force
Mark Golding, Limited Liability Company Task Force

046 JIM MOUNTAIN, OREGON SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS: Testifies and submits written testimony in support of SB 63. (EXHIBIT A)

076 CHAIR PARKS: Are the terms joint and several liability and vicarious liability synonymous?

080 MOUNTAIN: Yes they are, explains.

086 DON DOUGLAS, LIMITED LIABILITY COMPANY TASK FORCE: Explains that joint and several liability is a subset of vicarious liability.

091 CHAIR PARKS: Vicarious liability means that you are liable for the act of another person that you didn't have anything to do with the performing of the act, other than you have some relationship with the person who performed the act. In joint and several liability, you had some participation in the harm that resulted?

097 DOUGLAS: No, explains situation and circumstances under joint and several liability. If we were partners, you would be completely liable with me and our practice if I committed malpractice.

103 CHAIR PARKS: Because they are vicariously liable?

104 DOUGLAS: The form of that in the statement is "joint and several liability".

106 REP. JOHNSTON: Vicarious is a result of a factual relationship. Joint and several liability is a result of a legal relationship.

107 DOUGLAS: I am not aware of that distinction.

109 REP. JOHNSTON: Vicarious is a broader term that includes legal relationships, but is based upon a factual experience.

116 REP. QUTUB: Can you give an example or illustration of these?

117 REP. JOHNSTON: Gives example for vicarious liability.

126 MOUNTAIN: Continues with testimony, and cites concern about accounts liability regarding tax forms. Discusses what actions they would be personally liable for.

204 REP. BROWN: Because of the way that SB 63 is written in terms of personal liability, that might get rid of the limitation on the vicarious liability issue?

208 MOUNTAIN: That is my concern.

209 REP. BROWN: Were you referring to ORS 58.185?

210 MOUNTAIN: Yes, ORS 58.185, 2c.

211 DON DOUGLAS, LIMITED LIABILITY COMPANY TASK FORCE: Testifies and submits written testimony in opposition to SB 63. (EXHIBIT B) Disagrees and explains that Mr. Mountain's concerns are wrong, those instances couldn't happen. Discusses personal liability. Discusses joint and several liability. Discusses limited liability companies (LLC).

266 REP. BROWN: What is the purpose of LLCs?

267 DOUGLAS: Discusses differences between limited liability companies, partnerships, and S-corporations. This is a concept that is prevalent in Europe, Central and South America, and Asia.

313 MARK GOLDING, LIMITED LIABILITY COMPANY TASK FORCE: Testifies and submits written testimony in opposition to SB 63. (EXHIBIT B) Discusses tax benefits depending on the kind of business run.

324 CHAIR PARKS: What are the five things that you want to accomplish with this bill?

328 DOUGLAS: 1) We want to include professionals. 2) Any group that uses a business license can not use a LLC 3) When we created the new entity for the LLC, we didn't interface with all of the other statutes. It has come back to us that there is a big ambiguity for worker's compensation and if it applies to an LLC.

372 CHAIR PARKS: I'm not in favor of retroactive applications. Within the context of worker's compensation, what difference does it make?

380 DOUGLAS: Discusses the reason for importance in defining the LLC rules.

If we do not make this retroactive, we will have a legal morass as to what these entities will be and who they apply to. If we do not make this retroactive, there is a certain percentage of businesses who will not know whether they are included as an LLC or not and there could be a lot of needless litigation.

406 CHAIR PARKS: Haven't these people been paying workmen's compensation since their inception?

408 DOUGLAS: No. SAIF has only picked up 60 companies, which is 3.5 percent of the existing companies.

411 CHAIR PARKS: Why wouldn't they have paid them?

413 DOUGLAS: Explains that worker's compensation isn't clear because 1) it defines an employer that doesn't include LLC 2) even if LLCs are included there are a number of exceptions, i.e. partnerships, that would apply.

421 REP. JOHNSTON: Would the retroactivity open up an LLC who has not paid?

425 DOUGLAS: By making it retroactive we say that they are within, but they have the exception for members, explains. If we don't make this retroactive, we will find LLC members saying that even employees are not in the definition of LLC.

433 REP. JOHNSTON: Gives example of business with four members and a secretary, and even though the secretary is clearly an employee, they may not be covered by workmen's compensation?

438 DOUGLAS: Yes.

TAPE 19, SIDE A

004 REP. JOHNSTON: So they could have a two year period, where they did not pay worker's compensation, but the argument is that they are not an employer under the code? My concern about retroactivity is that I don't want to additionally open them up to penalties, fees, and interest because they have not complied.

008 DOUGLAS: I am not aware of anyone who has advocated that for the employee. If you are an employee, they should be under workers compensation. The issue is whether the member should be covered under workmen's compensation. Common knowledge is that you treat it like a partnership, if you are a member you are not covered under workers compensation.

022 REP. JOHNSTON: How does what your proposing change this bill? Are we not going to treat it like a partnership?

023 DOUGLAS: We are going to treat it like a partnership.

024 REP. JOHNSTON: Which means that the members do not have to be members of worker's compensation?

025 DOUGLAS: Yes, unless they elect to be.

026 REP. JOHNSTON: Then my concern about retroactivity is moot, because it is assumed that up until this time they have elected not to be?

027 DOUGLAS: That is correct. Discusses other areas they try to approach and interface in other areas for worker's compensation. Discusses three tier approach and explains what they hope to accomplish with it.

040 CHAIR PARKS: I don't understand your need for retroactivity. The legislature always makes laws that change the obligations for business entities. I don't see where this is any different when we adjust rates and have them comply with new regulations. I don't understand why we should make an exception for some people, explains. Why is this different? We are going to change the law and set standards as to how this can be judged, we would not make that retroactive if we were changing the definition of a partnership to make it apply to all partnerships?

059 GOLDING: One of the main concerns that prompted the retroactivity provision was that most LLCs that have members, have assumed that their members are exempt and covered by worker's compensation. We are concerned especially with a member who would bring a claim for the period of time of the inceptions of LLC until this statute is amended. SAIF would then have to pay the insurance because they are technically an employer.

077 CHAIR PARKS: How is that any different than any other business?

078 GOLDING: Because they had no reason to think that these people were not exempt. They assumed that this was like a partnership.

086 REP. JOHNSTON: There is a consequence to a decision or to a lack of decision. You are trying to get us to articulate in the law what that consequence is, explains. There is no other business entity that has that choice.

099 DOUGLAS: This is different because this is the first new entity in 75 years, explains.

104 CHAIR PARKS: But the business needs to make a decision if they have to comply with the law. If someone challenges it later, it isn't a defense to go to the legislature and try to get it changed to make your decision right.

112 DOUGLAS: We approached it differently. Had we thought of the interface problem, it would have been in the bill from the beginning.

116 CHAIR PARKS: That is what I want to verify in my own mind. I want to make sure that agencies within the government are comfortable with the retroactivity.

123 REP. NAITO: On page 1, line 22, under the definition of bankruptcy, is that the dissolution of an entity, or could it be the dissolution of a marriage fled by an entity?

129 DOUGLAS: We haven't heard the term dissolution in the marriage terms. It is clear for those people that work in this area that it deals with a partnership. I don't think anyone would take marriage as a definition of an entity.

136 REP. NAITO: On page 4, line 34, if the word "personally" was deleted, what effect would that have on what you are trying to accomplish?

142 DOUGLAS: It depends on whether it makes it greater clarity or greater uncertainty. I think it makes it more ambiguous. Explains why he likes "personally liable".

154 REP. BROWN: How does SB 393 interface with this legislation?

159 DOUGLAS: Explains how SB 63 interfaces with SB 393.
-a professional corporation and an LLC should be the same
-SB 393 removes the vicarious liability completely
-the business section did not take a position on this legislation
-there may be some good reasons for joint and several liability, explains
-discusses \$300,000 limitation per partner, may be too large
-there should be a cap on the joint and several liability up to a certain dollar amount
-SB 393, may go too far but there can be improvements on the existing joint and several liability provision

201 GOLDING: SB 393 does incorporate provisions regarding LLC specifically and further amends Chapter 63, which is the LLC statute.

206 DOUGLAS: We do have some problems with that language, but will address that at a later time.

207 MOUNTAIN: Our point in making a presentation was to ensure that this bill would be consistent in it's liability provisions with the professional

corporations act.
PUBLIC HEARING ON SB 66

(SB 66 deletes limitation on jurisdiction of district courts over misdemeanors)

Witness: Bradd Swank, State Court Administrators Office

229 BRADD SWANK, STATE COURT ADMINISTRATORS OFFICE: Testifies and submits written testimony in support of SB 66. (EXHIBIT C)

WORK SESSION ON SB 66

264 MOTION: REP. BROWN: Moves to add an EMERGENCY CLAUSE to SB 66.

VOTE: Hearing no objections SB 66 IS AMENDED. Rep. Tiernan is excused.

269 MOTION: REP. BROWN: Moves SB 66 AS AMENDED TO THE FULL DO PASS recommendation.

COMMITTEE with a

VOTE: 6-0 MOTION PASSES
AYE: Brown, Carpenter, Johnston, Naito, Qutub, Parks
NO: None
EXCUSED: Tiernan

PUBLIC HEARING ON SB 70

282 MILT JONES, COMMITTEE COUNSEL: SB 70 exempts lessor under finance lease from definition of owner in Oregon Safe Employment Act (OSEA).

Witnesses: Thomas Churchill,
Mike Scott, Power Rents & Oregon Equipment Rental Association
Joe Miller, OSEA

292 THOMAS W. CHURCHILL, OREGON STATE BAR CREDITOR /DEBTOR SECTION: Testifies and submits written testimony in support of SB 70 . (EXHIBIT D)

354 REP. CARPENTER: Is this going to be dealt with in tort reform?

356 CHAIR PARKS: No.

362 REP. QUTUB: Would this ever be interpreted as a lessor who takes their VISA and leases a piece of equipment and then considering it being financed through VISA, what repercussions could that have?

373 CHURCHILL: That would not occur. The financing lease is carefully defined, explains.

385 REP. JOHNSTON: We have been looking at the finance lease definition, cites and quotes definition. We are making a narrow distinction to allow a financing instrument that has been developed for business purposes, to continue functioning and the courts decision prevented that from happening.

414 MIKE SCOTT, POWER RENTS & OREGON EQUIPMENT RENTAL ASSOC.: Testifies and submits written testimony in opposition to SB 70. (EXHIBIT E)

TAPE 18, SIDE B

044 REP. BROWN: Was this issue raised on the Senate side?

046 SCOTT: This came up when I was gone, so I could not raise this issue when it was in the Senate.

054 CHAIR PARKS: You are right, but if we expand the bill to include people like you, that develops a bigger number of people to participate on this issue. Gives example of lessor.

068 SCOTT: That is true, but if you look at the definition of finance lease, it doesn't say that a finance lessor does not have the right, ability, or knowledge of a defect. Discusses Moe vs. Beck case discussed in EXHIBIT E.

081 CHAIR PARKS: Your point is that this bill proposes to ignore all other considerations and say that because it is a financing lease, the lessor is not responsible to comply with this act. You are right and that is the issue.

091 SCOTT: The law is unclear as to who is included or excluded from specific situations. If we are supposed to cover that situation, then let us know and we will take care of it.

100 CHAIR PARKS: How come the statute that provides that the title to motor vehicles only on presumptive evidence, doesn't apply in Moe vs. Beck?

106 SCOTT: In Moe vs. Beck the court did not say that we were subject to the act, it said they were going to send it to the lower court to find out what the factors were. But we are never sure of what the factors are under the lease.

111 REP. BROWN: The definition of finance lease seems to preclude the type of rental agreement that Rep. Qutub questioned about VISAs.

115 SCOTT: Yes, it does preclude that. The underlying basis for a finance lease, could be any lessor, but it is based upon purchase, explains.

121 REP. JOHNSTON: Were you, under Moe vs. Beck, or the finance lease holder, penalized civilly for the working conditions? Gives example and asks if they would be civilly liable?

129 SCOTT: It would depend upon factors concerning the problems with the equipment. Gives examples.

132 REP. JOHNSTON: We are talking about amending a definition in the Oregon Safety Employment Act. If we make the amendment as requested under statutory construction, everyone else are owners. If we put that in, by exempting one, we will include everyone else. What exposure does that cause you?

142 SCOTT: Gives example of someone renting new vehicle under Moe vs. Beck case.

154 REP. JOHNSTON: You wouldn't have any objection if instead of exempting the finance lease, we said that owner means "person having the right or ability to correct any safety problems"? Thus exempting the finance - lease people who never have that right?

159 SCOTT: Yes, exactly. We need the knowledge of the circumstance of knowing that something is wrong with what we rented, have the right to fix it, and the ability to fix it.

163 REP. JOHNSTON: It exempts you if you meet those qualifications?

164 CHAIR PARKS: They are responsible for (inaudible ending to question).

167 SCOTT: If the vehicle comes off of our property and it is not running right, we have knowledge of the defect. We then have failed the first test and have potential for liability.

169 CHAIR PARKS: They have the responsibility to maintain the truck throughout the lease.

171 SCOTT: If there is a maintenance problem, we will fix it, if they don't tell us, they are liable. If we don't know something is wrong, how can we be liable?

177 CHAIR PARKS: I don't see the distinction.

183 SCOTT: We need to figure out if there is a contractual obligation to make sure the vehicle continues to run, or if there is a statutory obligation to protect employees when the owner doesn't know there is a problem with it.

187 JOE MILLER, OSEA: Testifies in opposition of SB 70. Concerned that definitions will be changed where they shouldn't be.

219 CHAIR PARKS: What happened when Moe vs. Beck went back for reexamination?

222 MILLER: I can't address that. We have circumstances at times where an owner is responsible for work site conditions, regardless if they have employees there or not. I'm concerned that this could create others to want exemptions and eventually have a weakening of the act.

233 CHAIR PARKS: Gives U-Haul example. Who is liable?

243 MILLER: If the individual that is driving the truck is an employee, then the person that would be subject to our act would be the person that employed the driver. If the owner of that equipment was aware of problems that the employee asked to be corrected, then I feel that there is a potential that we could levy sanctions against the owner.

258 REP. JOHNSTON: Under OSEA, if I own property but am leasing to someone else who has workers there, under what conditions do I have responsibility for an injury that occurs there?

264 MILLER: There would likely be no conditions unless the conditions were pointed out and you failed to comply.

272 REP. JOHNSTON: You are agreeing with the "knowledge" requirement?

273 MILLER: Yes, I agree.

274 REP. TIERNAN: Cites three situations that could happen. Under those situations, how would this bill effect them?

290 MILLER: I don't know. Cites employer / employee relationships and that generally they find the employer responsible for the safety of their employees.

304 REP. TIERNAN: Gives example. If an employee causes injury to himself, right now, you would not cite the lessor of the equipment, but the employer?

316 MILLER: Correct.

317 REP. TIERNAN: Then it is up to the employer to go after the lessor for giving them faulty equipment?

318 MILLER: If the equipment was faulty, it is up to the employer as to what they want to do.

320 REP. TIERNAN: This bill doesn't impact OSEA at all?

323 MILLER: Only if the definition of "owner" is changed, explains.

331 REP. TIERNAN: What about leased employees, and if there was an unsafe working condition. In that situation, it wouldn't be against the temporary company, but against the employer that they were providing a service in?

338 MILLER: The temporary agency or a leasing company are actually the employer and have some responsibility to make sure their employees are in a safe work environment.

356 REP. TIERNAN: You don't cite a lessor at all for equipment?

362 MILLER: No.

365 CHAIR PARKS: Is this a third party condition?

369 MILLER: I assume that the Moe vs. Beck case was a third party route.

WORK SESSION ON SB 70

423 MOTION: REP. NAITO: Moves SB 70 TO FULL COMMITTEE with a DO PASS recommendation.

433 REP. JOHNSTON: We are silent on the applicability of this to the other parties. We are not saying that they are covered or not. We are excluding one, not including the rest.

441 REP. TIERNAN: Could someone summarize the bill?

447 MILT JONES, COMMITTEE COUNSEL: Discusses case that gave rise to SB 70.

TAPE 19, SIDE B

016 REP. TIERNAN: What was the result of that?

017 MILT JONES, COMMITTEE COUNSEL: The published portion of the case doesn't reveal that. I believe it was sent back to lower court.

019 REP. TIERNAN: By passing this bill, would it make the leasing company liable or not?

020 MILT JONES, COMMITTEE COUNSEL: It would make finance lessors not liable.

022 REP. JOHNSTON: I would be in favor of being able to pursue the policy that "knowledge" is a part of this bill.

029 REP. CARPENTER: I would like to take a look at the broader policy implications and schedule this for another time.

040 VOTE: 3-4 MOTION FAILS
AYE: Brown, Johnston, Naito
NO: Carpenter, Qutub, Tiernan, Parks

045 CHAIR PARKS: Mr. Scott, please put something together and we will hear this bill again in about three weeks.

PUBLIC HEARING ON SB 76

054 MILT JONES, COMMITTEE COUNSEL: SB 76 allows temporary orders to be enforced pending appeal. Specifies service of notice for modification of domestic relations order.

Witness: Russ Lipetzky, Family & Juvenile Law Section of Oregon State Bar

057 CHAIR PARKS: If you provide for service on the attorney, how do you enforce contempt sanctions when the rules say that in order to be held in contempt, you have to be served with an order?

060 RUSS LIPETZKY, FAMILY & JUVENILE LAW SECTION - OREGON STATE BAR: Testifies and submits written testimony in support of SB 76. (EXHIBIT F) The bill has two distinct parts, explains.

074 REP. NAITO: If the entire case is appealed later, can those temporary issues be raised later?

076 LIPETZKY: The statute has always provide that one of these temporary orders that is in effect while an appeal is pending, is itself nonappealable.

079 CHAIR PARKS: How are you going to enforce the contempt when you serve the lawyer?

086 LIPETZKY: That is not the purpose of the bill. The bill is to specify that those contempt powers are there, explains.

091 REP. JOHNSTON: You are raising the bar for practitioners. If you want to ultimately be able to get a contempt citation, you better not just serve the attorney but personally serve the other party.

094 LIPETZKY: That is already the law. This does not propose to change the law at all as to how to serve the contempt action.

096 REP. JOHNSTON: The prohibition on behavior is what your seeking to get contempt for?

099 LIPETZKY: Section 1 of this bill does not deal with service. Section 2 provides, explains. It clarifies the way a summons is served.

WORK SESSION ON SB 76

REP. BROWN:

CHAIR PARKS: Adjourns the hearing at 11:35 am.

Submitted by, Reviewed by,

Sarah May Debra Johnson
Committee Assistant Committee Coordinator

EXHIBIT SUMMARY:

- A. Testimony on SB 63 - Jim Mountain - 3 pages
- B. Testimony on SB 63 - Don Douglas - 11 pages
- C. Testimony on SB 66 - Brad Swank - 1 page
- D. Testimony on SB 70 - Thomas Churchill - 1 page
- E. Testimony on SB 70 - Mike Scott - 1 page
- F. Testimony on SB 76 - Russ Lipetzky - 1 page