

SENATE JUDICIARY SUBCOMMITTEE
ON CIVIL PROCESS

Hearing Room
Tapes - 33

MEMBERS PRESENT:

Rep. Del Parks, Chair
Sen. Tom Bryant, Vice-Chair
Rep. Kate Brown
Rep. Bryan Johnston
Rep. Leslie Lewis
Rep. Bob Tiernan
Sen. Ken Baker
Sen. Randy Miller
Sen. Peter Sorenson

MEMBER EXCUSED:

STAFF PRESENT:

Holly Robinson, Committee Counsel
Max Williams, Committee Counsel
Sarah May, Committee Assistant

MEASURES HEARD:

SB 385 - Work Session
SB 386 - 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

002 CHAIR BRYANT: Calls the meeting to order at 3:40 pm. Discusses tort reform hearings and procedures.

WORK SESSION ON SB 385

074 MAX WILLIAMS, COMMITTEE COUNSEL: Discusses SB 385 amendments -2 through -12. (EXHIBITS A, B)

272 CHAIR PARKS: Does the judge, in the mandatory settlement conference, take the place of the arbitrator in the -9 amendments?

277 MAX WILLIAMS, COMMITTEE COUNSEL: By triggering a settlement conference, along with this disclosure, it would allow the time for the opposing party to come forward with the information to make the settlement conference a more useful process. We discussed having the judge keep a record of what the parties had offered for the purpose of evaluating the offers. This would be a separate judge than the trial judge. Continues explaining amendments.

372 REP. LEWIS: Asks if on a contingent fee relationship if the plaintiff would have to give \$40,000 to attorney if their settlement was for only \$75,000?

384 MAX WILLIAMS, COMMITTEE COUNSEL: I don't know.

386 CHAIR BRYANT: That decision would have to be made based on the contract between the plaintiff and their attorney. If something like this were adopted and went into effect, the plaintiff's attorney would have to take that into consideration when drafting their contingency arrangements.

394 MAX WILLIAMS, COMMITTEE COUNSEL: Continues explaining amendments.

418 REP. TIERNAN: Asks about "objectively and unreasonably " language.

421 MAX WILLIAMS, COMMITTEE COUNSEL: We don't have it now. This was language that came out of the work group that we had Legislative Counsel draft for us. The concept was to allow the judge to make a determination as to the "reasonableness" of refusing the offer, explains.

444 CHAIR PARKS: Are there three separate proposals?

TAPE 33, SIDE A

009 MAX WILLIAMS, COMMITTEE COUNSEL: Yes. Explains the three proposals.

023 CHAIR BRYANT: Discusses EXHIBITS A, B. Starting discussion with -2 amendments.

037 SEN. SORENSON: Discusses "all" in line 6 of SB 385. What does that word add?

049 MAX WILLIAMS, COMMITTEE COUNSEL: I don't know what the distinction among "all attorney's fees occurred", means. The intent was that the it only be attorney fees from the second action, where the party is being forced to get an action dismissed.

056 SEN. SORENSON: The term "expenses of litigation's" have often been used in these kinds of rules to illustrate that not only are the parties going to incur attorneys fees, but they are also going to incur other kinds of expenses. Do we mean to exclude those other costs or expenses of litigation and only allow the award of attorney fees?

066 MAX WILLIAMS, COMMITTEE COUNSEL: No, it was intended to cover all costs and expenses of litigation.

071 CHAIR BRYANT: They would be able to recover their filing fees, etc. by other rules and statutes.

072 SEN. SORENSON: But not the expenses of litigation's. I'm also concerned about the term "reasonable" to describe costs.

078 SEN. BAKER: Asks about language in line 7 language, and if the plaintiff incur the subsequent action? On line 3, " was dismissed with prejudice", is there a definition or standard for that?

095 MAX WILLIAMS, COMMITTEE COUNSEL: There was some concern among the work group that if it said anything other than "dismissed with prejudice", there would be possibilities of confusion.

099 SEN. BAKER: The only times there is dismissed with prejudice is when they have a sharp attorney on the first case. There needs to be some safe provision to fall into.

105 CHAIR PARKS: If we are going to talk about "reasonable" it should be consistent in all of the amendments. There is an assumption that the caps is what is awarded to the parties, I don't agree with that. We need to address what the caps should be in Oregon.

131 CHAIR BRYANT: Are there any comments about the -3 amendments?

135 SEN. SORENSON: What kind of testimony did we have on mandatory settlement conferences? What would the response of the judiciary be to have a mandatory settlement requirement on every case where it is requested?

144 REP. BROWN: I asked that of Judge LaMar. Her worries were on costs and whether counties had any judges who were trained and wanted to do settlement conferences. She was also concerned about a mandatory provision.

149 SEN. SORENSON: That is a policy issue decision.

153 CHAIR BRYANT: In the bill now, it is discretionary at the court level.

154 CHAIR PARKS: In the county I live in, the judge has to do the mandatory settlements. The judges need to be trained and then be made to follow the legislative rules.

168 MAX WILLIAMS, COMMITTEE COUNSEL: The pro tem judges would also be able to step in and fill these roles.

171 CHAIR PARKS: No, can't be a throw away judge, because none of the lawyers will let them try the case. It takes a good and skilled judge to do this. Settlement cases are a good thing, but it takes someone who knows what they are doing.

183 REP. JOHNSTON: I support what Rep. Parks is saying. To what extent do we take what we are doing and look into the future of the court system? We need to discuss how these pieces fit in with the bigger picture and use tort reform as a gateway to court reform.

199 SEN. SORENSON: Before we enact the -3 amendments, we need to acquire

the views of the judges. If we don't agree with their views, then we can reject them. But, it would be helpful to have their point of view, explains.

219 SEN. BAKER: Do we have any single district judges in the state? If we do, would this be a problem?

224 CHAIR BRYANT: They would have to appoint pro tem judges in a few of those instances. Discusses -4 amendments.

232 SEN. SORENSON: The witnesses cause mistrials not attorneys. Was there thought to have this liability be imposed on witnesses who cause mistrials?

237 CHAIR BRYANT: No. Discusses -5 amendments.

266 REP. JOHNSTON: If asks about language, the party does not amend or otherwise withdraw the pleading motion, would they then thereafter prevails on the motion? The party who files can withdraw and would prevail? Do we have the right party specified?

274 MAX WILLIAMS, COMMITTEE COUNSEL: The intent is that the loser of the sanction motions pays the attorney fees.

279 REP. JOHNSTON: Gives example of a person not withdrawing a motion. The wording doesn't make sense.

286 SEN. SORENSON: Line 13, "all reasonable attorney fees". In SB 385-2 line 6, it reads "all attorney fees", not "reasonable".

292 CHAIR BRYANT: That should change to "reasonable". It should all be consistent.

293 SEN. SORENSON: Maybe we could delete the word "all"?

298 CHAIR BRYANT: In the next draft we will delete all of those "all".

299 MAX WILLIAMS, COMMITTEE COUNSEL: The "shall" was intended to be a "may".

304 CHAIR BRYANT: On the -5 amendments?

305 MAX WILLIAMS, COMMITTEE COUNSEL: Yes.

310 CHAIR BRYANT: Discusses -6 amendments.

317 MAX WILLIAMS, COMMITTEE COUNSEL: It might be helpful to defer comments until we hear further discussion on this in another hearing.

321 CHAIR BRYANT: Discusses -7 amendments, mandatory arbitration issue.

335 REP. JOHNSTON: On page 2, line 26, we should be looking at arbitration in this state, for all claims. There is an assumption that claims gain in complexity with the higher the dollar value, that isn't true. We need to get rid of this.

356 CHAIR BRYANT: Is there any limit that you would place on it as far as dollar amount?

357 REP. JOHNSTON: No.

358 CHAIR BRYANT: Is there any type of cause of action that you would not consider appropriate for the arbitration?

359 REP. JOHNSTON: Arbitration is something we use to resolve disputes. There are some cases that are inappropriate for arbitration and should be transferred to some other dispute resolution. It isn't the dollar amount that makes the determination. Gives example. There should be someone who decides where cases go, i.e., arbitration, mediation, or thrown out. Someone, possibly like a case assessment officer. That person would help filter out some of the frivolous complaints.

393 REP. TIERNAN: I agree, I don't see why there should be a limit on arbitration.

399 SEN. SORENSON: I have a concern on the application of this in the small claims court. Why couldn't we by the rearbitration rules, deal with all of the cases under the jury trial limit by putting those all on mandatory arbitration? The cases that are in the district court and small claims court jurisdiction, apply the arbitration to that or have a policy discussion on these little cases that are just as difficult as larger cases. All small claims cases would be subject to mandatory arbitration the way these -7 amendments are written.

434 MAX WILLIAMS, COMMITTEE COUNSEL: There was not a discussion as to what would happen to small claims cases. It wasn't the intent to pick up the small claims matters inside the arbitration rule.

440 SEN. SORENSON: The way the rule is written it would apply to all cases under \$25,000.

TAPE 32, SIDE B

011 CHAIR BRYANT: If it is under \$200,000, the judge in small claims hears it and in essence acts as the arbitrator. If the party left it with the court, the court would hear it. If they bump it into district court, then it would fall into arbitration.

017 REP. JOHNSTON: It is up to the defendant if they want an attorney or not. Gives example where the cap would be meaningless and they go to arbitration.

028 SEN. BAKER: Can we on small claims put a onus to that by requiring a jury trial fee to keep people in small claims court?

033 CHAIR BRYANT: I think you can require the payment of the jury fee. It is usually \$100.

036 SEN. BAKER: Could we up the fee to \$500?

036 CHAIR BRYANT: We could increase the fee but would also have to increase the fees that are paid to the jurors.

038 MAX WILLIAMS, COMMITTEE COUNSEL: There was some concern about running a foul of the constitution by requirement of posting a litigation bond.

042 SEN. SORENSON: On line 17, this does not apply to small claims court but does apply to district court actions between \$2,500 and \$10,000. Can we include this in all those?

050 CHAIR BRYANT: We could, but in small claims if we leave it there for under \$2,500 you get the binding arbitration because the hearing is in front of the judge without the attorneys.

052 SEN. SORENSON: The advantage of arbitration is that you do not take up the time of the judge. That would result in cost savings to society.

055 REP. JOHNSTON: The standard is what you do creates an undo hardship on the way to a jury trial. Mandatory arbitration there isn't a problem with, but if you had a mediation followed by a mandatory arbitration, that is unconstitutional. If you made the filing fee such that it doesn't bare a good relationship with the prayer, it would be unconstitutional. What kind of burdens do you put on them on the way to trial?

068 CHAIR BRYANT: What about the proposed attorney fees caps in successful or unsuccessful arbitration? The defendant could recover 10 percent of the prayer. If the defendant prevailed, then the plaintiff could prevail 20 percent of the actual judgment. Discusses options. Why was the 10 -20 percent suggested and not an equal amount?

082 MAX WILLIAMS, COMMITTEE COUNSEL: These numbers were arbitrary. The amount of the prayer is a larger number normally than the amount of the judgment, explains.

094 SEN. SORENSON: There would be a different way of handling cases where a contract provided for attorney fees. On page 5, of -7 amendments, would that language trigger the various statutes where attorney fees are awarded by statute as opposed to contract?

107 MAX WILLIAMS, COMMITTEE COUNSEL: My understanding of the distinction is that in the current law, it treated this issue with respect to contract.

114 SEN. SORENSON: Just by contract, not by application of an attorney fee provision?

119 JOHN DILORENZO, OREGON LITIGATION REFORM COALITION: If following an arbitration a party was dissatisfied and caused a jury trial de novo and if that party did not improve their position, in addition to being responsible per cap for the other sides fees, they would no longer have an entitlement even if they prevailed, to their fees. They would have their fees up through the arbitration proceeding but if they didn't improve their position, then they wouldn't get their fees at all.

137 ROBERT NEWBER, OREGON STATE BAR: When a party is dissatisfied with an arbitration, appeals and does not do better, they do not recover anymore. This is a winner pays provision, explains. The reason for the cap is simplicity. These are limited cases with limited recoveries.

164 CHAIR BRYANT: If there was a provision in a contract that allows a

person to recover attorney fees or by statute allows to recover attorney fees, that would be cut off as of the conclusion of the arbitration unless they did better at the trial?

170 NEWBER: There are two alternatives. The attorney fees would be compensated under the contractor statute as of the arbitration date, the other alternative is that they wouldn't get any.

176 DILORENZO: No one likes this solution. I don't like caps. We weren't all happy with this, but came up with an alternative that would work.

186 SEN. SORENSON: Is there an unconstitutional impairment of the right of contract to cut off awards to attorney fees where parties have entered into contracts for that purpose?

190 DILORENZO: I don't know. I believe the ORCP will currently allow that contractual right to be cut off where an offer of judgment is made and the party doesn't improve their position. If there is an impairment of contract problem, it already exists.

196 SEN. SORENSON: Usually in the standard forms, the award of reasonable attorney fees as part of the judgment is something the parties have bargained for.

203 REP. JOHNSTON: We are creating an arbitrator disincentive provision, explains. We don't care if you are the winner or the loser, we care about if you are taking court time. These are disincentives for trials which occur much too late in the process. Most of the work you do in trial you've done in arbitration, explains. We should move this system back to the risk of paying fees.

231 NEWBER: If you appeal and don't do better under existing law that party who appeals would not be entitled to any award of attorney fees under the contractor statute, but would be responsible for the award of attorney fees to the opposing party.

243 CHAIR BRYANT: Discusses 8,9,10,11, 12 amendments.

277 MAX WILLIAMS, COMMITTEE COUNSEL: That is the -8 amendments.

284 SEN. SORENSON: How does the plaintiff make an offer of compromise?

290 MAX WILLIAMS, COMMITTEE COUNSEL: It would essentially work the same way, by being a party neutral. The plaintiff could make the same sort of offer and the defendant would have 30 days to respond under these provisions or in the version that included the mandatory settlement conference.

301 SEN. SORENSON: Would the -8 amendments apply to cases under \$25,000?

307 MAX WILLIAMS, COMMITTEE COUNSEL: The idea was to that it they would not apply.

312 CHAIR BRYANT: There are two system. One for \$25,000 and under and one for above \$25,000.

315 SEN. BAKER: In the -8 amendments, line 17 you can't make the offer sooner than 120 days after service. Do we have certain kinds of lawsuits that have accelerated time schedules? Are we limiting ourselves to then say that those kinds of cases would not come into this process? Gives example.

327 MAX WILLIAMS, COMMITTEE COUNSEL: That is a good point and something we need to look at.

328 SEN. BAKER: At some point we may be trying case within four months.

335 MAX WILLIAMS, COMMITTEE COUNSEL: That does need to be looked at. The concept of the 120 days was to allow a party enough time to know enough about their case to be in a position to respond to an offer.

341 SEN. BAKER: We have a lot of district court dockets that run under four months now.

346 CHAIR BRYANT: If this didn't cover district courts because of the jurisdiction limit. The answer then might be to rephrase to 30 days so that if the trial date is within the 120 days, they could make the offer within 30 days of the trial date.

352 REP. JOHNSTON: I need to voice my disagreement with the concept of these amendments. These provisions penalize the wrong people, explains.

378 SEN. SORENSON: Discusses federal offer of compromise rule. There is a policy choice on line 5. Did you specifically decide to exclude statutory, equitable or mixed type actions? It seems like the jury trial cases are being brought to trial faster, but the other areas we did not hear much testimony on. What if the idea was broadened as in ORCP 68 to include the equitable arena in the offer of compromise?

404 MAX WILLIAMS, COMMITTEE COUNSEL: There wasn't much discussion about that issue.

409 DILORENZO: It was a conscious decision to restrict this format to cases where money damages only were requested. The reason is, who is to say whether the party has improved their position or done better? When SB 385 was printed, I made a conscious decision to restrict it to money damages.

429 SEN. SORENSON: In a sex discrimination case where equitable relief and money damages are sought, would that be excluded from the provisions of SB 385 -8?

433 DILORENZO: I would have to look at the wording of the bill. That would pertain to the mixed action money damages portion. It wouldn't pertain to any equitable side to that action. It wouldn't exclude the case from this format, but would only be restricted to the money damages portion.

496 CHAIR BRYANT: Adjourns the hearing at 5:05 pm.

Submitted by, Reviewed by,

Sarah May Debra Johnson
Committee Assistant Committee Coordinator

EXHIBIT SUMMARY:

- A. Memorandum on SB 385 Amendments - Staff - 5 pages
- B. Proposed Amendments to SB 385 - Staff - 25 pages