

SENATE JUDICIARY SUBCOMMITTEE  
ON CIVIL PROCESS

Hearing Room  
Tapes - 35

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

006 CHAIR PARKS: Calls the meeting to order at 3:40 pm.

WORK SESSION ON SB 386

012 MAX WILLIAMS, COMMITTEE COUNSEL: Discusses SB 386-1 amendments and memorandum. (EXHIBITS A, B)

055 SEN. SORENSON: Asks about Section 2 of -1 amendments. Would those be removed from the list where a private right of action for RICO could be brought? Unless it was a criminal conviction, you could not bring an action under civil RICO for a communication crime?

063 MAX WILLIAMS, COMMITTEE COUNSEL: Correct.

064 SEN. SORENSON: Isn't that communication crime like telephone harassment?

066 MAX WILLIAMS, COMMITTEE COUNSEL: I would have to look at the statutes on that. The intent was to avoid the mail fraud claims.

072 SEN. SORENSON: A lot of the problems that are related to the purpose of the civil RICO, where repeated conduct is occurred, the government has given up on enforcing it because they don't have the resources. Are communication crimes and telephone harassment the same thing?

080 MAX WILLIAMS, COMMITTEE COUNSEL: I don't know, but will look into it.

082 SEN. SORENSON: The theft, burglary, etc. would be kept in? A person wouldn't need a prior conviction of a predicate act?

086 MAX WILLIAMS, COMMITTEE COUNSEL: That is correct, with exception of theft. Theft would still be kept out because it is easily plead in a commercial context.

089 SEN. SORENSON: Would they be removed if there was one criminal conviction? How many convictions do you need?

096 MAX WILLIAMS, COMMITTEE COUNSEL: That is an important issue. Cites wording on page 4 of -1 amendments. These are conceptual amendments to prohibit someone from pursuing a private right of action under these enumerated offenses unless there had been a criminal conviction for the enumerated offense.

105 SEN. SORENSON: One criminal conviction for one, or three criminal convictions for three?

106 MAX WILLIAMS, COMMITTEE COUNSEL: That is a policy decision.

110 REP. BROWN: How are medical facilities defined under the statute? Dissemination of obscene materials to adults should be removed from the RICO statute because it was ruled unconstitutional a few years ago.

124 REP. JOHNSTON: Do we have an idea of how many cases were brought using these various predicate acts?

127 MAX WILLIAMS, COMMITTEE COUNSEL: I'm unaware of those statistics. I will check with the State Court Administrators office.

132 CHAIR PARKS: Please do that, it would be helpful information to know.

137 REP. BROWN: Was anyone in the work group from the Multnomah county District Attorney's office and if so, did they feel comfortable with these amendments?

139 MAX WILLIAMS, COMMITTEE COUNSEL: No, I don't believe anyone was from there.

146 SEN. BAKER: I would like to have another work session on SB 386.

148 SEN. SORENSON: I would like some answers to these questions. Are we

going to have a formal opportunity to hear from the people that were concerned about specific aspects of the Oregon RICO? This proposes to modify the bill to allow quite a number of actions. It seems like it is a major rewrite of the bill. Maybe some of the people could come back who testified on the original bill.

175 CHAIR PARKS: The people that were against the bill, are probably still against it. Senator Bryant will consider that though.

WORK SESSION ON SB 385

188 MAX WILLIAMS, COMMITTEE COUNSEL: The work group met on SB 385. We didn't get that far and are going to continue to pursue those issues. I am hoping to have more amendments drawn up.

202 CHAIR PARKS: I want you to discuss how the reciprocal attorney fees work.

229 MAX WILLIAMS, COMMITTEE COUNSEL: Discusses and explains reciprocal attorney fees.

249 SEN. SORENSON: What is applied to the \$50,000?

251 MAX WILLIAMS, COMMITTEE COUNSEL: The offer was \$100,000 and the defendant rejected the offer. The actual judgment came in at \$50,000 so the plaintiffs attorney fees would be the cap. Continues with explanation and examples.

288 SEN. BAKER: Does the defendant get any attorney fees? If the defendant held the verdict for under \$200,000 does the defendant get any credit for that?

292 MAX WILLIAMS, COMMITTEE COUNSEL: Not under this system or rule 54. Continues with explanations and examples.

302 SEN. SORENSON: On the first two examples, are those the caps under the provisions of the new 54F, or are those the actual amounts under 54F?

308 MAX WILLIAMS, COMMITTEE COUNSEL: The consensus is that it would be actual attorney fees not to exceed the amount of the cap. The "gap is the cap".

320 SEN. SORENSON: What happens in a mixed statutory claim and damages claim, where there are attorney fees on top of the dollar amount?

327 MAX WILLIAMS, COMMITTEE COUNSEL: A party who doesn't do better at trial under rule 54F cuts off their right for attorney fees, explains.

342 SEN. SORENSON: In the second example, where the defendant is offered \$100,000 and if it was under a statutory scheme, would the attorney fees attach to that judgment if the plaintiff accepted the judgment of \$100,000?

352 MAX WILLIAMS, COMMITTEE COUNSEL: I don't believe we've ever discussed that. The Alaska rule does allow for a recovery of a certain percentage of

fees if an issue is resolved pretrial or prejudgment. That scheme exists somewhere but we didn't consider it in the drafting of these amendments.

364 SEN. SORENSON: Under FRCP 68, there are federal appellate case laws that say when the offer is accepted, the attorney fees are added to the judgment.

373 REP. JOHNSTON: When this scheme was first noted, I raised the argument that it increases the litigation's lottery aspect to trial and that I'm opposed to it. This doesn't encourage offers. Whoever makes the first move is the potential loser, explains options.

421 CHAIR PARKS: Do you agree with the numbers that he used and that it is the way it would work?

425 MAX WILLIAMS, COMMITTEE COUNSEL: My understanding is that this bill with the amendments drafted, would only trigger the fees if you made the rule 54 offer.

436 REP. JOHNSTON: Rejecting isn't enough to trigger this? Gives example, there are no fees exchanged?

TAPE 35, SIDE A

011 MAX WILLIAMS, COMMITTEE COUNSEL: No.

012 CHAIR PARKS: Because of why?

012 HOLLY ROBINSON, COMMITTEE COUNSEL: Only the offering party (inaudible).

015 MAX WILLIAMS, COMMITTEE COUNSEL: The example I used is mutually assured destruction.

018 REP. BROWN: We need an incentive for people to settle at \$150,000. Under this proposal, there is no incentive for that to happen.

020 MAX WILLIAMS, COMMITTEE COUNSEL: The fear of being tagged with the attorney fees is the incentive.

021 REP. BROWN: Gives example of employer discrimination case. This doesn't level the playing field.

032 MAX WILLIAMS, COMMITTEE COUNSEL: That is from the theoretical premise that the defendant would have more money than the plaintiff?

033 REP. BROWN: If in a situation that was the case. That would be true if we assumed that the defendant and the plaintiff always had the same amounts of money, but that isn't the case.

037 MAX WILLIAMS, COMMITTEE COUNSEL: I agree with that.

039 SEN. SORENSON: How would this work if we used the 10 & 20 percent methods?

042 MAX WILLIAMS, COMMITTEE COUNSEL: Explains the 10 & 20 percent methods.

044 SEN. SORENSON: The under \$25,000 case, we are applying a system of mandatory arbitration and then we are using the arbitrator suggested award as the trigger point for the 10 and 20 percent method for assessing fees?

050 MAX WILLIAMS, COMMITTEE COUNSEL: Correct.

051 SEN. SORENSON: Then for cases above \$25,000, we would use the method you were describing ?

052 MAX WILLIAMS, COMMITTEE COUNSEL: This only applies when parties make a rule 54F offer. Parties, if this was adopted, would still have the ability to communicate and make offers. It would not be an across the board system.

060 SEN. SORENSON: Assuming the facts that you discussed, that would trigger the award of attorney fees?

068 MAX WILLIAMS, COMMITTEE COUNSEL: Correct.

069 SEN. SORENSON: What would happened where there was a defense verdict and the defendant had offered the \$100,000. Would the gap be the award to the defendant?

074 MAX WILLIAMS, COMMITTEE COUNSEL: No. Under the current amendments there is a floor, the plaintiff wouldn't be allowed to go in the hole, explains.

080 REP. JOHNSTON: Originally I was frightened by the potential of nuisance offers. What you just said is true, it doesn't matter.

092 CHAIR BRYANT: Congress has been discussing these same issues. Discusses exhibits distributed to the committee. (EXHIBIT C)

111 CHAIR BRYANT: Adjourns the hearing at 4:21 pm.

Submitted by, Reviewed by,

Sarah May Debra Johnson  
Committee Assistant Committee Coordinator

EXHIBIT SUMMARY:

- A. Memorandum on SB 386 - Staff - 2 pages
- B. Proposed Amendments to SB 386 - 5 pages
- C. Testimony on SB 385 - Sen. Bryant - 34 pages