

SENATE JUDICIARY SUBCOMMITTEE  
ON CIVIL PROCESS

Hearing Room  
Tapes - 45

MEMBERS PRESENT:

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

MEMBER EXCUSED:

Sen. Peter Sorenson  
Sen. Shirley Stull

STAFF PRESENT:

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

MEASURES HEARD:

SB 385 - Work Session  
SB 450 - 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 BRYANT: Calls the meeting to order at 5:34 pm.

WORK SESSION ON SB 450

008 MAX WILLIAMS, COMMITTEE COUNSEL: SB 450 eliminates joint liability for torts. Discusses -9 amendments. (EXHIBIT A)

023 CHAIR PARKS: What is the definition for acting in concert generally? Is it the same as is in the bill?

026 MAX WILLIAMS, COMMITTEE COUNSEL: Discusses work with legislative counsel on preparation of amendment. We reviewed similar statutes from other states, it was the intent that acting in concert would have the same meaning that it does in current law.

031 CHAIR PARKS: The court could rely upon this committee in determining and defining "acting in concert".

034 MAX WILLIAMS, COMMITTEE COUNSEL: That is correct.

034 MOTION: REP. PARKS: Moves to ADOPT SB 450-9 amendments dated 05/01/95.

040 REP. JOHNSTON: Asks about line 14 of -9 amendments. It is my experience that 50 percent is a common number for juries to settle on. Discusses case where this language would apply. I suggest we use the same language of "at least 50 percent", explains.

061 CHAIR PARKS: I take that as a friendly amendment to my motion.

062 REP. TIERNAN: I object. I don't think that is a friendly amendment.

073 CHAIR PARKS: Let's vote on my motion.

076 VOTE: 8-0 MOTION PASSES  
AYE: Sen. Baker, Miller, Bryant - Rep. Brown, Johnston, Lewis, Tiernan, Parks  
NO: None  
EXCUSED: Sen. Sorenson, Stull

086 MOTION: REP. JOHNSTON: moves to AMEND SB 450 by changing "at least" to "more than" on page 1, line 14 of the bill.

VOTE: 3-5 MOTION FAILS  
AYE: Sen. Baker - Rep. Brown, Johnston  
NO: Sen. Miller, Bryant - Rep. Lewis, Tiernan, Parks  
EXCUSED: Sen. Sorenson, Stull

104 MOTION: SEN. MILLER: Moves SB 450 AS AMENDED be sent to the floor

with a DO PASS recommendation.

VOTE: 8-0 MOTION PASSES  
Parks AYE: Sen. Baker, Miller, Bryant - Rep. Brown, Johnston, Lewis, Tiernan,  
NO: None  
EXCUSED: Sen. Sorenson, Stull

WORK SESSION ON SB 385

118 MAX WILLIAMS, COMMITTEE COUNSEL: SB 385 allows court to require plaintiff who previously dismissed action with prejudice and who refiles action to pay reasonable attorney fees incurred by defendants in dismissed action. Discusses -A54 & -A55 amendments. (EXHIBITS B, C)  
Discusses statutes in relation to SB 385. Continues discussion of amendments.

214 SEN. BAKER: Which amendment is that in?

215 MAX WILLIAMS, COMMITTEE COUNSEL: At the top of page 2 on the -A55 amendments.

220 SEN. BAKER: Section 17 is completely taken out?

221 MAX WILLIAMS, COMMITTEE COUNSEL: Correct. Continues with discussion of amendments.

235 SEN. BAKER: By deleting that from the bill we are not effecting ORS 20.096? We are not amending that statute at all?

237 CHAIR BRYANT: It would stay in the same condition as it is presently.

238 MAX WILLIAMS, COMMITTEE COUNSEL: Continues with discussion of amendments.

274 CHAIR PARKS: Sen. Baker, do you understand this?

276 SEN. BAKER: Enough.

277 MAX WILLIAMS, COMMITTEE COUNSEL: If necessary, there are people here that can address this issue more clearly.

281 CHAIR PARKS: Discusses what section two now becomes with the proposed amendments.

287 MAX WILLIAMS, COMMITTEE COUNSEL: Yes, that is correct.

288 CHAIR PARKS: Then you are adding to that, section 139?

290 MAX WILLIAMS, COMMITTEE COUNSEL: The idea is that we are trying to break the practice of pleading a survival statute case with wrongful death cases in means of recovering attorney fees. Continues with discussion and explanation of amendments.

309 REP. TIERNAN: What are the brackets for on the -A55 amendments?

312 MAX WILLIAMS, COMMITTEE COUNSEL: To show that they are different from the -A54 amendments, for identification purposes.

318 REP. TIERNAN: It would be helpful to have a summary as to what is left of the bill and what reform we are going to be voting on.

329 CHAIR BRYANT: We will give you a review of what the bill accomplishes.

332 MAX WILLIAMS, COMMITTEE COUNSEL: Continues with discussion of amendments. Discusses conceptual amendments.

417 CHAIR PARKS: Adds language on line 19, "and deposition expenses", to amendment. Starting from the "De novo", and continuing through the sentence.

426 CHAIR BRYANT: "De novo.", at line 12?

428 CHAIR PARKS: Yes.

430 MAX WILLIAMS, COMMITTEE COUNSEL: Continues with amendments.

TAPE 45, SIDE A

015 CHAIR PARKS: It is my intent to change the time frames on all of those, and to exclude the expert witness expenses, explains.

025 CHAIR BRYANT: There is no problem in eliminating "expert witness fees and deposition expenses", but do you need the rest of that sentence as it relates attorney fees?

029 MAX WILLIAMS, COMMITTEE COUNSEL: A person is still able to claim costs and disbursements, which may or may not be incurred before or after. The lines in subsection B are only attainable after the filing of the decision and award of the arbitrator.

034 CHAIR PARKS: We are discussing subsection 4A on line 6?

035 MAX WILLIAMS, COMMITTEE COUNSEL: Cites possible amendment on line 13. That clause would only be applying to reasonable attorney fees in cost and disbursements.

040 CHAIR PARKS: "Including reasonable and necessary expert fees."

041 MAX WILLIAMS, COMMITTEE COUNSEL: That language would be struck.

042 CHAIR BRYANT: We would delete that and then the rest of the clause would refer back to the reasonable attorney fees.

043 REP. JOHNSTON: That one gives someone attorney fees under the contract, so it does make sense.

046 REP. TIERNAN: These expert fees are not within the cap without the amendments?

048 CHAIR BRYANT: Yes that is right, explains why.

056 REP. TIERNAN: These are district court cases?

057 CHAIR BRYANT: These are the \$25,000 and under cases.

058 REP. TIERNAN: What happens when the district courts go away?

059 MAX WILLIAMS, COMMITTEE COUNSEL: It won't change the cases that are still in arbitration. Continues discussion of conceptual amendments. Explains what the amendments now say as to the starting date of the act.

078 CHAIR BRYANT: It would be consistent on procedural matters.

079 MAX WILLIAMS, COMMITTEE COUNSEL: The substantive wouldn't change, it would become effective for cases filed after the date of the act, explains.

084 CHAIR PARKS: Wouldn't it be simpler just to have it start on January 1?

087 REP. JOHNSTON: Explains that we shouldn't change the rules for those pending cases. Those who were in favor of the prevailing party fees wanted to chill the filing of some of these cases, it would be unduly harsh to and unconstitutional to submit them as ex-post facto.

096 MAX WILLIAMS, COMMITTEE COUNSEL: I wasn't thinking that it would effect the prevailing party fees, explains.

101 REP. JOHNSTON: I agree, but think we should take them out and specify that these become effective upon passage no matter where the case stands.

105 CHAIR BRYANT: We can conceptually adopt that.

107 MAX WILLIAMS, COMMITTEE COUNSEL: We had a couple of other changes to the ORCP as well. It might be best to put this conceptual amendment in with the already amended ORCP passage.

111 REP. JOHNSTON: That works.

113 CHAIR PARKS: Cites and discusses possible conceptual amendments.

127 CHAIR BRYANT: This amendment would be for when a case gets bumped out of small claims and elects to go to a jury trial?

130 CHAIR PARKS: No, they elect to go to arbitration. If we didn't have that provision, they wouldn't get attorney fees at all. This would cure people of trying to make it difficult for the other person to collect money.

135 MAX WILLIAMS, COMMITTEE COUNSEL: That amendment is on page 13, line 30, striking "\$2,500" and inserting "\$1,000"?

137 CHAIR PARKS: Yes.

138 MAX WILLIAMS, COMMITTEE COUNSEL: Is it your intent on page 12, to strike just the \$500 attorney fee award but to leave the 20 percent judgment?

142 CHAIR PARKS: Yes.

143 CHAIR BRYANT: We can't delete the whole section, just the \$500 section.

144 SEN. BAKER: We would strike "at least \$500" on line 28, and then on line 29 strike "may award additional attorney fees". Reads language how it would read with amendment.

151 CHAIR PARKS: Discusses how conceptual amendment language would now read in the end.

153 MAX WILLIAMS, COMMITTEE COUNSEL: We are striking the \$500 minimum amount, but the court may award the 20 percent of the judgment and the 10 percent of the amount claimed?

155 CHAIR PARKS: Yes.

155 SEN. BAKER: Is that a "may" or a "shall"?

156 MAX WILLIAMS, COMMITTEE COUNSEL: Explains language.

157 SEN. BAKER: We want the language to be "may" don't we?

158 CHAIR BRYANT: No, it should be "shall", explains.

160 CHAIR PARKS: But to an amount not to exceed, which will cover the "shall". It is up to the judge in light of the other factors as to how much is awarded.

166 REP. TIERNAN: Asks about page 13, section 4. What is the rational for that language change?

168 CHAIR BRYANT: This would just be in the small claims proceedings, explains. The right to recover attorney fees is a disincentive, so that they may leave it in small claims court.

179 CHAIR PARKS: Discusses that there is also some constitutional dimension about language. These are claims over \$250 and under \$2000.

186 REP. TIERNAN: What is the small claims limit?

187 CHAIR BRYANT: \$2,500. According to our constitution right now, if it is over \$200 a person has the right to request a jury trial. That is what we are trying to address.

191 SEN. BAKER: Can Max read that language on page 12, line 28?

194 MAX WILLIAMS, COMMITTEE COUNSEL: Discusses language for conceptual amendment.

204 SEN. BAKER: The court could award less than that?

205 MAX WILLIAMS, COMMITTEE COUNSEL: Yes. Continues with explanation.

208 CHAIR PARKS: Cites another conceptual amendment. This is the unlawful trade practices act, explains. Discusses how conceptual amendment would effect the unlawful trade practice act.

240 MAX WILLIAMS, COMMITTEE COUNSEL: What is being struck?

242 CHAIR PARKS: Explains conceptual amendment and how it should read.

255 MAX WILLIAMS, COMMITTEE COUNSEL: You want to strike the remainder of lines 22-24?

256 CHAIR PARKS: Yes, so that the state can't recover. There was one on banking that worked the same way, did we include that on line 29-30?

263 MAX WILLIAMS, COMMITTEE COUNSEL: Yes, that is in the -A55 amendments.

266 REP. JOHNSTON: There was some discussion between the Attorney General's office, the committee, and the governor's office. Did we reflect those changes?

272 CHAIR BRYANT: Somewhat, explains. The issues that were raised last week, we left them as "may", leaving discretion to the judge. On the issues dealing with discrimination, it remained "shall" for the prevailing party, and "may" if it was a meritless claim.

292 MAX WILLIAMS, COMMITTEE COUNSEL: There were several instances in the original bill that treated the state differently by not allowing them to recover attorney fees when they prevail. Those statutes were modified and placed on the same footing so that there were no statutes that disallowed the state to recover attorney fees.

302 SEN. BAKER: Asks about language on page 6. Is there a definition as to what "nonmonetary penalties" are?

305 CHAIR BRYANT: I thought we were going to delete that?

306 MAX WILLIAMS, COMMITTEE COUNSEL: That didn't make it in the amendments.

Recess at 6:23 pm.

Re-opens hearing at 6:35 pm.

314 CHAIR BRYANT: Discusses Rep. Johnston's question about limitation for recovery prevailing party fees.

320 MAX WILLIAMS, COMMITTEE COUNSEL: Cites section 7 concerning question from Rep. Johnston. That language means that there would only be one prevailing party fee awarded regardless of the number of prevailing parties.

336 REP. JOHNSTON: Gives example of court suit, and asks how much the person who loses would be responsible for?

344 MAX WILLIAMS, COMMITTEE COUNSEL: If it was in circuit court, the person would only be responsible for a mandatory prevailing party fee of \$500 and up to a discretionary amount of \$5,000 which the judge could award.

350 REP. JOHNSTON: Then they would have to split it as they chose?

351 MAX WILLIAMS, COMMITTEE COUNSEL: Yes. There is joint liability under the terms of this provision.

354 SEN. BAKER: On page 6, line 22, asks about partial summary judgment.

359 CHAIR BRYANT: Yes, we added language in the -A55 to clarify that.

362 MAX WILLIAMS, COMMITTEE COUNSEL: Cites language that was included.

367 SEN. BAKER: That include partial summary judgment?

370 MAX WILLIAMS, COMMITTEE COUNSEL: Yes.

372 SEN. BAKER: On pg. 6, section 6, asks about objective standards concerning attorney fees awards. I agree to the amounts up to \$5000. Asks about giving the court discretion. Cites concern about language that has been deleted. That language is too loose and doesn't give any direction to

the court, explains. It would be reasonable to eliminate lines 13-23, but preserve the language on lines 10-12.

TAPE 44, SIDE B

009 CHAIR BRYANT: The other purpose we are trying to accomplish is provide a prevailing party fee in situations where the case is not just brought in bad faith or willful and malice conduct. The person who sues and prevails, has the opportunity to recover attorney fees, or vice a versa.

015 SEN. BAKER: What is the standard?

016 CHAIR BRYANT: This does leave a lot of the discretion to the court.

017 SEN. BAKER: We are already awarding, in circuit court, prevailing costs. We are already awarding 20 percent attorney fees after arbitration.

My problem is that we are trying to get people into the low end of court, resolve their issues, and then get them out of court. When you have this language, there could be problems, explains. I don't think these are tight enough standards.

030 CHAIR BRYANT: Cites section 5 about an abusive discretion.

033 SEN. BAKER: Anything up to that point, the court of appeals will not review it.

035 CHAIR BRYANT: That is right. The decision of the court would have to have gone through arbitration. One of the purposes of the bill is to say that there is \$5000 possible even though there is no attorney fees clause.

042 SEN. BAKER: The beauty of arbitration is that everyone comes into that, and they don't over try their cases. With these types of penalties, you force everyone into arbitration as the final conclusion. As a result, everyone over prepares and over documents, which defeats the purpose of arbitration, explains.

056 CHAIR BRYANT: I understand what you are saying, I think that we just disagree.

059 REP. JOHNSTON: Gives case example about extension of Oregon law.

Recess at 6:45 pm.

Re-opens at 6:55 pm.

078 CHAIR BRYANT: Discusses conceptual amendment and where it would be added.

081 MAX WILLIAMS, COMMITTEE COUNSEL: Cites where amendment would be placed about "one prevailing party fee".

085 MOTION: SEN. BRYANT: Moves to ADOPT SB 385-A55 amendments dated 05/01/95.

VOTE: Hearing no objections the amendments are ADOPTED.

088 MOTION: SEN. BRYANT: moves to AMEND SB 385 by inserting "conceptual amendments, (EXHIBIT D)".

VOTE: Hearing no objections the amendments are ADOPTED.

095 MOTION: SEN. BAKER: moves to AMEND SB 385 by deleting "lines 13-23".

VOTE: 3-5 MOTION FAILS  
AYE: Sen. Baker - Rep. Brown, Johnston  
NO: Sen. Miller, Bryant - Rep. Lewis, Tiernan, Parks  
EXCUSED: Sen. Sorenson, Stull

102 REP. JOHNSTON: The issue is that no one be penalized for additional prevailing party fees unless there is something extraordinary about it, explains.

111 CHAIR BRYANT: Those are all of the things listed A-G.

113 REP. JOHNSTON: Those are all things out of the normal, explains.

118 REP. TIERNAN: I think this language is as it says.

126 MOTION: REP. LEWIS: Moves SB 385 AS AMENDED be sent to the floor  
with a DO PASS recommendation.

VOTE:

7-0 MOTION PASSES

AYE: Sen. Baker, Miller, Bryant - Rep. Johnston, Lewis, Tiernan, Parks

NO: Rep. Brown

EXCUSED: Sen. Sorenson, Stull

135 CHAIR BRYANT: Adjourns the hearing at 7:01 pm.

Submitted by, Reviewed by,

Sarah Watson Debra Johnson  
Committee Assistant Committee Coordinator

EXHIBIT SUMMARY:

- A. Proposed Amendments to SB 450 - Staff - 2 pages
- B. Proposed Amendments to SB 385 - Staff - 2 pages
- C. Proposed Amendments to SB 385 - Staff - 4 pages
- D. Proposed Amendments summary to SB 385 - Staff - 2 pages