

SENATE JUDICIARY SUBCOMMITTEE  
ON CIVIL PROCESS

Hearing Room  
Tapes - 19

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  
Sen. Peter Sorenson

STAFF PRESENT:

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

MEASURES HEARD:

SB 385 - 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

005 CHAIR BRYANT: Calls the hearing to order at 3:38 PM

WORK SESSION ON SB 385

Witnesses: Dan Harris, Oregon State Bar  
Bill Symme, Oregon State Bar  
Bob Neuberger, Oregon State Bar  
Greg Mowe, Oregon State Bar  
Ted Kulongoski, Attorney General  
John Hart, Council on Court Procedures  
Tom Tongue, Oregon Association of Defense Council  
Edward Brunet, Law Professor at Lewis and Clark College

040 DAN HARRIS, CHAIR OF OREGON STATE BAR PROCEDURE AND PRACTICE COMMITTEE:

Introduces other men and EXHIBIT A.

046 BILL SYMME, OREGON STATE BAR PROCEDURE AND PRACTICE COMMITTEE:  
Testifies and submits written testimony in support of SB 385. (EXHIBIT A)

128 BOB NEUBERGER, OREGON STATE BAR PROCEDURE AND PRACTICE COMMITTEE:  
Testifies and discusses EXHIBIT A.

168 CHAIR BRYANT: Did they have any study that showed why litigation cost increased with the loser pay?

178 NEUBERGER: I don't know about Florida. There has been studies done about the English rule and loser pay. Generally they find that litigants can be categorized in two categories, explains.

-discusses Alaska rules  
-we want to help in the civil justice system

251 GREG MOWE, OREGON STATE BAR LITIGATION SECTION: Testifies and submits written testimony in opposition to SB 385. (EXHIBIT B)

335 SEN. SORENSON: Can you all comment on the procedural matter of amending the rules of civil procedure. Should the legislative assembly be making those changes?

354 SYMME: The Council on Court Procedures was a body that was established by the legislature. Our recommendation is that those matters that pertain to the Oregon rules of civil procedure go through the ordinary channels and that they be referred to the Council on Court Procedures for consideration.

363 MOWE: That is also the position taken in our report.

366 CHAIR PARKS: Discusses proposed amendments in EXHIBIT A. Can you give us actual amendments rather than "how you feel"? This is a good piece of work that should be put into actual wording.

393 REP. JOHNSTON: I also like the Oregon State Bar report. Could you comment on the preface of the sentence, "then we suggest"?

407 SYMME: This was a request that we come up with a proposal. As a committee we support some of the changes, other parts and provisions of the bill, we as a committee do not agree with. These are just suggestive changes, not changes that we as a committee would endorse. Given a preference, we do not want this bill to pass.

431 REP. JOHNSTON: Cites language and asks how and why they reached that conclusion?

TAPE 18, SIDE A

007 SYMME: We as a committee perceive this as an access to justice issue. If the loser pay provisions are enacted, it will deter even meritorious suits. A person cannot afford to lose everything, and the proposed changes have that effect.

014 REP. JOHNSTON: In Chicago, civil proceedings are delayed enough that a personal injury case filed today will be heard in the year 2004. In Oregon, our worst jurisdictions are in the eighteen month to two year range. Do you think that we are trying to solve someone else's problem?

021 MOWE: Yes, explains. We had concern that the impact on something like the loser pay on litigation would be very difficult to predict. We are concerned that the cases that go to small claims mediation or arbitration, would be abandoned in ordered to recover attorney fees.

035 REP. TIERNAN: Is your section of Civil Process and Procedures dominated



not is not an indicator to me whether it was a good case, most of them are.

To have a system in which you would have the state pay the attorney fees if they lose, they wouldn't act.

TAPE 17, SIDE B

022 REP. TIERNAN: If I see the state going after an independent contractor for failure to pay worker's compensation, my sympathy doesn't go out to them. I see the state going after the little guy instead of the big guy.

028 KULONGOSKI: If all but a few are obeying the law, those that don't should be put upon. I don't see anything unfair about making people follow the rules.

037 REP. TIERNAN: But if you were wrong in your assessment or not, why should the person your filing against have to pay their own attorney fees?

038 KULONGOSKI: It is a balance. The benefit the state gets by taking an action, if the individual prevails, I still think the state has won because they tried to enforce the law. Discusses unlawful trade practice act and gives examples of cases. This bill has the most impact on the middle income, small business people.

060 REP. JOHNSTON: If the state regulatory body were to be too zealous, I would expect the citizens to vote him/her out. Does RICO also apply to those predicate offenses that are based upon mail fraud? You don't want your office to have to pick up the slack if the private attorney general concept doesn't work? In these cases, which are the general business cases, a private remedy already exists, explains. There has been an unintended expansion of RICO into business disputes where it doesn't accurately belong.

078 KULONGOSKI: How many of these cases do you think there are, that out of the total civil RICO case that have been filed, there has been an abuse of the process? There may be 2-4 instances, but to eliminate the whole system, doesn't make much sense, there are other remedies. RICO cases are tough cases to win, I don't know if it warrants repealing the civil cause of action provision.

100 REP. JOHNSTON: We can remove only that portion that is a problem.

104 KULONGOSKI: If I were taking these cases, I would prefer that they be handled by the private party.

109 SEN. SORENSON: On the ORCP changes, is it your view that we should that we should refer this to the Council on Court Procedures?

111 KULONGOSKI: I think you should give the council the time to be able to come back and give their suggestions to rule 17.

118 SEN. SORENSON: Asks if in SB 385, there are any specific statutes that you would urge us to amend?

129 KULONGOSKI: That is why there needs to be a review process to figure out what would be applicable to all of those statutes that are sought to be amended.

134 SEN. SORENSON: Is it possible for you to provide us with a fiscal

impact of what it would cost your department to step in to do the civil RICO cases?

141 KULONGOSKI: I will get that to you in writing.

153 JOHN E. HART, COUNCIL ON COURT PROCEDURES: Testifies and submits written testimony on SB 385. (EXHIBIT D)

- discusses councils jobs
- discusses how members are appointed to council
- there are 6-8 members who do Tort law
- discusses ORS 1.735
- council concern to Section 1, 4, 5 of bill - there are procedural matters
- our ORCP amendments are for
- the proposed amendments have some procedural problems
- gives procedure and language examples that aren't strong
- continues talking and discussing written testimony
- gives and discusses examples
- the council has and always will pay attention to the detail language and bills need
- delete or study Section 1,4, and 5
- help give you assistance in the upcoming time
- we are willing to assist your subcommittees

TAPE 18, SIDE B

099 SEN. SORENSON: Have the drafters of the bill come to your council to discuss the possible amending of ORCP?

106 HART: SB 385 has not been discussed by the council. We have not met officially since December.

112 SEN. SORENSON: The attorney fee provisions, in SB 385, are not part of your work because they are "substantive " matters of the unlawful trade practices act, etc.?

117 HART: Yes.

138 TOM TONGUE, OREGON ASSOCIATION OF DEFENSE COUNSEL: Testifies and submits written testimony in opposition to SB 385. (EXHIBIT E)

- procedural matters should go through the defense counsel
- the present Oregon system works, explains.
- the number of civil filings in Oregon in '94 were dropped
- we are interested in speedy, fair resolutions
- jurors have the greatest common sense
- discusses offers of compromise
- gives examples of cases tried in Oregon
- recommends adopting a circuit riding judge, for eastern Oregon and sparsely populated areas
- likes mandatory settlement conferences

300 CHAIR PARKS: What do you think of settlement conferences for cases under \$20,000 with the court making a recommended finding which would be the threshold for loser pays? Gives example.

312 TONGUE: We would try that. Explains what Judge LaMar does in her court. Discusses that in many parts of the state there are court arbitration for cases under \$25,000. The problem with that is that people in litigations, if they don't like the outcome, can go back into a trial. If you adopted the \$20,000 level, it might not work in all counties. We need to find something that will work all over the state efficiently and cheaply.

352 CHAIR BRYANT: You would have to, constitutionally, allow the right for trial. If they elected to go through the arbitration process and then decided to go to trial and lost, they would have to pay the other sides

arbitration cost?

360 TONGUE: The arbitrator is acting as a judge might act in a settlement conference. I recommend Judge LaMar's process. Continues with testimony.

- Discusses federal rule 11 that is like SB 385?
- discusses Oregon's rule 17
- discusses people who usually bring cases against others

TAPE 19, SIDE A

081 EDWARD BRUNET, LAW PROFESSOR AT LEWIS AND CLARK COLLEGE: Testifies and submits written testimony in opposition to SB 385. (EXHIBIT F)

139 SEN. SORENSON: Is one of the differences between the Oregon and federal system that we have a greater scrutiny for the jury trial right of the litigants? Is that one of the impediments for use of summary judgment as use of case resolving mechanism?

145 BRUNET: Discusses rule 47. We can have summary judgments provided there are no genuine issues of material fact, which is the Oregon and federal standard, and the existing constitutional right to jury trial does not stand as an impediment.

154 REP. TIERNAN: Businesses don't like this rule of loser pays because of the slip falls. If there is an \$10-12,000 claim and it cost \$8,000 in attorney fees, the person will only get \$4,000. Why isn't the loser pay, when under \$20,000, a fair rule? People are deterred right now from suing because of what it will cost to sue and what they get isn't worth it.

166 BRUNET: In some counties, court of next arbitration, is working very well. With this sort of legislation, 95 percent of these cases are settling without a need for trail. Discusses settlements and court systems in Australia. The trial rate will increase and the settlement rate will decrease if you pass this legislation.

189 CHAIR BRYANT: Adjourns the hearing at 5:50 pm.

Submitted by, Reviewed by,

Sarah May Debra Johnson  
Committee Assistant Committee Coordinator

EXHIBIT SUMMARY:

- A. Testimony on SB 385 - Bill Symme - 18 pages
- B. Testimony on SB 385 - Greg Mowe - 10 pages
- C. Testimony on SB 385 - Ted Kulongoski - 6 pages
- D. Testimony on SB 385 - John Hart - 13 pages
- E. Testimony on SB 385 - Tom Tongue - 11 pages
- F. Testimony on SB 385 - Edward Brunet - 5 pages