

OREGON STATE BAR
Request for Authority to Oppose Legislation
Part I – Legislative Summary

RE: HB 2148
(<http://www.leg.state.or.us/o9reg/measpdf/hb2100.dir/hb2148.intro.pdf>), filed pre-session at Governor's request for Oregon Department of Administrative Services. Summary: "Allows transfer of liability to and assessment of liability against reorganized business entity where predecessor entity owed debt to state agency. Provides for appeal of assessment by reorganized business entity." Work session and hearing set for Tuesday, February 3, 2009.

Submitted by: Debtor-Creditor Section

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1. PROBLEM PRESENTED (including level of severity):

The bill would permit a state agency as creditor of a business entity to recover the entity's debt from a "reorganized business entity." We are concerned about (1) ambiguity and excessive agency discretion in the definition of *reorganized business entity* and (2) requiring that any dispute over characterization be resolved as an agency administrative-law matter rather than in court.

The notion that a person or business entity who buys or otherwise succeeds to assets of a different person or entity would succeed to some or all of the liabilities of the prior owner is referred to as "successor liability." With the exception of liens (such as mortgages and security interests) and very few other well-circumscribed exceptions, one who acquires assets does not succeed to the debts of the prior owner. Drastically broadening the circumstances in which successor liability is possible—such as by the passage of HB 2148—would create great uncertainty regarding and substantially increase the risk and cost of every asset-sale transaction.

Current common law (case law developed by judges) recognizes that successor liability is appropriate in very limited circumstances. For example, in a 1986 federal district court case applying Oregon law, the court held that a transferee corporation was not subject to contractual obligations of the transferring business because the two businesses did not share officers, directors, or shareholders. *Estey & Associates, Inc. v. McCulloch Corp.*, 663 FSupp 167, 171 (D Or 1986). Without the passage of this bill, state agencies can of course invoke current common law to impose successor liability where appropriate.

Definition of Reorganized Business Entity

Ambiguity. Under the bill, *reorganized business entity* would include a business entity that "has changed ownership from that of its predecessor entity." Section 2(1). Because a change in an entity's ownership does not change the

entity's debts, that phrase is confusing and nonsensical unless the drafter means something else, such as that the physical business operated by a business entity has changed ownership from the entity to another entity. If the drafter has the latter intent, the bill should say so.

Also, under the bill, a business entity is not a reorganized business entity "solely because of" several factors, including "a transfer of an interest of an investor who has no right to manage the business entity." Again, because the transfer of an ownership interest in an entity does not affect its debts, that carve-out makes no sense.

To the extent the ownership-change carve-out makes any sense, section 2(1)(c) identifies as an ownership change that would not result in successor liability the transfer of the interest of "a limited partner of a limited partnership that does not participate in the control of the business of the limited partnership." Because as a matter of law a limited partner of a limited partnership cannot participate in the control of the business of the limited partnership, that language unnecessary. If it is necessary, the drafter must intend some nonobvious interpretation of the bill.

Excessive agency discretion. In section 2(3), the bill identifies an apparently nonexclusive list of factors the agency may consider in determining whether a business entity is operating substantially the same business as the entity owing the debt. Those factors would supplant common-law successor liability factors. (As mentioned above, legislation would not be necessary to give agencies the right to pursue other entities under the existing common law of successor liability.) We are concerned that the listed factors, especially because they are permissive and nonexclusive, would give an agency too much discretion to, in essence, develop an administrative common law of successor liability.

Administrative versus court determination of successor liability

Under the bill, the state agency would make the factual and legal determinations supporting successor liability, and the target's only remedy is an administrative appeal. Especially in view of the discretion the law and bill leave to the agencies to develop the law, we are very concerned about also leaving the fact-finding to them and limiting any appeal to an administrative-law appeal.

Conclusion

Current law gives state agencies the ability to pursue successor liability where appropriate. The bill is thus unnecessary. More importantly, it would allow each agency to develop and apply the law with limited or no judicial review in contexts in which the agency has a conflict of interest because it is both creditor and judge. We urge the committee not to pass the bill to the full House.

- 2. IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED** or interested in this change. Who would support it and who would oppose it?

Anyone who might sell or buy assets—or who wants to avoid any steps that would restrict Oregon’s attempt to grow out of the current recession—should also oppose this bill due to the uncertainty about the ability to acquire assets free of any claim of the transferor’s creditors and the increased due-diligence costs that will be incurred in transactions that proceed. The state would presumably want to have the revenue this bill would generate, but the state should not be in the business of unfairly taking property from innocent purchasers and should rely on the existing common law of successor liability.