

2017 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2159

2017 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

SB 2159
1/16/2017
Job Number 26906

- Subcommittee
 Conference Committee

Committee Clerk Signature

Era Liebelt

Explanation or reason for introduction of bill/resolution:

Management of a limited liability company

Minutes:

Attachment 1 & 2

Chairman Klein: Called the committee to order.

Marilyn Foss, General Counsel for the North Dakota Bankers Association: Written testimony, see attachment #1 and amendment, see attachment #2. (:18-4:47)

Senator Casper: Let's say you have an LLC with a dozen members, the member control agreement indicated that the president and vice president could bind the LLC and the only asset is a parcel real-estate and the secretary went and bought a loader and the bank lent fifty percent of the value of the loader and then asked the LLC to sign a security agreement on the loader and the secretary signed it without a waiver from the members consenting to it under current law, you are saying that your security interests could be at risk?

Marilyn Foss: Yes, I am saying they will have to go back and figure that out. Fixing this simply restores the law to what most people thought it was.

Senator Casper: Once we change this law if one of the twelve members, using my example again, signs the security document with the bank then the bank would be secure, regardless of what was said in the member control agreement?

Marilyn Foss: This provision is that you do not require members consent for a security interest. I am not telling you that there isn't a possible variation for a control agreement or a voting agreement that couldn't be argued to apply. I am telling you this does resolve the uncertainty of what the process is for the LLC to give a security agreement.

Senator Casper: Under this legislation, any member of a LLC could bind the LLC without the consent of the other members, the LLC on a security agreement with the lending institution?

Marilyn Foss: That is not a correct statement. You still have to determine that there is authority within the LLC and how the governing structure is set up. What it is saying is, this section of law is relating to transfers of interests in LLC property. People don't think of security agreements as transferring an interest in LLC property, that is what it is.

Senator Roers: If you were to get the resolution of authority signed by the LLC stating the individual signing has that authority, doesn't that negate the need for this amendment?

Marilyn Foss: I would say not, at least the question is raised and because the provision has been in our law since 1993, we don't have this interpretation of it because it was not needed. If this gap is left in, that raises the question in respect to legislative intent, which I am quite certain was a mistake. The correction was made in the Minnesota law.

Chairman Klein: That lone paragraph suggesting if it doesn't pass and all the bad things that could happen, we left that outside. Things will be moving as smoothly as we thought and intended to have done since 1993?

Marilyn Foss: That is correct if we add the retroactive clause because that also fills the two-year gap.

Senator Campbell: (11:25-12:16) Gave an example to explain how this works and said that they need to change this because currently they could be in violation with some of the things they are involved with where they don't have that 100 percent member consent. It's the definition of the member consent that we want to eliminate because we could be challenged.

Marilyn Foss: (12:18-15:22) That is correct. Essentially leaving the law the way it is raises the real prospect that any member of an LLC could veto its financing arrangements.

Greg Tschider, Credit Union Association of the Dakotas: In support. (15:45-

Barry Haugen, Independent Community Banks of North Dakota: In support.

Dana Bohn, North Dakota Farmer Credit Counsel: In support.

Chairman Klein: Closed the hearing.

Senator Poolman moved to adopt the amendment.

Senator Burckhard seconded the motion.

Roll Call Vote: Yes-7 No-0 Absent-0

Senator Campbell moved a do pass as amended.

Senator Poolman seconded the motion.

Roll Call Vote: Yes-7 No-0 Absent-0



Senator Campbell will carry the bill.



January 16, 2017

Handwritten:
Done
4/16/17
181

PROPOSED AMENDMENTS TO SENATE BILL NO. 2159

Page 1, line 4, after "company" insert "; and to provide for retroactive application"

Page 2, after line 13, insert:

"SECTION 4. RETROACTIVE APPLICATION. This Act applies retroactively to cases arising after July 31, 2015."

Renumber accordingly

**2017 SENATE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2159**

Senate Industry, Business and Labor Committee

Subcommittee

Amendment LC# or Description: 17.0671.01001

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Senator Poolman Seconded By Senator Burckhard

Senators	Yes	No	Senators	Yes	No
Chairman Klein	x		Senator Marcellais	x	
Vice Chairman Campbell	x				
Senator Roers	x				
Senator Burckhard	x				
Senator Casper	x				
Senator Poolman	x				

Total (Yes) 7 No 0

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

**2017 SENATE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2159**

Senate Industry, Business and Labor Committee

Subcommittee

Amendment LC# or Description: 17.0671.01001

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Senator Campbell Seconded By Senator Poolman

Senators	Yes	No	Senators	Yes	No
Chairman Klein	x		Senator Marcellais	x	
Vice Chairman Campbell	x				
Senator Roers	x				
Senator Burckhard	x				
Senator Casper	x				
Senator Poolman	x				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Senator Campbell

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2159: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2159 was placed on the Sixth order on the calendar.

Page 1, line 4, after "company" insert "; and to provide for retroactive application"

Page 2, after line 13, insert:

"SECTION 4. RETROACTIVE APPLICATION. This Act applies retroactively to cases arising after July 31, 2015."

Renumber accordingly

2017 HOUSE INDUSTRY, BUSINESS AND LABOR

SB 2159

2017 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee
Peace Garden Room, State Capitol

SB 2159
3/6/2017
28699

- Subcommittee
 Conference Committee

Ellen Hartung

Explanation or reason for introduction of bill/resolution:

Management of a limited liability company & provide for retroactive application.

Minutes:

Attachments 1

Chairman Keiser: Opens the hearing of SB 2159.

Senator Campbell ~ District 19-Grafton: Introduces HB SB 2159. I will refer to my colleagues in the industry to explain the bill.

Marilyn Foss ~ General Counsel of the ND Bankers Association: Attachment 1.

6:35

Rep Ruby: The only change in the amendment, why the retroactivity?

Foss: It fixes the 2-year gap with loans in the interim period.

Rep Ruby: This is allowing, does this capture the LLC's that have started in this gap or is this for loans that were started?

Foss: I think it affects both.

Rep Becker: Is a member vote required to take out a loan?

Foss: That depends on the organizational documents of the LLP.

Rep Becker: That's my point, why are we not leaving it to the articles of organization on whether the member vote should be or managing member make the determination of whether it should be a security interest?

Foss: Largely because that is a detail that does not usually come up in discussion of whether they will loan to go borrow money? They go to a bank & they say that I'm not going to do it on an unsecured basis. Then they say, do we need to get a member vote for that?

Rep Lefor: If you don't take it to the member vote, that's basically means that the bank won't need resolution in the future to get a loan?

Foss: If you do not take it to a member vote, the security interest part of it, it doesn't do anything at all the authority that the members have to give to borrow the money in the first place.

Rep Lefor: In order to do this, the President or CEO can do these things without the board approval?

Chairman Keiser: The articles in a corporation control it. Whatever is stated in the articles is the guidance that the board & CEO officers follows. We inadvertently removed this when we did the law. What it says is, that the articles of incorporation allow any officer to initiate a loan, then they can guarantee the security interest on behalf of the organization.

So it's controlled by the articles of incorporation & generally say we give the power to our executive group to take out the loan & secure it. Because, when we eliminated it, this created a gray area, if it goes to court. What they are trying to do is put it back in so that if they have the authority to take the loan, they have the authority to guarantee the loan.

Rep Laning: Do you expect any financial implications?

Foss: No.

Chairman Keiser: Anyone here to testify in support of SB 2159,

Rep Ruby: Moves a Do Pass.

Rep Bosch: Second.

Chairman Keiser: Further discussion?

Rep Becker: Why do we need the government to intervene. For the members of the LLC to be severally liable, we need a member vote for securing, when the government could say no. I'm looking for why this is necessary.

Chairman Keiser: It's all in the articles in the federation. Government would be intervening a lot more if you start dictating with the absence of this.

Rep Becker: If of articles in the incorporation dictate that or the LLC any interest in that security, it requires a member vote. You don't see that that overrides the articles?

Chairman Keiser: No, I don't. Further discussion?

Roll call was taken on SB 2159 for a Do Pass with 12 yes, 0 no, 2 absent & Vice Chairman Sukut is the carrier.

Date: Mar 6, 2017

Roll Call Vote #: 1

**2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES**
BILL/RESOLUTION NO. 2159

House _____ Industry, Business and Labor _____ Committee _____

Subcommittee

Amendment LC# or Description: _____

Recommendation

- Adopt Amendment
- Do Pass Do Not Pass Without Committee Recommendation
- As Amended Rerefer to Appropriations
- Place on Consent Calendar

Other Actions

- Reconsider _____

Motion Made By Rep Ruby Seconded By Rep Bosch

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	X		Rep Laning	X	
Vice Chairman Sukut	X		Rep Lefor	X	
Rep Beadle	Ab		Rep Louser	X	
Rep R Becker	X		Rep O'Brien	X	
Rep Bosch	X		Rep Ruby	X	
Rep C Johnson	X		Rep Boschee	X	
Rep Kasper	Ab		Rep Dobervich	X	

Total (Yes) 12 No 0

Absent 2

Floor Assignment Rep Sukut

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2159, as engrossed: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends **DO PASS** (12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). Engrossed SB 2159 was placed on the Fourteenth order on the calendar.

2017 TESTIMONY

SB 2159

Testimony of Marilyn Foss
North Dakota Bankers Association
in favor of S.B. 2159

Mr. Chairman, members of the IBL Committee, I am Marilyn Foss, General Counsel for the North Dakota Bankers Association ("NDBA"). Senator Campbell introduced S.B. 2159 on behalf of NDBA.

S.B. 2159 allows an LLC to grant a security interest in LLC property specific member consent in every case and also allows an LLC to transfer property to a 100% wholly owned organization, also without first obtaining specific member consent.

The provisions included within S.B. 2159 appear to have been a part of N.D. LLC law since its inception in 1993, but they were inadvertently dropped when the LLC act was entirely redone by the 2015 Legislative Assembly because, in 2015, as in 1993, North Dakota modeled its LLC law on that of Minnesota.

When Minnesota revised its LLC law (in 2103, as I recall) the provisions addressing an LLC security interest and transfer to a wholly owned organization were also inadvertently dropped. The simple truth is that the drafting of the 2015 act for North Dakota occurred before Minnesota fixed its error, so that error flowed over to our LLC law as well. Minnesota has now fixed the error as we are asking this Legislative Assembly to fix our law and, with the amendment I also propose, we are asking you to make that fix retroactive to August 1, 2015, when the LLC revision took effect.

I have been asked what happens if S.B. 2159 does not pass. The answer is that at the very least LLC financing will be made more difficult for LLCs and lenders and may be substantially disrupted or terminated by lenders who are uncertain of the status of a security interest in LLC property. The first question will be what member consent is actually required? With the current state of affairs, the matter seems to me to be ambiguous. The statutes may easily be read to mean "unanimous"

member consent. Or, perhaps, it means majority consent, or maybe its meaning depends on organizational documents or a member control and voting agreement. Whatever the case if this isn't fixed, lenders will need to go back to review existing loans to LLCs and determine whether proper member consent was obtained or not and if there is some question, to obtain that consent. For their legacy loans and new LLC loans, lenders will have to determine what is needed for them to verify and document who the members are and the existence of member consent and be sure they have obtained compliant security agreements and financing statements. If compliant member consent cannot be established or obtained, it seems to me that the financing will have to be terminated because most LLC financing is not going to be done on an unsecured basis.

Passing S.B. 2159 restores the law and, with a retroactivity feature, provides for a smooth transition from the old law to the new act.

NDBA believes the mistake made in 2015 should be corrected back to the effective date of the 2015 revisions. We are asking you to do that with the amendment and this bill.

I'd be happy to answer questions.

Thank you.

PROPOSED AMENDMENT TO SENATE BILL NO. 2159

(Offered by Marilyn Foss on behalf of the North Dakota Bankers Association)

Page 1, line 4, after "company" insert "; and to provide for retroactive application"

Page 2, after line 13, insert:

SECTION 4. RETROACTIVE APPLICATION. This Act applies retroactively to cases after July 31, 2015."

Renumber accordingly

March 6, 2017

1

Testimony of Marilyn Foss
North Dakota Bankers Association
In favor of Engrossed S.B. 2159

Mr. Chairman, members of the IBL Committee, I am Marilyn Foss, General Counsel for the North Dakota Bankers Association. Senator Campbell introduced SB 2159 on our behalf. I am here today to provide a bit of background for the legislation and to ask you to support

S.B. 2159 restores a provision to our LLC law that was inadvertently left out when the LLC law was completely revised in 2015. The dropped provisions were included as part of the LLC statutes that were repealed in connection with the 2015 revision. All we are asking is to have North Dakota LLC law restored to its pre-revision state by including law to specifically provide that an LLC may grant a security interest in some or all LLC property without member approval and to also allow an LLC to convey its property to a 100% wholly owned affiliate without first obtaining member approval. It is important to note that this change does not affect the process by which an LLC must authorize the company to borrow money. Borrowing money must still be authorized in whatever manner is required by the LLC in its governing documents.

With my proposed amendment, we are asking the restoration to be made retroactive to cases occurring after July 31, 2015. This reflects the inadvertent nature of the gap created by the repeal and also will continue to smooth the transition between the former law and current law.

One final note – from its inception, ND LLC law has been modeled on Minnesota LLC law. Indeed, the 2015 revision of our LLC act was undertaken because Minnesota acted to revise its LLC act. The gap in our law occurred because the same omission occurred and gap was created with the Minnesota LLC law revision. Minnesota has fixed its law and filled its gap in the same way as I am asking you to do.

With this short explanation, I ask you to amend the bill to provide retroactive application and to then support the amended bill. Thank you. I am happy to try to answer any questions you may have.