

MINUTES FOR THE MEETING  
JUDICIARY COMMITTEE  
MONTANA STATE  
HOUSE OF REPRESENTATIVES

January 16, 1985

The meeting of the Judiciary Committee was called to order by Chairman Tom Hannah on Wednesday, January 16, 1985 at 9:00 a.m. in Room 312-3 of the State Capitol Building.

ROLL CALL: All members were present.

CONSIDERATION OF HOUSE BILL NO. 95: Hearing commenced on HB 95. Representative Jack Ramirez, District #83, and chief sponsor of the bill, testified in support of it. He informed the committee that two additional sponsors (Representative Spaeth and Marks) have been added to the bill since the original drafting. At this time, Representative Ramirez submitted a proposed amendment to the bill marked as Exhibit A.

Representative Ramirez gave the committee a little background concerning the issues the bill addresses. He referred to a recent Supreme Court Decision (Klaudt vs. Flink) where the court ruled that "bad faith" action and the underlying action could be consolidated for the purposes of trial. This bill will prevent the two separate actions from being consolidated. He feels that the "bad faith" definition is too vague. While these cases have an element of crime to them, they have none of the safeguards that a person would have if charged with a specific crime. If "bad faith" were a crime, we would have the safeguards of a definite penalty. Criminal statutes define what the penalty will be. In a civil "bad faith" case, there is no limit on the penalty. There is no standard given to the jury as to the amount of fine they may impose. In a civil "bad faith" action, punitive damages would go to the plaintiff. These are some of the concerns that Representative Ramirez has when a "bad faith" case is filed. He went on to say that in a civil "bad faith" case, a plaintiff for purposes of determining damages may even introduce into evidence the wealth of the defendant.

Although Representative Ramirez thinks that the "bad faith" cases have a definite place in society and do serve a useful purpose, he feels the protections of the defendant are not being fully considered. The defendant has a definite disadvantage under the Supreme Court decision requiring consolidation of the two actions. He feels this bill would correct that particular problem in that the "bad faith" action would be delayed until the parties can resolve the underlying issue. At that time, the plaintiff may bring the "bad faith" case against the insurance company if desired.

Zander Blewett, attorney from Great Falls, testified in support of the bill. He stated that the recent Supreme Court decision (Klaudt vs. Flink) has created a great amount of confusion. In

addition to two separate lawsuits, two different attorneys would need to be hired; thus, adding to the cost and the heavy court caseload. In many instances, if the underlying case is settled or the defendant wins, the "bad faith" lawsuit is dismissed or dropped. It was Mr. Blewett's opinion that extended litigation would result from trying the two cases together. He said that Montana's Supreme Court is the only one in the nation that has allowed a "bad faith" lawsuit against an insurance company and the underlying lawsuit to be tried at the same time. He strongly believes the underlying tort claim should be settled before a "bad faith" claim is filed. He said that without this bill, a jury will be extremely confused when dealing with a consolidated case.

Mr. Blewett informed the committee that if this bill is passed, it will allow the underlying tort case to be settled before a "bad faith" claim is filed. This, in effect, will help relieve the courts of a lot of needless litigation. Mr. Blewett shared some of the personal experiences he has had concerning this issue.

John Alke, representing the Montana Physicians' Service, spoke in favor of the bill. He offered an amendment to the bill which would simply include health service corporations.

Bob James, representing the State Farm Insurance Companies, testified in support of the bill. A copy of his testimony is attached as Exhibit B. He told members that the cost involved in lawsuits is getting ridiculous. This bill would help keep the costs of lawsuits down. He stated that the defendant has a conflict of interest when both claims are tried together thus making it necessary to employ two lawyers. Passage of this bill would also prevent the courts from becoming all the more cluttered with litigation.

Terry Screnar, president of Blue Cross of Great Falls, testified in support of the bill. He talked about the problems with the determination of medical necessities. He said that when they are forced to settle invalid claims, care cost are passed on to the policy holders. He submitted a copy of proposed amendments to the bill (Exhibit C) which will include "health service corporations".

Glen Drake, representing the American Insurance Association, spoke in favor of the bill's passage. He said that the interests of the insured are not the same as the interests of the company. That is why these actions should not be consolidated. He pointed out that consolidation would only result in additional legal costs. Mr. Drake feels that the business climate for the insurance industry in Montana is bad. He repeated that the insured ultimately assumes the additional costs in these legal cases.

Roger McGlenn, an independent insurance agent, wished to go on record as supporting this bill. Elmer Hausken, representing the Montana Association of Life Underwriters; F. H. Boles, president

of Montana Chamber of Commerce and George Allen, Montana Retail Association, all wished to go on record as supporting this bill. John Cadby, Montana Bankers Association, wished to go on record as supporting the bill with the proposed amendments included. Kim Schulke, attorney for the State Auditor, did not oppose the bill.

OPPONENTS TO HB 95: Karl Englund, representing the Montana Trial Lawyers Association, testified in opposition to the bill. He asked the committee to consider a couple of situations.

The trial court, under our current system, has control over the handling of litigation involving both personal injury and "bad faith" arising out of the same situation. The court can, under the present system, sever cases if there is any prejudice involved. Mr. Englund feels that our present system works. It provides for immediate remedy once liability is established. Mr. Englund said that he opposes this piece of legislation even with the proposed amendments submitted by Representative Ramirez. He feels that it would unduly prolong the litigation process.

Mike Meloy, practicing attorney in Helena, testified in opposition to the bill. He said that this bill would actually cause more lawsuits. The bill would restrict justice in not allowing the lawsuits to be tried together. Amendments submitted still require the insured and injured parties to try two separate lawsuits. Mr. Meloy said the proponents made a point by stating that the jury would find out about insurance if the cases were consolidated. However, Mr. Meloy feels that juries realize that insurance is usually an involving factor. Another point made by the proponents was the fact that two different attorneys would have to be hired anyhow, and he further believes this is a good practice.

Referring back to juries, Mr. Meloy said that juries are aware of why offers of settlement are made, and he feels that the juries determination will not be affected by knowledge of it. He feels that it will help the system work ever better. There are risks involved, however, in trying the two cases together. He stated that he feels it would be ridiculous to try the two cases together, but the bill will undo that option. The bill is simply unnecessary, in his opinion.

Jim Moore, attorney from Kalispell, spoke in opposition to the bill. He said that "bad faith" has been well established by the courts.

Mr. Moore stated that the amount of punitive damages are based upon two things: 1. How outrageous the conduct of the defendant is; 2. The ability of the defendant to pay. For that reason, it would be catastrophic if a uniform penalty is applied. Mr. Moore continued on by describing how difficult it is to get a case tried before court. If the first action has to be resolved before the second action can be filed, justice would certainly be delayed.

Mr. Moore said he has no opposition to the basic purpose of Representative Ramirez's bill, but he feels that there should be an option of trying cases together.

There being no further opponents to the bill, Representative Ramirez closed. He said that the underlying tort may be obscured if the lawsuits are combined. He feels the system should be fair to both sides. He also feels that if the cases are consolidated, the "bad faith" claim can be used as leverage to force excess payment of claims. He said that no time is saved when the cases are consolidated for the purposes of discovery. Again, Representative Ramirez said his intent was to get this back to where it is evenly balanced in that the "bad faith" claims are not used as threats against insurance companies for over payment or underpayment of claims.

Chairman Hannah opened the floor up for discussion. Representative Brown questioned the length of time involved in getting these lawsuits before a court of law. Representative Ramirez informed the committee that most court delays are due to the lawyers themselves and not the courts.

Representative Addy asked Mr. Meloy about who assumes pre-trial costs and who pays defense costs. Mr. Meloy informed him that clients assume all pre-trial costs even if the case is lost and the insurance company pays the defense costs directly. Mr. Meloy stated that the plaintiffs face a higher risk of losing cases than a defendant does. He believes it is usually the defendant's practice to delay litigation.

Representative Ramirez did not agree that defendants delay litigation. He thinks that most defendants' attorneys have plenty of work to do and do not delay litigation on purpose to build up their defense costs.

In response to Representative Rapp-Svrcek's question, Representative Ramirez feels that there are some cases where lawyers would like to consolidate the cases and try them together. He said that regardless of what the lawyer wants to do, the decision to consolidate or not to consolidate is left up to the judge.

Representative Miles directed a question to Mr. Meloy. What other recourse would a plaintiff have if the case was being delayed? Other than writing to the insurance commissioner's office, Mr. Meloy could find no other recourse. Mr. Meloy felt that one would have a little more leverage if a "bad faith" case were filed.

Representative Ramirez said that many insurance companies advance payment on medical expenses. He continued by saying that if under the treat of a "bad faith" case, the insurance company will certainly try to accomodate the claimant fairly.

Representative Montayne asked Representative Ramirez if this piece of legislation had any bearing on the \$5,000,000 case resulting out of Billings. Representative Ramirez said it did not.

Representative Mercer had a few technical questions. One dealt with the statute of limitations on "bad faith" actions. Representative Ramirez said that "bad faith" would fall under the three year limitation.

Representative Mercer wanted to know if more litigation would be created down the road as a result of delays in the judicial system.


Representative Ramirez stated that he didn't think this would be a problem. Most "bad faith" cases are brought about on the advice of the claimant's lawyer. Again, Representative Ramirez stated that there is no advantage to the insurance company to delay litigation.

Representative Ramirez submitted another amendment at this time that would apply to every situation. The amendment would basically insert the word, "defendant" in lieu of "insured."

There being no further discussion of HB 95, the hearing closed. Chairman Hannah informed the committee that action on this bill will be delayed for a few days to see whether or not any other bills relating to this issue will surface.

Representative Addy submitted a letter written to him by Richard W. Anderson, attorney at law, stating his opposition of this bill. The letter is marked as Exhibit D.

ADJOURN: A motion having been made by Representative Keyser to adjourn, and that motion having been seconded, the meeting adjourned at 11:30 a.m.

  
\_\_\_\_\_  
REPRESENTATIVE TOM HANNAH, Chairman

DAILY ROLL CALL

HOUSE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date 1-16-85

NAME	PRESENT	ABSENT	EXCUSED
Tom Hannah (Chairman)	✓		
Dave Brown (Vice Chairman)	✓		
Kelly Addy	✓		
Toni Bergene	✓		
John Cobb	✓		
Paula Darko	✓		
Ralph Eudaily	✓		
Budd Gould	✓		
Edward Grady	✓		
Joe Hammond	✓		
Kerry Keyser	✓		
Kurt Krueger	✓		
John Mercer	✓		
Joan Miles	✓		
John Montayne	✓		
Jesse O'Hara	✓		
Bing Poff	✓		
Paul Rapp-Svrcek	✓		

# STANDING COMMITTEE REPORT

Exh. A  
H.B. 95  
1-16-85

19

MR. ....

We, your committee on RULES .....

having had under consideration HOUSE ..... Bill No. 95 .....

Introduced reading copy ( white )  
color

## LIMITING TIME WHEN BAD FAITH ACTION AGAINST INSURER CAN BE COMMENCED

Respectfully report as follows: That HOUSE ..... Bill No. 95 .....

Introduced bill, be amended as follows:

1. Page 1, line 8  
Strike: "ADJUDICATED"  
Insert: "SETTLED OR CONCLUDED"
2. Page 1, line 15  
Following: "until"  
Strike: ", in an action on"
3. Page 1, line 16  
Following: "claim"  
Strike: ", a court of law has established:"  
Insert: "has been settled or otherwise concluded. The underlying  
claim is the claim involving:"
4. Page 1, line 17  
Following: "insured's"  
Insert: "contractual"

DO PASS

5. Page 1, line 17  
Following: "insurer"  
Strike: ", in the case of an insured's action against its  
insurer for lack of good faith"
6. Page 1, line 21  
Following: insured"  
Strike: ", in the case of a third-party claimant's action  
against an insurer for lack of good faith"
7. Page 1, following line 22  
Insert: "Section 2. For purposes of the statute of limitations,  
the claim for bad faith shall not accrue until the date  
the underlying claim is settled or otherwise concluded.  
Renumber subsequent sections.



Bob James

EXHIBIT B  
HB 95  
1-16-85

HOUSE BILL 95

State Farm supports HB 95.

The bill provides that a person cannot bring a "bad faith" lawsuit against an insurance company until the underlying lawsuit is complete. At the present time, if A and B are involved in an automobile collision, A can sue B. This is referred to as the underlying lawsuit. Montana law also allows A to sue the insurance company of B at the same time. This is the "bad faith" lawsuit. If A sues B's insurance company, it is called a third-party action; if B sues his own insurance company, it is a first-party action.

Montana is the only state which allows an underlying action and a "bad faith" lawsuit to be brought concurrently and tried to a court or jury at the same time. In most cases, however, if these two claims are brought together in one lawsuit, a judge will bifurcate or split the lawsuits. This will result in two separate trials.

State Farm supports the bill for the following reasons:

1. The present law increases the cost of lawsuits. When a person is sued for causing someone's injuries in an accident, the defendant's insurance company will hire an attorney to represent him or her. If the insurance company is also sued in a "bad faith" action, the insurance company must hire another lawyer to represent the company individually. Two lawyers cost more than one lawyer;

In many instances if the underlying case is settled or the defendant wins, the "bad faith" lawsuit is dismissed or dropped. If that occurs, money has already been spent in hiring an attorney and paying the court costs;

2. If the "bad faith" lawsuit is split from the underlying action (which is usually the case), the court system then has two separate lawsuits to schedule. This only adds to the heavy case load that Montana courts presently operate under. Under HB 95, the "bad faith" lawsuit, in many instances, will probably not be filed because of the outcome of the underlying case;

3. The bill will discourage frivolous lawsuits. Some lawyers will sue a company hoping to pressure it into settling the underlying case. The "bad faith" case will then be dismissed;

For example, State Farm was sued in 1982 for \$11,074.47. The case involved a fender bender in a parking lot. There was a dispute regarding which person was at fault. The plaintiff sued for damages to his car in the amount of \$1,074.47. He also sued State Farm, the insurance agent and the insurance adjuster for \$10,000.00 for punitive damages for bad faith. The company hired two attorneys--one to represent its insured and the other to represent the company. The agent was dismissed out of the suit. If he had not been dismissed, State Farm would have had to hire a third attorney to represent him. The district court refused to split the underlying claim (damage to the car) from the bad faith claim (\$10,000.00). The Montana Supreme Court agreed. Trial was set three different times and continued each time by the judge.

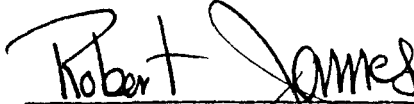
State Farm, based solely on economic considerations, settled the case for \$1,000.00 in October of 1984. State Farm's attorney fees and costs were almost \$10,000.00.

Perhaps most significant was the lawyer's comment that he sued State Farm for bad faith because his law firm wanted him to get experience in the "bad faith" area of the law;

4. The bill will prevent the "bad faith" and underlying action from being consolidated. The Honorable Frank B. Morrison, Jr. of the Montana Supreme Court believes the parties will be prejudiced if the two actions are consolidated. Justice Morrison, a former President of the Montana Trial Lawyers Association, stated, "I am concerned about the prejudice which can result from consolidating the two actions. Additionally, lay jurors will have a very difficult time separating evidence which relates to the case against the insurer from evidence which bears upon the issues in the principle action against the tortfeasor [defendant]. The likely confusion and potential prejudice lead me to oppose consolidation." Klaudt v. Flink, \_\_\_\_\_ Mont. \_\_\_\_\_, 40 St. Rptr. 64, 69 (1983).

This bill does not prevent persons from suing an insurance company if they believe the insurance company did not treat them fairly. The bill would discourage frivolous lawsuits, reduce the cost of defending lawsuits, and not burden the courts with additional cases.

RESPECTFULLY SUBMITTED

  
\_\_\_\_\_  
Robert James  
Lobbyist

# PROPOSED AMENDMENTS TO H.B. 95

EXHIBIT C  
I-16-85

Submitted by BLUE CROSS OF MONTANA

1. Page 1, line 5, after "COMPANY"  
insert "OR HEALTH SERVICE CORPORATION".
2. Page 1, line 12, after "insurer"  
insert "or health service corporation".
3. Page 1, line 14, after "insurer"  
insert "or health service corporation".
4. Page 1, line 17, after "insurer"  
insert "or health service corporation".
5. Page 1, line 18, after "insurer"  
insert "or health service corporation".
6. Page 1, line 22, after "insurer"  
insert "or health service corporation".

insert "or health service corporation."

ANDERSON, EDWARDS & MOLLOY

ATTORNEYS AT LAW

1601 LEWIS AVENUE, SUITE 206

BILLINGS, MONTANA 59103

P. O. BOX 1049  
406-248-7521

RICHARD W. ANDERSON, LTD.  
A. CLIFFORD EDWARDS, LTD.  
DONALD W. MOLLOY, LTD.

January 14, 1985

The Honorable Kelly Addy  
House of Representatives  
State of Montana  
Capitol Station  
Helena, Montana 59620

Re: House Bill No. 95

Dear Mr. Addy:

I would like to go on record in opposition to the captioned legislation. It is an obvious attempt to favor the insurance industry where Montana citizens have become victims of unfair treatment. The policy holder who pays his premiums would have no right at all to take any legal action against the company for unfair practices until another kind of lawsuit (the underlying claim) has been filed, tried and resolved. The Bill thus restricts the actual policy holder in his rights, and it interjects a mandatory two-step process (involving expensive and duplicated court efforts and unnecessary legal services).

No other industry doing business in the State is the beneficiary of such favored treatment. All of the rest of us, whether we are individuals, banks, farmers or carpenters, are subject to the usual rules of civil procedure which empower the trial judge to control his own calendar and to consolidate, separate and bifurcate all manners of claims in his own discretion. The Bill would increase costs to the taxpayer and add to the burdens of our already over-burdened District Courts.

I can think of no sound reason why such special interest legislation should be passed when everyone else in society would live by a different set of rules. Surely we have not reached the point where the insurance industry has rights in the courts which are not shared by everyone.

Thank you for taking the time to consider my remarks.

Very truly yours,

ANDERSON, EDWARDS & MOLLOY

  
Richard W. Anderson

RWA:NKT

## VISITOR'S REGISTER

HOUSE

JUDICIARY

COMMITTEE

HOUSE BILL #95

DATE 1-16-85

SPONSOR REP. JACK RAMIREZ

(PLEASE PRINT NAME CLEARLY)

NAME	RESIDENCE	REPRESENTING	SUP- PORT	OP- POSE
KARL ENGELAND	MISSOULA, MT.	MT. TRUCK LAWYERS		✓
F.H. GOLES	HELENA	MT CHAMBER OF COMMERCE	✓	
J. CADDY	"	MT BANKERS ASSN	✓	
Terry Janner	Great Falls	Blue cross of montana	✓	
Roger McILLEN	HELENA	Independent Ins. Agent OF MONTANA	✓	
Jim Schulke	HELENA	State Auditor	✓	
Glen Drake	Helena	America In Asia	✓	
Norm Huxley	Helena	Archbishop's As. Com	✓	
George Olsen	Helena	MT. Catholicism	✓	
Bob James	g. Falls	STATE FARM, WAII	✓	
Al Davis	Missoula	Prostitution		
ELMER HANSEN	HELENA	MONTAN ASSOC OF LIFE UNDERWRITERS	✓	
Jim Moore	Kalispell, MT	Conf. MTLA		✓
Zander Blewett	Great Falls MT	Myself	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.