MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

January 21, 1985

The tenth meeting of the Senate Judiciary Committee was called to order at 10:05 a.m. on January 21, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present, with the exception of Senator Daniels, who was excused.

CONSIDERATION OF SB 66: Senator Mike Halligan, sponsor of SB 66, stated he submitted this proposition last session, but because of the press of the transmittal deadline, the committee elected to table it. This bill requires plain language in consumer contracts. It is an outgrowth of the nationwide concern or push for comprehensible language in contracts. It is premised on the common law principle that contract provisions not having been understood by the parties when entered into are void. Senator Halligan noted the bill does not address business-to-business contracts, just consumer contracts. Page 3, section 4, excludes some areas from plain language requirements. Senator Halligan indicated the committee should look at this section and determine whether it should include state governmental agencies. Section 6 goes on to limit the remedies of a consumer. There is a built-in statute of limitations--when your contract has been performed, your time to sue is up. Page 5, section 7, states the remedies are cumulative. In order to allow businesses to comply with this act, the applicability date proposed is January 1, 1986.

PROPONENTS: Scott J. Burnham, associate professor at the University of Montana School of Law, testified in support of SB 66. Professor Burnham stated his testimony represented his own views and not the views of the School of Law. He stated it is important that a contract be understood during performance and not just at the beginning. Professor Burnham provided the committee with written testimony in support of his position (see Exhibit 1). He stated that when a business goes through the process of translating an agreement to make it plain language, it often improves the substance of the agreement. He believes that when contracts are translated into plain language, there is a change in substance which benefits the consumer as well as a change in style. Sometimes courts will look on agreements favorably when they have attempted to draft them in language consumers can understand. Professor Burnham expressed some concerns he has with the bill (see page 2 of Exhibit 1). Professor Burnham stated he thinks the act is a thoughtful

one that balances the needs of the consumer with the needs of the businesses. George Bousliman, representing the State Bar of Montana, appeared in support of SB 66. He stated they support this bill in terms of the concept and the content. The think it is a good faith effort to take some of the mystery out of contracts, which should make it easier for all parties to understand their rights and obligations. Mr. Bousliman echoed what was said about section 3(2); he feels the bill should stop after saying contracts should be written in plain language. Julie A. DalSoglio, representing the Montana Public Interest Research Group, appeared in support of SB 66 (see written testimony attached as Exhibit 2). Sam Ryan, of the Montana Low Income Coalition, stated the coalition is in favor of the plain language bill. He stated no one should be faced with any document that requires the services of a lawyer (see witness sheet attached as Exhibit 3). Molly Munro, Executive Secretary of the Montana Association of Homes for the Aging, stated they fully support this bill and urge the committee pass it (see witness sheet attached as Exhibit 4). Louise Kunz, representing the Montana Low Income Coalition, stated they support this bill (see witness sheet attached s Exhibit 5). Tom Ryan, of the Montana Senior Citizens Association, submitted written testimony in support of SB 66 (see Exhibit 6). Jim Hughes, representing Mountain Bell, stated they don't oppose the concept and intent of this bill, but offered the following amendment:

Page 3, line 16.
Following: 33-15-329;
Delete: "or"

Page 3, line 18.
Following: "instrumentality"
Insert: "; or

(e) the provision of public utility service under tariffs approved by the public service commission"

(See witness sheet and amendment attached as Exhibit 7.) Mike Rice, of Transystems, Inc., appeared in support of SB 66 (see exhibit 8). Mr. Rice stated he shares the same concerns as Mr. Hughes, although he has a more compelling concern, and that is the description of bad faith. He suggested an amendment that would limit the remedies or make those the full remedies under the law. Neil Haight, on behalf of the Montana Legal Services Association, testified in support of SB 66 (see Exhibit 9). Wade Wilkinson, on behalf of the Low Income Senior Citizens Advocates, stated they would like to offer another perspective on this. Through his education, he has learned to speak in not so plain language. They advocate trying to find straight forward ways to say things. Paul Carpino, of the Montana Low Income Coalition, testified in support of

this bill and stated what we are dealing with is the concept of control of information. If you control the information, you maintain power. He believes information is often given in a way that keeps people powerless. One way that affects low income people is it is given to them in a form that is too late, and when it is too late, it is no good for them. Another important way information or power is kept from people is when it is given to them in a form which they can't understand. Tanya Ask, from the Montana Insurance Department, spoke merely to clarify some of the points of the bill. She explained that easy to read language is already required for life and disability contracts in the state. Easy to read language in life and health insurance contracts is already part of the codes. (See witness sheet and proposed amendment attached as Exhibit 10.)

OPPONENTS: Jeffry M. Kirkland, Vice President of Governmental Relations for the Montana Credit Unions League, stated they support and have supported the concept of plain English consumer contracts, but have some concerns with this bill (see Exhibit 11). George Bennett, counsel for the Montana Bankers Association, testified in opposition to the bill (see witness sheet attached as Exhibit 12). They feel like the credit unions. They are in favor of the careful and simple use of English language, but this bill presents problems for all financial institutions and principal banks. There is no objective standard. Section 3 attempts in vague terms to define plain language. They wonder if there is a problem and would this bill really address those problems in relationship to banks. They oppose the bill as it may be applied to banks. Les Alke appeared in opposition to the bill on behalf of the Montana Bankers Association. In January 1985, he conferred with Mr. Wines of the Department of Commerce, who could recall no instances of consumer complaints about understanding consumer contracts. Some complained about terms they had not read before signing it, but they understood them after they read the contract fully. In no instances did he receive a complaint dealing with unintelligeble language in a contract. Banks and other financial institutions have many forms they use. If these forms are subject to change, it will be a horrible onus for these financial institutions to comply with. These costs could affect the retailers. Their intern surveyed other states and found a Catch 22 in Maine. Maine has a plain language law. He believes we are using a cannon to shoot a mosquito. (See witness sheet attached as Exhibit 13.) Terrence D. Carmody, on behalf of the Montana Association of Realtors, appeared in support of the concept of this bill. The evolution of forms his industry used have been developed over the years by law. They would like to have some means of getting these documents approved before they are used so they won't have to go through 25 years of litigation. (See witness sheet attached as Exhibit 14.) Riley Johnson, on behalf of the National Federation of Independent Business, reiterated concerns about punitive damages. He also believes there is a lack of definition of

terms. They want plain language, but feel the lack of definition of terms automatically forces them to go into court. He is more concerned with the legal language and perceived problem and doesn't believe we really have a need for this bill at this time. (See witness sheet attached as Exhibit 15.)

QUESTIONS FROM THE COMMITTEE: Senator Pinsoneault asked Mr. Alke if a compliance time in the bill would be helpful to them in getting the forms together. Mr. Alke responded that is not the concern of the financial institutions. Their concern is new court decisions that come out requiring new language. Senator Blaylock asked Mr. Carmody if the sample sentences contained language the courts are imposing on us. Mr. Carmody responded yes. He explained that when they lost a particular case, they contract with an attorney to redraft the wording in the contract accordingly. Senator Towe told Senator Halligan that on page 1, line 25, the word "primarily" bothered him. Senator Halligan stated the language defining federal contracts was taken from the Federal Trade Commission as well as our own consumer act. There is case law outlining that. Senator Towe asked how Senator Halligan interpreted Professor Burnham's suggestion to strike the plain language definition alltogether and just use the term "plain language." Senator Halligan stated in his 1983 bill, he used the New York law to which he is referring now; he would have no problem in adopting that language. The only reason he provided it this session is he was trying to address all of the problems from last session. In his 1983 bill, he had the option of going with the Flesch test or the New York law. The Flesch test is the objective standard. Senator Towe asked about the constant litigation of what these things mean. Senator Halligan does envision this as a problem, but New York has not experienced extensive litigation. He believes litigation may not help the first person that is hurt, but it will help along the line. Senator Towe asked how technical terms, such as arbitration, are to be defined in everyday words. Senator Halligan stated those terms are dealt with in the code. Senator Crippen asked Mr. Bennett if Mr. Carmody's suggestion that contracts be pre-approved by an agency of the state government (such as the Department of Commerce) would help his problem by giving him some input as to what is an objective standard. Mr. Bennett responded yes; that would be extremely helpful. The plain language bill in last session was SB 261. There was a recommendation at that time that some state agency set up procedures for reviewing consumer contracts. That was essentially the point he was trying to make. Senator Pinsoneault asked Professor Burnham if the law school could take a lead in this and come up with some forms to be receptive to the public's needs. Professor Burnham stated he would not like the state to have to bear that expense. Senator Pinsoneault asked if conceptually a person who can't hire an attorney could go to the Montana Bar or the Law School and present his particular problem to him and they could be responsive to his need, since the people who have the

problem don't have the money to hire an attorney. Professor Burnham responded he was not sure. He thinks they might be infringing on free enterprise. Senator Mazurek explained to Professor Burnham he had some concern over the growing litigation in the bad faith area. Professor Burnham stated he had not anticipated that. He didn't believe anyone had gone that far as to the definition of bad faith. He believes that could be built into the bill and stated tThere is no intention to have an action for bad faith brought under this bill. Senator Mazurek was concerned with the landlord-tenant area in particular. If an attorney for the landlord drafts a release which incorporates language from the model act which language may not be in plain English, that landlord-tenant agreement would violate this act. But to make sure your lease would not run afoul of that act, you would want to use it. Professor Burnham stated you would have to translate that statute into plain English to use it. Senator Crippen addressed a question to Professor Burnham to follow up on his statement to Senator Pinsoneault about the possibility of having a state agency as the arbitrator. He doesn't particularly like the idea of a state agency getting involved. He does believe they will probably settle out of court simply because of the cost, and then you really haven't accomplished anything at that time. He wondered if that would be more expensive in terms of cost. Professor Burnham said it is a question of balancing considerations. We have here light penalties. Even for a light penalty, they would pay rather than fight it. The experience of other states is they have not had an increase in litigation. Senator Crippen stated the definitions should be done in the statutes and should not be left up to the judicial system. Professor Burnham said we should have the subjective standard so we may promote business's using standard forms as every state may say the print size might be different. Senator Towe asked Professor Burnham if he would agree it appears the logical solution to this problem may well lie in the Law School's hands, as they should instill these type of objectives in their students. Professor Burnham stated he couldn't agree with him more about the burden's being on attorneys and law schools. He did emphasize there is an exclusion for a consumer represented by an attorney at the time of the action.

CLOSING STATEMENT: Senator Halligan stated he would like to address the issues brought up by the opponents. Was there a problem? If we did everything in the legislature because there had been a clamour from the people, we would have a problem. We try to anticipate the problems. As to the subjective nature of section 3--again, he has no problem with some sort of optional Flesch test. Senator Halligan passed out what he believes is an excellent consumer contract (see Exhibit 16). He believes the good faith defense will stop the frivolous lawsuits to perhaps a trickle. He had suggested the state agency in last session's bill, but the expense to the state would be tremendous. Because there are thousands of consumer contracts entered into on a daily basis, there is

no reason to perpetuate the plain language that should have been in a long time ago. As Mr. Bousliman indicated, this bill balances the needs of the consumers with the needs of the business people.

Hearing on SB 66 was closed. Chairman Mazurek turned the chair over to Senator Blaylock as he was one of the sponsors of the next two bills to be heard. Acting Chairman Blaylock then stated both SB 63 and SB 110 would be heard together, as their subject matter was similar.

CONSIDERATION OF SB 63 AND SB 110: Senator Halligan, sponsor of SB 63, stated the best way to describe this bill is to look at the title and read it. The purpose of the bill is to allow the option of arbitration to the parties. It is less costly and less time consuming. Also, the decision making process or dispute resolution of problems takes place in a more familiar place than litigation.

Senator Mazurek, sponsor of SB 110, stated the bill's purpose was to adopt the provisions of the Uniform Arbitration Act. Even though Montana has arbitration statutes on the books, there is existing case law and statutes in Montana which prohibit parties from agreeing in advance of a dispute to submitting it to arbitration. What this bill would do is allow parties in advance of any dispute arising agreeing to submit a dispute to arbitration and adopts the Uniform Arbitration Act which establishes the procedures under which an arbitration would occur and provides the means for enforcement of awards. The reasons for proposing the uniform act are it modernizes our current statutes and would bring Montana in line with the other states having the act. Montana and six other states do not have the uniform act in place. There is an effort to encourage states to get more involved in arbitration. It would take those matters of the parties outside the context of the court to allow them to be arbitrated. It is hoped that by allowing arbitration, we would have an impact on the current clogging of the courts. This bill would help get some of those matters out of those courts. It is a practice in this state already. This bill would allow either side of a dispute to enforce the arbitration proceedings. The bill is fairly broad. His principal concern is making the commercial setting where the parties are already arbitrating enforceable. He thinks arbitration is helpful in many settings; it is a less expensive, less cumbersome means of settling.

PROPONENTS: William Corbett, Professor of Law at the Univerisity of Montana Law School and an arbitrator, appeared in support of the bill. (See witness sheet and written testimony attached as Exhibit 17.) He stated his views are his own personal views and do not reflect those the University of Montana Law School or the University of Montana school system. Arbitration means that instead of taking up the courts time, we are asking a private third party to resolve the dispute. Both bills

attempt to resolve the future dispute. If there are some that shouldn't be going to arbitration, then exemptions should be written into the bill. The rule shouldn't be modeled after those few cases that shouldn't be handled by arbitrators. Charles Sande, of Billings, appeared in support of this bill. Judge Sande stated we have a great responsibility to make our legal system work. Today, we have a chance to examine something that might make our system a little bit better. To date, 44 states have adopted the Uniform Arbitration Act. He believes this is something that would be good for the state. We are not in a completely new field. Montana, North Dakota, Vermont, and three southern states are the only ones that haven't adopted the act. The objections that may be raised here have been raised in other states. These things have been considered. This is legislation whereby we would have another tool. It is completely voluntary. Cases take a long time to get to court. Once you get a decision from the district court, it may be appealed to the supreme court. By using arbitration, you avoid all of this pleading. Once you hear the arbitrators, you don't go to the supreme court, except in rare cases. You cannot appeal an award on the substance of the award. Arbitration also avoids publicity. This bill is not something that forces people to use arbitration. They would have to agree to do it. William Jensen, general counsel for Blue Cross of Montana, stated they are in favor of these bills. If the committee were to go to SB 63, they may want to amend 27-4-112. The Uniform Arbitration Act would allow them to negotiate with their groups, and they would be able to reduce the costs to their subscribers. (See witness sheet attached as Exhibit 18.) Scott J. Burnham, associate professor at the University of Montana Law School, appeared in support of this bill on his own behalf and not on behalf of the Law School. He stated we are only talking about arbitration where the parties have agreed to it, so the present law takes away a freedom of the parties, a freedom to contract. The courts are no longer jealous of jurisdiction. Professor Burnham anticipated objections to this bill about contracts that are not freely agreed to and whether that kind of arbitration clause should be enforced. He agreed with Judge Sande--we should not have exceptions. (See witness sheet and written testimony attached as Exhibit 19.) Karl Englund, of the Montana Trial Lawyers Association, stated that as lawyers, they were not afraid of this bill or that it will hurt their business, although they are concerned about contracts of adhesion. They have written alternative suggestions of amendment (see Exhibit 20). Terrence D. Carmody, on behalf of the Montana Association of Realtors, stated they support the bill (see witness sheet attached as Exhibit 21). Bill Olson, Secretary-Treasurer of the Montana Contractors Association, rose in support of the bills. He questioned how Section 6, page 4, works with regard to labor agreements. John Alke appeared on behalf of the Montana Physicians Service in support of the bills and stated he was available to answer any questions about the bill with regard to health insurance. (See also the witness sheet completed by Riley Johnson in

support of SB 110 attached as Exhibit 22.) (See witness sheet completed by Mike Rice, on behalf of Transystems, Inc., in support of SB 63 attached as Exhibit 23.) (See correspondence from Kenneth D. Bryson, of the Montana Arbitrators Association, in support of SB 110 attached as Exhibit 24.)

OPPONENTS: None.

CLOSING STATEMENT: None.

QUESTIONS FROM THE COMMITTEE: Senator Blaylock requested that Senator Mazurek respond to Mr. Olson's question. Senator Mazurek stated he didn't have an answer at this point, but believes the question needs to be looked into by the staff attorney, Mr. Petesch. Senator Towe addressed a question to Professor Burnham and Mr. Corbett. He then related an example of Nannabelle Nickleberry, an elderly lady agreeing in a home improvement contract to arbitrate a dispute in New York. Senator Mazurek responded that Senator Towe was raising a good example and we need to prepare an amendment to address that situation; it should be excepted out, as we need to get those situations out from the coverage of this act. Senator Towe asked even if we adopt the Montana Trial Lawyers Associations' amendments, will that do that. Senator Mazurek responded he would work with Senator Towe to address that situation.

Hearing on SB 63 and SB 110 was closed.

There being no further business to come before the committee, the meeting was adjourned at 12:20 p.m.

Chairman

(This sheet to be used by those testifying on a bill.)

NAME: Julie A. DaBoglio DATE: 1/21/85

ADDRESS: 532 N. Warren

PHONE: 443-5155

REPRESENTING WHOM? Montana Public Interest Research Group

APPEARING ON WHICH PROPOSAL: Senate bill #66

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 012185
BILL NO. SB 66

Montana Public Interest Research Group
729 Keith Avenue ● Missoula, MT. 59801 ● (406) 721-6040

TESTIMONY BEFORE THE COMMITTEE ON

JUDICIARY OF THE MONTANA SENATE

January 21, 1985

Good morning, Mr. Chairman and members of the committee. My name is Julie DalSoglio and I am a lobbyist for the Montana Public Interest Research Group (MontPIRG), a non-profit, non-partisan research and advocacy organization funded and directed by University of Montana students. I am here to speak in support of Senate Bill 66, a "Plain Language in Contracts Act."

Ideally, the purpose of a consumer contract is to provide a plain, concise statement of what two parties intend to do in a business relationship. Unfortunately, the way many contracts are written consumers can be confused as to their rights and responsibilities. MontPIRG students run a consumer hotline from their Missoula office. The service area for the hotline covers Western Montana and MontPIRG receives 10 to 15 calls a week which concern contract obligations such as landlord/tenant agreements and auto repairs. Many times these callers have to be referred to a lawyer for legal counseling. MontPIRG believes this dependence on the legal establishment for consumer contract interpretation inhibits consumer confidence in business transactions. Based on its consumer hotline experiences, MontPIRG believes that the use of more understandable or "plainer" language in contracts would be of significant assistance in decreasing contract problems faced by Montana consumers.

The plain language bill before the committee would require all parts of contracts to be understandable and it would apply to contracts concerning consumer transactions of those goods and services that are used primarily for personal, family, or household

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 01/21/85
BILL NO. SB 66

SB 66
Montana Public Interest Research Group
January 21, 1985

use. MontPIRG believes that requiring plain language in contracts would benefit the citizens of Montana by increasing consumer confidence in the buying process.

Thank you Mr. Chairman and members of the committee for your time.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 012185
BILL NO. SB 66

(This sheet to be used by those testifying on a bill.)

NAME: Sam Byan DATE: 1-21-85

ADDRESS: 700 W. Main St

PHONE: 442-3638

REPRESENTING WHOM? Mont Low income Coalition

APPEARING ON WHICH PROPOSAL: 66

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENT: I support the Plain Language Bill - No one should be face with a document that requires services of a legal expert

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 01285
BILL NO. SB 66

(This sheet to be used by those testifying on a bill.)

NAME: Molly Munro DATE: 1-21-85

ADDRESS: P.O. Box 5774, Helena

PHONE: 443-1185

REPRESENTING WHOM? Exec Secy Mont. Assoc. of Homes for the Aging

APPEARING ON WHICH PROPOSAL: SB 66

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENT: No written Statement.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 4
DATE 01/21/85
BILL NO. SB 66

(This sheet to be used by those testifying on a bill.)

NAME: Louise Kunz DATE: 1/21/85

ADDRESS: 107 Lawrence

PHONE: 449-8801

REPRESENTING WHOM? MT Low Income Coalition

APPEARING ON WHICH PROPOSAL: SB 66

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENT: Many persons have difficulty with the present language in utilities. This can result in hardship on these people and can be especially difficult for low income people who may find an already inadequate budget committed to heat.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 5
DATE 01-21-85
BILL NO. SB 66

TO: Senator Hazurek - Chairman, Senate Judiciary Committee

FROM: Tom Ryan, Montana Senior Citizens Association

RE: SB66 sponsored by Senator Mike Halligan

DATE: January 21, 1985

The Montana Senior Citizens Association supports the "plain language" efforts by Senator Halligan.

We are particularly concerned about the contracts, documents, and instruments when we have to make crucial and sometimes hurried decisions. Our concerns include:

1) Hospital and health-care contracts
2) House, automobile and major purchases
3) Land transfers -- landlord-tenant agreements
4) Emminent Domain provisions
5) Financial contracts with banks, savings & loan associations and credit unions
6) Contracts dealing with home improvements
7) Senior citizens attempting to cope with escalating energy costs have purchased solar heating systems that do not work. And in some cases, seniors have suffered financial losses in addition to to damages to these homes.

Following the Senate Taxation hearings we feel we are not unduly concerned. Lawyers, accountants and so-called authorities could not agree on the meaning of the instructions to tax or exempt both Social Security and Railroad Retirement benefits.

MSCA appreciates the efforts of Senator Halligan and urges the Committee to recommend a Do Pass decision.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 6
DATE 012185
BILL NO. SB 66

(This sheet to be used by those testifying on a bill.)

NAME: Jim Hughes DATE: JAN. 21, 85

ADDRESS: 560 N. PARK HELENA, MT.

PHONE: 449-3385

REPRESENTING WHOM? MOUNTAIN BELL

APPEARING ON WHICH PROPOSAL:

DO YOU: SUPPORT? _____ AMEND? ✓ OPPOSE? _____

COMMENT:

PAGE 3 SECTION 4 SUBSECTION (d)

FOLLOWING "INSTRUMENTALITY." ADD ; OR

(e) THE PROVISION OF PUBLIC UTILITY SERVICE UNDER TARIFFS APPROVED BY THE PUBLIC SERVICE COMMISSION.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 7
DATE 012185
BILL NO. SB 66

(e) the provision of public utility service under tariffs approved by the Public Service Commission,

from the borders of the paper.

(1) It is written and organized in a clear and coherent manner.

Section 4. Scope. (1) Except as provided in subsection (2), [section 3] applies to any agreement signed in connection with a consumer contract entered into in this state between a consumer who is a resident of this state at the time of the transaction and a seller, lessor, or lender.

(2) [Section 3] does not apply to:

(a) consumer contracts in which the value of the money, property, or services bought, leased, or borrowed exceeds $50,000 at the time of the contract;

(b) consumer contracts in which securities or commodities accounts are bought, leased, or borrowed;

(c) consumer transactions subject to the provisions of 33-15-321 through 33-15-329; ~~and~~

(d) a seller, lessor, or lender, if it is a government agency or instrumentality.; or

(3) The use of specific language expressly required or authorized by a court decision, state or federal statute or administrative rule, or governmental agency is not a violation of [this act]; nor is a legal description of real property a violation of [this act].

Section 5. Consumer's remedy. (1) Except as otherwise provided in [section 6], if an agreement does not comply

with the requirements of [section 3], the seller, lessor, or lender is liable to a consumer who signed the agreement in an amount equal to:

(a) $50 plus any actual damages; and

(b) costs of the action, together with reasonable attorney fees as determined by the court.

(2) A consumer may bring an action under this section in any court of competent jurisdiction.

Section 6. Limitations on remedies. (1) A consumer may not bring an action under [section 5] after the date on which his obligations in connection with the agreement are scheduled to be finally performed.

(2) No seller, lessor, or lender is liable under [section 5] if a good faith attempt is made to comply with requirements of [section 3].

(3) Noncompliance with the requirements of [section 3] does not make a consumer transaction void or voidable if it is otherwise legal, nor may a consumer raise noncompliance as a defense to an obligation to perform in connection with the transaction.

(4) In a class action brought under [section 5], the seller, lessor, or lender is liable under [section 5] for not more than $10,000 plus actual damages.

(5) In any individual transaction, if there is more than one consumer who is party to a single-consumer

(This sheet to be used by those testifying on a bill.)

NAME: Mike Rice DATE: 1/21/85

ADDRESS: Box 399, Black Eagle, MT

PHONE: 727-7500

REPRESENTING WHOM? Transystems, Inc

APPEARING ON WHICH PROPOSAL: 66

DO YOU: SUPPORT? _____ AMEND? X OPPOSE? _____

COMMENT:

J. Michael Rice
President

TRANSYSTEMS INC.

1627 Third Street NW
Great Falls/MT
(406) 727-7500

Mailing address:
P.O. Box 399
Black Eagle/MT 59414

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 5
DATE 012185
BILL NO. SB 66

AMENDMENT OF SENATE BILL 66

A bill for an act ent... "An act requiring consumer contracts to be written in plan lan... providing for coverage, exemptions, and remedies; and providing ... applicability date."

Section 7(1). The remedies provided for by [this act] shall constitute the sole remedy for claims arising under [this act].

Section 8. Applicability. This act applies to consumer contracts entered into after July 1, 1986.

Mike Reel
Transcriptions, Inc

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 8
DATE 012185
BILL NO. SB 66

(This sheet to be used by those testifying on a bill.)

NAME: Neil Haight DATE: 1-21-85

ADDRESS: 301 No. Last Chance Gulch

PHONE: 442-9830

REPRESENTING WHOM? clients of MT. Legal Services Ass-

APPEARING ON WHICH PROPOSAL: SB 66

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9
DATE 012185
BILL NO. SB 66

MONTANA LEGAL SERVICES ASSOCIATION
801 N. LAST CHANCE GULCH
HELENA, MONTANA 59601
(406) 442-9830

NEIL HAIGHT
DIRECTOR

RUSSELL LaVIGNE, JR.
MANAGING ATTORNEY

January 21, 1985

COMMENTS IN SUPPORT OF SENATE BILL #66

Clients of Montana Legal Services would benefit from the enactment of Senate Bill #66. These people have little specific knowlege of the contents of many consumer contracts. They have a rather vague concept that the contract requires them to make certain payments and if these are not made they will suffer a penalty of some sort, most commonly loss of property. Many contracts presently are written in such a manner that only a person who regularly works with such contracts can understand them and then only after careful study. The average consumer is left in a fog.

The average consumer will have no knowlege of the normal contractural provison allowing a creditor to accelerate the contract and take possesion of the property. Acceleration means all of the remaining payments become due at once and

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9
DATE 01/21/85
BILL NO. SB 66

if the consumer can not raise that amount, the property is lost. Acceleration is not always excercised but many consumers do not realize the creditor has that option, that "catching up on the payments" may not be sufficient.

The average consumer is not aware of the "insecurity repossesion clause" which allows a creditor to accelerate and reposses property if he feels insecure in his security interest.

One of our current problems deals with a lease of an automobile where it is unclear who has the obligation to do major repair work. A plain language contract would have helped.

Few consumers will be aware of acts of insolvency which might trigger acceleration and repossesion.

Often a consumer is not aware of location restrictions on property.

The purpose a contract is to have a written record of the understanding of the parties. If one party does not understand that purpose is thwarted. While a plain language contract will not always be read and understood, at least the opportunity is there, whereas now it is a virtual

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 7
DATE 01-21-85
BILL NO. SB 46

impossibility in many instances.

These comments are given in relation to our experiences with Legal Services clients. I think they apply with equal effect to more affluent consumers.

Respectfully submitted,

Neil Haight

NH/kjh

SENATE JUDICIARY COMM.
EXHIBIT NO. 9
DATE 6/24/83
BILL NO. SB 66

(This sheet to be used by those testifying on a bill.)

NAME: Tanya Ask DATE: 1/21/85

ADDRESS: Montana Ins Department - Mitchell Building

PHONE: 444-2996

REPRESENTING WHOM? Montana Insurance Dept.

APPEARING ON WHICH PROPOSAL: SB66

DO YOU: SUPPORT? _____ AMEND? ✓ OPPOSE? _____

Add to Section 4 Subsection (2)

COMMENT: Section (e) Contracts approved under the authority of 33-1-501

This amendment is suggested for Clarification purposes.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 10
DATE 01.21.85
BILL NO. SB 66

(This sheet to be used by those testifying on a bill.)

NAME: Jeffry M. Kirkland DATE: 1-21-85

ADDRESS: 2842 Festival Road Helena

PHONE: 227-5901

REPRESENTING WHOM? Montana Credit Unions League

APPEARING ON WHICH PROPOSAL: SB 66

DO YOU: SUPPORT? * with reservations as delineated in testimony AMEND? _____ OPPOSE? ✓ * without substantial amendment

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 11
DATE 01/21/85
BILL NO. SB 66

Senate Bill 66

Testimony of Jeffry M. Kirkland

Vice President-Governmental Relations

Montana Credit Unions League

Before the Senate Judiciary Committee

on Monday, 21 January 1985

Mr. Chairman and members of the Committee, for the record I am Jeff Kirkland, Vice President-Governmental and Community Relations for the Montana Credit Unions League. The league is a trade association representing 111 of the 114 credit unions in Montana and their over 200,000 members.

We support the concept of clear and coherent (or "plain English") consumer contracts. And we don't fear to have the terms and conditions of our contracts written in a manner that our members--and possibly their eighth grade sons and daughters--can understand without the help of an attorney. In fact, an increasing number of credit unions are beginning to utilize such contracts and forms.

A case in point is our most recently-developed consumer contract, a Home Equity Loan Agreement--which is also our most complex contract from a purely legal standpoint. This Agreement is drafted in what we believe to be as close to "plain English" as such a contract can be. And it was drafted well in advance of both this legislative session and the introduction of Senate Bill 66. That is, it was developed in "plain English" voluntarily and not because of any requirement to do so.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 11
DATE 012185
BILL NO. SB 66

In looking at the guidelines for "plain English" contracts as listed in Section 3(2) of Senate Bill 66 (page 2, lines 10-25 and page 3, lines 1-3), we feel confident that our contract meets each one. However, while we are demonstrably supportive of clear and coherent language in consumer contracts and of the intent of Senate Bill 66, we have several concerns with this bill as it stands.

First, we are unaware of any problems--either in terms of lawsuits on the increase or of complaints to consumer-advocate agencies--with current consumer contracts in Montana that would warrant this type of legislation. However, if there is evidence of this type, I have little doubt that credit unions would willingly bear the expense of rewriting or revising any non-complying consumer contracts.

Second, in terms of the bill itself, we are most concerned about the lack of specificity in the requirements set out in Section 3. For instance, on page 2, line 13, what is a "short" sentence and a "short" paragraph? Fifteen words? Four sentences? On line 14, what is an "everyday" word? On line 19, what type size is a "readable" size?

With those definitions left up to subjective determination, we can foresee a sharp increase in what we would consider frivolous lawsuits.

Which brings me to our third concern about this bill--the nature and scope of the consumer's remedies as laid out in Section 5 (page 3, lines 24-25 and page 4, lines 1-6). We can foresee many credit unions--and possibly other financial institutions--settling with the consumer out of court for the $50--even though they honestly felt that the contract complied with the law--rather than having to retain and pay an attorney to fight the case, possibly having to incur the expense of traveling to another town or city for a hearing, and in the case of many of our credit

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 11
DATE 01 21 85
BILL NO. SB 66

unions, having to shut down the office while the sole employee goes to court.

To our way of thinking, the penalty section--along with the subjectivity of the requirements in Section 3--create the potential for a sharp increase in frivolous lawsuits. And lenders would end up incurring the expenses of settling with consumers whether or not the consumer contracts actually complied with the law. That hardly seems equitable. Why create additional liability for lenders who are essentially in compliance now?

Even though Section 6(2) on page 4, lines 13-15 states that a lender who makes a good faith attempt to comply with the requirements will not be liable, lenders would still have to respond to possibly frivolous lawsuits to determine good faith compliance.

In summary, we support the concept of clear and coherent language in consumer contracts both in our words and in our actions. If Senate Bill 66 has been introduced to remedy a specific and recurring problem with consumer contracts, we will support it--but only after the concerns we have brought to your attention today have been remedied to strike a balance between the rights of both consumers and creditors.

(This sheet to be used by those testifying on a bill.)

NAME: GEORGE T. BENNETT DATE: 1/21/85

ADDRESS: P.O. Box 1705 Helena 59624

PHONE: 442-8950

REPRESENTING WHOM? Montana Barber's Assn

APPEARING ON WHICH PROPOSAL: S.B. 66

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 12
DATE 1/21/85
BILL NO. SB 66

(This sheet to be used by those testifying on a bill.)

NAME: Les Alke DATE: 1/21/85

ADDRESS: 1 Last Chance Gulch

PHONE: 442-4122

REPRESENTING WHOM? Montana Outdoor Recreation

APPEARING ON WHICH PROPOSAL: S.B. 66

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 13
DATE 012185
BILL NO. SB 66

(This sheet to be used by those testifying on a bill.)

NAME: Terrance D. Carmody DATE: 1/21/85

ADDRESS: 910 Helena Ave Helena, MT

PHONE: 443-4032

REPRESENTING WHOM? Mont Assoc. of REALTOR

APPEARING ON WHICH PROPOSAL: SB-66

DO YOU: SUPPORT? _____ AMEND? X OPPOSE? _____

COMMENT:

To include prior approval of forms & contracts by some authority.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 14
DATE 01/21/85
BILL NO. SB 66

(This sheet to be used by those testifying on a bill.)

NAME: Riley Johnson DATE: 1-21-85

ADDRESS: 491 So. Park Ave

PHONE: 442-6424

REPRESENTING WHOM? Nat. Fed. of Independent Business

APPEARING ON WHICH PROPOSAL: SB66

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENT: ① oppose possible punitive damages ② oppose letting courts decide on definition of terms ③ What happens for recovery on materials and services ④ don't feel the need.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 15
DATE 01.21.85
BILL NO. SB 66

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 16
DATE 012185
BILL NO. SB 66

RETAIL INSTALLMENT CONTRACT (MONTANA)

Buyer(s)-Name, Address (include County & Zip Code)	**Seller**-Creditor Name, Address

THIS AGREEMENT covers my installment purchase from you of the property described below. In this agreement, the words "I", "ME", and "MY" refer to the buyer. The words "YOU" and "YOUR" refer to the Seller, Assignee and any other person to whom this agreement may be assigned.

Promise to Pay. I promise to pay you, the Seller, a Total Sale Price of $_____. I have made a downpayment of $_____. I will repay the balance in _____ monthly installments of $_____ beginning on _____, 19____ plus any irregular payments (if any) as follows: _____.
This payment schedule is based on an Annual Percentage Rate of _____% which includes the cost of any insurance and other charges on which you and I have agreed. Finance Charge begins to accrue _____, 19____.

I understand that you intend to assign this contract to First Bank _____
Address _____
and that I will make my payments directly to the bank which will have the same rights you have under this agreement. I understand that anyone else who signs this agreement (except someone offering only a security interest in the property) will be individually and jointly responsible, to the same extent as I am.

The Property. The property I am buying is described as follows:

N or U	Year and Make	Body Type & Model	Description (including capacity if truck)	Property Used For	Number		Cash Sale Price
					Serial	Key	

Accessories & Miles: A. Trans. ( ) P. Steering ( ) F.M. Radio ( ) A. Cond. ( ) Other _____ Miles _____

FEDERAL TRUTH-IN-LENDING ACT DISCLOSURES

ANNUAL PERCENTAGE RATE The cost of my credit at a yearly rate.	**FINANCE CHARGE** The dollar amount the credit will cost me.	Amount Financed The amount of credit provided to me or on my behalf.	Total of Payments The amount I will have paid after I have made all payments as scheduled.	Total Sale Price The total cost of my purchase on credit, including my downpayment of $_____.
%	$	$	$	$

Payment Schedule: No. _____ Amt. $_____ Due: ☐ Monthly ☐ (Other) _____
Beginning _____, 19____. Irregular payments (if any) as follows: _____
_____ **Filing Fees:** $_____ **Non-Filing Insurance** $_____
Security: I am giving you a security interest in: ☐ the property being purchased. ☐ Other (describe) _____
_____. Collateral securing any other debts I owe you may also be security for this sale.
Late Charge: If a payment is late by more than 10 days I will be charged $5 or 5% of the unpaid installment, whichever is less.
Prepayment: I will not have to pay a penalty if I pay off early. If I do I may be entitled to a refund of part of the finance charge.
Assumption Policy (Applicable only to Mobile Home Transactions when used as Principal Residence): Someone buying my mobile home ☐ may, subject to conditions, be allowed to ☐ cannot assume the remainder of my obligation on the original terms.
See the contract provisions for any additional information about nonpayment, default, any required repayment in full before the scheduled date, any prepayment penalties and refunds.
e means an estimate

Itemization of the Amount Financed of $_____.	Amount paid to others on my behalf:
$_____ Amount given to me directly.	$_____ to public officials/agencies $_____ to credit reporting agency
$_____ Amount paid on my account.	$_____ to appraiser $_____ to insurance company
	$(_____) prepaid finance charge $_____ to _____

MONTANA RETAIL INSTALLMENT SALES ACT DISCLOSURES

I UNDERSTAND THAT THIS IS AN APPLICATION FOR INSURANCE COVERAGE AND NOT A COMMITMENT TO PROVIDE IT.

I may obtain property insurance from anyone I want that is acceptable to you. If offered, I may get the following coverage from you at a cost of $_____ for a _____ (year) (month) term.

( ) Comprehensive
Deductible $_____
( ) Collision
Deductible $_____
( ) Fire, Theft & Combined
Additional Coverage
( ) Other _____

} $_____

I ALSO UNDERSTAND THAT YOU DO NOT PROVIDE LIABILITY INSURANCE COVERAGE FOR BODILY INJURY OR PROPERTY DAMAGE TO OTHERS UNLESS INDICATED ABOVE.

Agent _____
Phone

1. My Cash Sale Price	$_____	(1)
2. My Cash Downpayment	$_____	
Trade-In (Net) - Description:	$_____	
Make _____ Model _____ Yr. _____		
My Total Downpayment	$_____	(2)
3. My Unpaid Balance (1-2)	$_____	(3)
4. Other Charges I Am Financing:		
A. Taxes (not included in #1)	$_____	
B. Official Fees	$_____	
C. Total of Charges for Insurance and Other Benefits	$_____	
D. Other (Specify) _____	$_____	
Total (A+B+C+D)	$_____	
Less Cash Paid, If Any	$_____	
Total Other Charges I Am Financing	$_____	(4)
5. My Principal Balance (3+4)	$_____	(5)
6. Finance Charge	$_____	(6)
7. Total Amount of Time Balance (5+6)	$_____	(7)
8. With Monthly Premium Insurance:		
A. Total of Payments	$_____	
B. Deferred Payment Price	$_____	
C. Total Monthly Payment	$_____	

Credit life and credit disability insurance are not required to obtain credit, and will not be provided unless I sign and agree to pay the additional cost. I am under 66 years of age and may apply for this insurance at the premium shown below. However, if a loan is either secured by real estate or for a term in excess of 120 months the insurance may be Monthly Premium Insurance and the premium is not included in the amount disclosed as being financed. I want:

☐ Single Credit Life $_____ Date _____ Signature _____ Birthdate

☐ Joint Credit Life $_____ Date _____ Signature _____ Birthdate

☐ Credit Disability $_____ Date _____ First Signer Only _____ Birthdate

ACCEPTANCE OF ASSIGNMENT

By signing below, both Seller & Bank, consent to this transfer according to the terms on the reverse side:

Seller consents to this transfer.

_____ By _____
Date Name Title

The Bank consents to this transfer.

_____ By _____
Date Name Title

NOTICE TO BUYER:

1. **Do not sign this contract before you read it or if it contains any blank spaces.**
2. **You are entitled to an exact copy of the contract you sign.**
3. **Under the law, you have the right to pay off in advance the full amount due and obtain a partial refund of the finance charge.**

No Personal Liability. The person whose signature appears below has signed this contract only for the purpose of granting the Secured Party a security interest in the Property, and has no personal liability for payment of this debt.

Signature _____
Date

I HAVE READ THIS AGREEMENT, UNDERSTAND IT, AND AGREE TO ALL OF ITS TERMS. I ALSO ACKNOWLEDGE RECEIPT OF A COMPLETELY FILLED-IN AND EXECUTED COPY OF THIS CONTRACT THIS _____ DAY OF _____, 19_____.

First Signer's Signature _____ Address _____

Second Signer's Signature _____ Address _____

Seller's Signature _____ Title _____ Date _____

NOTICE: SEE OTHER SIDE FOR IMPORTANT INFORMATION

DEALER COPY

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

DEFAULT

Definition. You can require me to repay my entire debt at once, without prior notice or demand if any one of the following conditions or events occur: (a) I do not pay an installment on time; (b) I break any of my promises under this or any other agreement with you; (c) I have made any false or misleading statements on my application; (d) I fail to pay on time any taxes due on the property; (e) I become unemployed or insolvent; (f) I do not keep the property insured to your satisfaction; (g) I misuse the property in any way including in a manner which might result in confiscation by a third party; (h) I die; (i) I sell or assign the collateral without obtaining your prior written agreement; (j) or if anything else happens that you feel may endanger my ability to repay or jeopardize your security interest in the collateral such as the removal of the collateral from this state for a period of 90 days or more with the intention of relocating permanently outside this state.

Rights and Remedies. If I default in any of the ways described above, I understand that you may take one or both of two actions.

Acceleration. You can require me to repay the entire amount of this debt including any accrued interest. Any rebate to which I may be entitled will be made in the manner set out below.

Repossession. You can repossess the collateral if my entire balance becomes due. If you decide to do this, I will return it to you at any time or place convenient to both of us which you choose. If I do not, I understand that you may enter the premises where it is kept and take it yourself. After you have possession of the collateral, you may sell it and apply the proceeds first against the costs related to repossession, storage, preparation for sale, sale and legal expenses, including an attorney's fee, not to exceed 15%, if the attorney is not a salaried employee of any holder of this agreement. The balance will then be applied against the agreement. If the sale doesn't cover all that I owe, I realize that I am still responsible for the difference. I also realize that I may recover the collateral from you before sale by paying any amounts due under this agreement plus any charges to which you are entitled.

Performance and Default. If you accept my payment after it is due, I will not be in default as to that payment. This acceptance of my payment does not affect any of my other obligations nor your rights. You can delay or even waive the enforcement of any of your rights without losing them.

SECURITY INTEREST. To protect you if I don't pay this debt according to the terms of this agreement, I give you a security interest under the UCC in the collateral and any equipment added to it. This security interest covers the "Total Amount of Time Balance" (Item 7) as well as any property insurance proceeds which I may receive. I also give you permission to file a financing statement covering your security interest without my signature on it. For this credit transaction only, you waive any security interest in my principal dwelling you may have under any previous security agreement with me.

LATE CHARGES. If a payment is late by more than 10 days, I will be charged $5 or 5% of the unpaid balance, whichever is less.

PREPAYMENT. I understand that I may prepay this debt in full or in part at any time without penalty. In that event, you will rebate any unearned finance charge computed under the actuarial method. You will also refund any unearned insurance premium to me figured by the Rule of 78's, a legally acceptable method used to figure rebates. No rebate of less than $1.00 will be made.

TRADE-INS. I promise you that any property or vehicle which I give you as a trade-in is free of any lien or other claim.

INSURANCE AND THE RISK OF LOSS. I agree to insure the property fully against any loss for which you require coverage, such as fire, theft, collision and other such hazards. I will send you a copy of the policy whenever you request it. In addition, if for any reason I don't keep the property fully insured, I authorize you to place insurance on your own to protect your interest in the property. If the cost of financing this insurance has not been included in the amount I am financing, I agree to pay you the premium on request. I understand that you have no liability to obtain such coverage.

As far as the insurance coverage is concerned, I authorize you to: (a) Receive on my behalf any amounts payable under the policy as well as any unearned premiums which are returned; (b) Sign or endorse on my behalf such insurance documents as proofs of claim, drafts, or releases when settlements are negotiated; (c) Cancel any policy; and (d) Do anything you think is appropriate to reach a settlement.

If the property is lost, stolen, damaged or destroyed, I will still have to pay you all amounts I owe under this agreement. As far as the property is concerned, I will also: (a) Care for it at my own expense; (b) Keep it free from any liens or other claims; (c) Not use it illegally, improperly, or for hire; and (d) Reimburse you for any amounts you have spent on my behalf to pay off any taxes, liens, or other claims on the property.

If any policy is cancelled and you receive a refund, you may use it in payment of similar insurance to protect your interest and, if there is a balance left over, you may use it to pay installment payments that I owe you under this agreement.

Any amounts I owe you under this section, such as an insurance premium, I may repay by: (a) Paying you in cash; (b) Adding it to the amount I already owe you under this agreement along with a finance charge based on the Annual Percentage Rate stated on the reverse side; or (c) Signing a separate note to you for the amount due plus a finance charge based on the Annual Percentage Rate stated on the reverse side.

LAW THAT APPLIES. Montana law will govern this agreement. I understand that if you made any warranties or statements about the property I am buying they will be considered part of this agreement.

ASSIGNMENT AND BUYER'S DEFENSES. I will not sell or assign either this agreement or the property without your prior written approval. However, you have the right to sell or assign this agreement without my written consent.

TERMS OF SELLER'S ASSIGNMENT

FOR VALUE RECEIVED, Seller sells, assigns and transfers to the Assignee, its successors and assigns, all of the right, title and interest of Seller in and to this contract and the property sold, with power to take legal proceedings in the name of Seller or in its own name in order to enforce those rights.

As a condition of this assigment, Seller warrants that: (1) The contract is valid, enforceable and genuine; (2) Seller has made all disclosures to Buyer as required by law with respect to the contract and the sale of the property; (3) Seller had title to the property free and clear of encumbrances at the time of the execution of the contract and at the time of delivery of the property to the Buyer; (4) Buyer is eighteen years of age or more; (5) Seller has followed all procedures required by law to assure that Assignee has a valid security interest in the property; and (6) Seller has no reason to believe that Buyer has violated any laws including those concerning liquor or narcotics, which may result in confiscation of the property.

Seller makes the above warranties for the purpose of inducing the Assignee to purchase the contract and if any of the warranties shall be untrue or claimed by Buyer to be untrue, Seller will repurchase the contract for the amount then owing thereon plus any and all related costs and expenses paid or incurred by the Assignee. If Buyer exercises any right of rescission accorded Buyer by law, or if Buyer asserts any claim against Seller as a defense, counterclaim, set-off or otherwise to Assignee's right to receive payment of any or all installments due under the contract, then, in any such event, Seller hereby agrees unconditionally to repurchase the contract from the Assignee, upon demand, for the full amount then unpaid, whether or not the contract shall then be, or not be, in default. This Assignment is subject to such additional terms and agreements as may from time to time be entered into between the Seller and Assignee.

DEALER'S GUARANTY. Seller does hereby unconditionally guarantee payment of the full amount remaining unpaid under the contract and agrees to purchase the contract from the Bank, upon demand for the full amount then unpaid, whenever the contract shall be in default. Seller hereby waives all notice to which Seller, as guarantor, may otherwise now or hereafter be entitled to receive and waives any requirement that the Bank first pursue any other remedies it might have and agrees that Bank may, without affecting Seller's liability hereunder, grant extensions of time and other accommodations to Buyer and other obligors, if any.

Dealer _____

By _____
Title

(This sheet to be used by those testifying on a bill.)

NAME: Bill Corbett DATE: Jan 21, 1985

ADDRESS: Law School - University of Montana

PHONE: 243-4741

REPRESENTING WHOM? Myself

APPEARING ON WHICH PROPOSAL: SB 63, SB 110

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 17
DATE 012185
BILL NO. SB 63, SB 110

BEFORE THE MONTANA SENATE JUDICIARY COMMITTEE

Statement by William L. Corbett
Professor of Law, Arbitrator
University of Montana Law School
Missoula, Montana

IN SUPPORT OF SENATE BILLS #63 and #110.

I. What is Arbitration?

A consensual method of submitting a dispute to a private third party for resolution.

II. What Gives Rise to an Arbitration Case?

A. The existing dispute - two or more persons have a current dispute involving issues of law and/or fact and agree to submit it to arbitration.

B. The future dispute - two or more persons foresee they may have disputes in the future and agree to submit disputes that may arise involving issues of law and/or fact to arbitration.

III. The Problem with the Current Montana Law.

The Montana Supreme Court has held that Mont. Code Ann. § 27-5-101 precludes the enforcement of an agreement to submit to arbitration a future dispute involving legal issues. Moreover, if the parties submit such dispute to arbitration and the arbitrator issues an award, the award is unenforceable. See the attached article: Corbett, William L., "Arbitration in Montana and the Need for New Legislation," The Montana Lawyer, Vol. 6, No. 6, Feb. 1984.

As a consequence, the intent of the parties to submit to arbitration future disputes involving legal issues and an arbitration award of such disputes is not given effect.

IV. Why Does the Existing Law Make Unenforceable Agreements to Submit to Arbitration Future Disputes Involving Legal Issues?

At common law arbitration was viewed with much disfavor. The courts believed they should not be ousted of their traditional role in dispute settlement. Part of the reason for this disfavor was that a judge received a fee for each case. If private parties were allowed to resolve disputes involving legal issues, the income of the judges would fall.

The current Montana law was enacted in 1893 and has long been interpreted as adopting this common law notion.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 17
DATE 2/12/85
BILL NO. SB 63 + 110

V. Why Do Parties Choose Arbitrators, Rather than Judges, to Resolve Their Disputes?

A. To save time - for example, building and construction cases.

B. To save money - for example, the winding up of a partnership.

C. The need for a specialized or expert decisionmaker - for example, building and construction disputes, labor management disputes and family disputes.

VI. Why is Arbitration Good for the Society?

A. Crowded court dockets often mean cases that should be heard by courts are unreasonably delayed. Arbitration helps lessen the number of disputes that come before the courts, reducing court dockets, and speeding up the resolution of important cases.

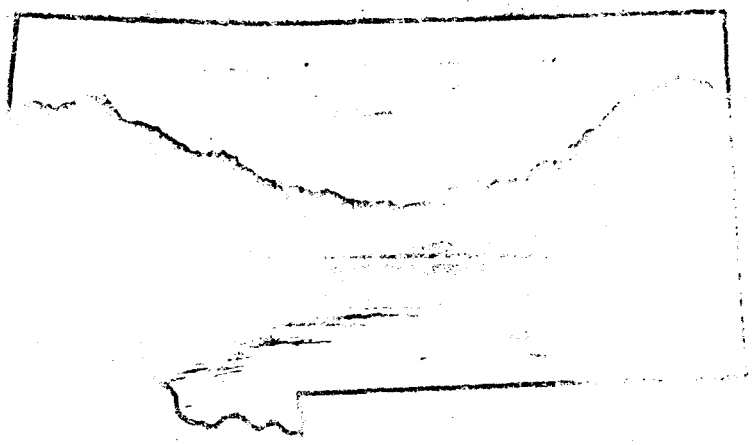
B. The crush of cases before the courts causes the costs of the judicial system to increase - a cost the taxpayer must bear. The cost of arbitrating disputes is paid by the parties to the dispute, not the taxpayers. Arbitration helps reduce the cost of the court system by reducing the number of cases.

VII. How the Legislature Should Handle the Exceptional Future Dispute Involving Legal Issues Believed Not Appropriate for Arbitration.

If there are future disputes involving legal issues the Legislature does not believe should be decided by arbitration, these disputes should be exempted. The mere fact there may exist a small percentage of disputes which are believed inappropriate for resolution by arbitration is not reason to prohibit the effective resolution of the vast majority of cases appropriate for arbitration.

The presumption should be to give effect to the intent of the parties to submit their disputes to arbitration. If the Legislature believes a particular future dispute involving legal issues should only be resolved by the courts, it should be treated as an exception. The exceptional case should not write the general rule.

THE MONTANA LAWYER



FEBRUARY 1981 VOLUME 6, Number 6

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 17
DATE 012185
BILL NO. SB 374

ARBITRATION IN MONTANA AND THE NEED FOR NEW LEGISLATION

By William L. Corbett
Associate Professor of Law
University of Montana
School of Law

This article reviews the current legal status of arbitration in Montana and compares the Montana law with the Uniform Arbitration Act. Legislative Enactment of the Uniform or similar legislation is necessary to enable Montana to join the vast majority of states that permit and encourage effective private dispute settlement through arbitration.

I. Arbitration at Common Law.

To clearly understand the current Montana law on arbitration it is necessary to understand arbitration at common law. This is due to the fact that arbitration law in Montana has changed little in the ast one hundred years.

At common law arbitration was viewed with much disfavor by the courts. The courts believed that they should not be ousted of their traditional role in dispute settlement by private tribunals, nor should parties to a contract be deprived of access to the courts. As a consequence, arbitration clauses were almost universally held to be void and unenforceable. *Palmer Steel Structures v. Westech, Inc.*, 35 S.Rept. 1354, 1358(B) dissenting opinion (1979) *School Dist. No. I v. Globe and Republic Ins. Co.*, 146 Mont. 208, 212 (1965). See Note, *Contract Clause Providing For Arbitration Of Future Disputes Is Not Enforceable In Montana,* 24 Mont. L. Rev. 77 (1963).

At common law, the courts generally **recognized** but did **not necessarily enforce** three distinct types of arbitration clauses:

(1) An agreement to arbitrate a dispute **existing** at the time the agreement is entered. These provisions were valid and enforceable only after the subject was actually arbitrated, but a party would be denied a court order enforcing the contractual duty to arbitrate.

(2) An agreement to arbitrate a **future factual** dispute (a **factual** dispute not in existence at the time of the agreement was entered but which might arise in the future). These provisions were considered valid because the courts were not ousted of their jurisdiction over issues of law.

(3) An agreement to arbitrate **any future** dispute (fact or law). These agreements were uniformly held to be void and unenforceable because the courts were ousted of their jurisdiction over legal issues and it was believed that the parties should not be deprived of their access to the courts.

II. Arbitration in Montana.

A. Arbitration in commercial disputes.

In 1867 the Montana legislature enacted a statute which upon first reading appears to have reversed the common law bias against arbitration. The statute provides that "persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them . . . . 27-5-101 MCA. Despite the potentially broad reading this statute might be given, the Montana Court, in conformity with jurisdictions with similar legislation, interpreted the statute to provide for judicial enforcement of an arbitration provision only when the dispute is in existence at the time the agreement is entered. *Green v. Wolff*, 140 Mont. 413, 423 (1962). Thus, under the statute, an agreement to arbitrate only an **existing** dispute is valid and enforceable.[1] In addition to the statute, the Montana Court continued the common law notion that an agreement to arbitrate any **future factual** dispute was valid and enforceable (category #2 discussed above). Moreover, the Court recognized that an arbitration award under a valid and enforceable arbitration agreement is binding on the parties.[2] See *Palmer Steel Structures v. Westech, Inc., supra,* 35 S. Rept. at 1357.

However, the major obstacle to arbitration remained. The Montana Court continued to follow the common law rationale that an agreement providing for the arbitration of a **future** dispute involving an issue of law was unenforceable (category ÷3). *Palmer Steel Structures v. Westech, Inc. supra,* 35 St. Rept. at 1357.

Unlike Montana, many jurisdictions early came to the realization that if an agreement providing for arbitration of **existing** disputes involving issues of **law** were enforceable, it would not violate public policy to make enforceable an agreement to arbitrate a **future** dispute involving an issue of **law.** These courts realized that even if the award of an arbitrator were to be based on an issue of law, the award was not enforceable until a court, with an opportunity to review the legal rationale, enforced the award. *See Ezell v. Rocky Mountain Bean & Elevator Co.*, 76 Colo. 409, 232 Pac. 680 (1925). However, these jurisdictions, unlike Montana, were not faced with a legislative mandate prohibiting the development of arbitration away from its common law limitations.

In 1895 the Montana legislature enacted a statute that codified the existing common law notion that courts cannot be denied their traditional jurisdiction over dispute set-

Continued on page 6

tlement by agreements of the parties. *School Dist. No. 1 v. Globe & Republic Ins. Co., supra* 146 Mont. at 212.[3] This 1895 statute has been consistently interpreted by the Montana Court to make unenforceable an agreement to arbitrate **future** disputes unless the arbitration provision is limited to the determination of solely **factual** issues. *Palmer Steel Structures v. Westech, Inc., supra,* 35 St. Rept. at 1356-1357.[4]

The Montana Court has indicated that such a narrow conception of arbitration is not truly arbitration but merely judicial recognition of commercial appraisal. *School Dist. No. 1 v. Globe & Republic Ins. Co., supra* 146 Mont. at 213. Thus, what is often referred to as arbitration in Montana is nothing more than legal recognition and enforcement of appraisal agreements in a commercial setting.

B. Arbitration in Labor Disputes.

Frequently a collectively bargained contract between an employer and a union will include a provision for dispute settlement ending in arbitration.[5] In view of the limited scope of arbitration in the commercial setting, the question arises whether the agreed method of labor dispute settlement will fare any better. Because the arbitration machinery in the labor agreement anticipates the resolution of all (factual and legal) future disputes, it could be argued that these arbitration agreements will meet with the same fate as found in commercial contracts. However, this is not the case.

Section 301 of the National Labor Relations Act provides that a suit for violation of a labor contract involving a private sector employer engaged in interstate commerce may be brought in a Federal District Court (with state court concurrent jurisdiction) without regard to the amount in controversy or diversity. 29 USCA 185(a). The great majority of cases brought under § 301 are actions to enforce agreements to arbitrate and actions to enforce (or set aside) arbitration awards rendered. Additionally, under § 301 a federal court can by declaratory relief rule that an employer is not required to arbitrate under the specific contract provisions. Gorman, Robert A., *Basic Text on Labor Law Unionization and Collective Bargaining,* 547 (1976).

Accordingly, if a Montana private sector employer engaged in interstate commerce agrees to the arbitration of labor disputes, federal law provides for the enforcement of the agreement. The federal law, unlike Montana, does not limit arbitration of future disputes to solely the resolution of factual disputes.

If the arbitration clause is included in a labor agreement involving a Montana **public** employer (not subject to the federal legislation), it also appears that the clause will be enforced without regard to the limitations found in commercial arbitration. The Montana Collective Bargaining For Public Employees Act provides that nothing "prohibits the parties from voluntarily agreeing to submit **any** and **all** of the issues to final and binding arbitration," and any "agreement to arbitrate, and the award issued . . . shall be enforceable in the same manner **as is provided in the act for enforcement of collective bargaining agreements.**" (Emphasis added.) 39-31-310 MCA. Thus, the legislature provided for enforcement of public employment arbitration provisions in the same manner as the enforcement of the collective bargaining agreement in which the provision is included. The problem is that the legislature did not (forget to?) include a provision in the Act concerning the enforcement of the collective bargaining agreement.

However, this is not a significant problem. Collective bargaining agreements are universally enforced in the same manner as any other contract.[6] It is not reasonable to assume the Montana legislature intended any other procedure. If the legislature intended that "any and all" arbitration clauses would be enforced as collective bargaining agreements, and collective bargaining agreements are traditionally enforced as any other contract, then the only reasonable conclusion is that the legislature intended arbitration provisions to be fully enforced without the limitations found in commercial law.

The need to treat labor arbitration differently than commercial arbitration has long been recognized. The United States Supreme Court has noted that in the commercial setting arbitration is the substitute for industrial strife. Given this distinction, the Court stated since "arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. *United Steelworkers v. Warrior and Gulf Navigation Co.,* 363 U.S. 574, 578 (1960). It appears that the Montana legislature recognized this distinction and clearly intended that public employee labor arbitration be fully enforceable.

While the Montana Court has not spoken directly on this issue, two recent opinions assumed the traditional broader position for labor arbitration. However, the Montana Court, without discussing any conflict, upheld a District Court order requiring the employer to arbitrate what appears to be clearly an issue of **law** under an arbitration clause requiring the arbitration of **future** disputes, *Butte Teachers Union v. Bd. of Ed.,* 34 St. Rept. 726, 730 (1977). In another case, the Court assumed that if the grievance came within the grievance procedure the union could compel the employer to arbitrate the quasi-legal question of "just cause" as required by the contract grievance procedure, *Wibaux Education Association v. Wibaux County High School,* 35 St. Rept. 93 (1978). Moreover, if the Court were to directly speak on the issue, should certainly place much weight on the expressed legislative intent, especially in light of the universally recognized distinction between labor and commercial arbitration.

Accordingly, with labor arbitration provisions involving a Montana employer engaged in interstate commerce fully enforceable under federal law, and such provisions involving a Montana public employer enforceable under the Montana Public Employee Bargaining Act, the vast majority of labor arbitration provisions will be enforceable without regard to the limitations applied to commercial arbitration. For those few Montana solely intrastate employers who have a labor agreement providing for arbitration, it can be argued that the arbitration provi-

sion should be fully enforceable without regard to the limitations imposed on commercial arbitration, based upon the universally cognized distinction between labor and commercial arbitration. However, given the fact that Montana, unlike most jurisdictions, has a specific statutory limitation on arbitration, this argument might very well be rejected. *See Smith v. Zepp, supra* 34 St. Rept. 753, 761 (1977). Thus, an arbitration agreement involving a solely intrastate private employer might very well be subject to the limitations found in commercial arbitration while no such limitation would be applied to a similar agreement involving an interstate or public employer.

III. Comparison Between the Uniform Arbitration Act and Montana Law.

A summary analysis of the Uniform Arbitration Act and a comparison with current Montana law can conveniently be presented under three headings: (1) which agreements to arbitrate would the model act apply; (2) the judicial procedure applicable in the enforcement of arbitration agreements and arbitration awards; and (3) the hearing procedure used by arbitrators.

1. Agreements Covered.

As previously discussed, current Montana law provides that agreements to arbitrate future disputes involving legal issues are unenforceable. The Model Act eliminates this limitation. The Model Act provides for the enforcement of a written agreement to submit any existing controversy, or a written contract provision to submit any controversy thereafter arising between the parties regardless whether the issue is legal or factual. Uniform Arbitration Act §1. (Hereafter cited as U.A.A.)[11] The Model Act also specifically applies to labor arbitration agreements, unless the parties specify otherwise. The equal treatment for both commercial and labor arbitration under the Model Act eliminates the present confusion in Montana law on this subject. See U.A.A. § 31.

2. Enforcement Procedure.

The Model Act provides that upon motion to the court (a court of competent jurisdiction in the state, e.g., a Montana District Court), a party may seek an order directing arbitration. The order must be granted if the court finds that there is an agreement to arbitrate covering the dispute in question and that the opposing party refuses to arbitrate. U.A.A. § 2(a). In the event there is an action or proceeding involving the issue pending before the court, the court must stay that action or proceeding, or sever the arbitrable issue from that action or proceeding. U.A.A. § 2(c) and (d). The purpose of staying the action or proceeding or severing the arbitrable issue from the action or proceeding is to prevent the court from preempting the arbitration process. The Model Act also provides that a court may not refuse an order for arbitration because the court believes the issue lacks merit. U.A.A. § 2(e). Whether the party seeking arbitration raises a meritorious issue is to be left to the decision of the arbitrator and the arbitration process must not be preempted by the court. Thus, when a party seeks a court order enforcing an arbitration provision, the court need only concern itself with whether there is a valid arbitration agreement and whether the agreement covers the dispute in question. Whether the issue raised has merit is left to the arbitrator. Current Montana law is in substantial agreement with these provisions of the Model Act.[8]

The other major area of judicial intervention concerns the enforcement of the award. The Model Act follows the traditional motions to confirm, vacate, correct or modify the award of the arbitrator. U.A.A. §§ 11, 12, 13. This corresponds to the method used in Montana. Compare MCA §§27-5-203 through 27-5-302 with §§ 11, 12 and 13 of the Model Act.[9]

The Model Act provides that the court shall vacate an award on five separate grounds.[10] The Montana statute provides that a court **may** vacate an award under similar circumstances. Compare 27-5-301 MCA with U.A.A. § 12. Other than the compulsory language in the Model Act requiring the Court to vacate and the permissive language of the Montana Act, there is little substantive difference between the two provisions.[11] Moreover, the Montana Court has recognized that its scope of review under **common law** arbitration is narrow, and its authority to vacate an award is limited to situations similar to those set forth in the Montana statute and the Model Act. *McIntosh et al. v. Hartford Fire Ins. Co.*, 106 Mont. 434, 439-440 (1930). *See also Lee v. Providence Washington Ins. Co.*, 82 Mont. 264, 274-275 (1928); *Clifton Applegate - Toole v. Drain Dist. No. 1*, 82 Mont. 312, 328-9 (1928). Accordingly, the Model Act does not represent a sharp departure from current Montana law on this subject.[12]

3. Arbitration Hearings.

Dean Pirsig, the leading draftsman of the Model Act, has indicated that the goal of the arbitration hearing procedure in the Model Act "was to safeguard the essentials of a fair hearing without detracting from the informality, the freedom from technicality, and the dispatch which characterize arbitration hearings and which are commonly important reasons why the parties have agreed to resort to arbitration," Pirsig, *supra* note 12 at 118. The hearing procedure set forth in the Model Act meets this important goal. While, in comparison with the Montana Act, the Model Act specifically provides for more procedural options [13] and procedural safeguards,[14] these provisions are not inconsistent with the Montana Act or the decisions of the Montana Court. The Model Act merely goes further to assure that the arbitration process will be workable and fair.

IV. Conclusion.

Twenty two states and the District of Columbia have adopted the Model Act. Most other states have statutes similar to the Model Act or judicial decisions affording full use of the arbitration process as a method of private dispute settlement. Given the present Montana statutory framework that locks in the out of date, universally rejected common law view of arbitration, the Montana legislature must act if Montana is to have a truly effective method of extrajudicial dispute settlement. The Montana Court has similarly recognized that although "arbitration may be the most speedy and economical means available to parties for a binding resolution of their disputes," full utilization of this method cannot be made until the legislature acts. *Smith v. Zepp, supra* 34 St. Rept. 761. In an era of

Continued on page 17

ARBITRATION

Continued from page 7

crowded dockets and lengthy and expensive litigation, methods supporting private settlement of disputes should be encouraged. The Model Act or some tailored form of the Model Act is the best method to achieve this goal.

William L. Corbett

Mr. Corbett received his B.S. from the University of Wyoming, in 1967, his J.D. from the University of Wyoming in 1970, his LL.M. from Harvard University, in 1971. He was Attorney, Appellate Court Div., Office of the General Council, National Labor Relations Board, from 1971 to 1974.

FOOTNOTES

Fourteen footnotes, which include complete citations as well as explanatory material, accompany this article. Because of space limitations, the text of these footnotes has been deleted. However, copies of the text of the footnotes are available upon request from the writer or the Montana Bar, and the footnote numbers have been left in the text of the article for the convenience of those who wish to make such a request.

ROMAN LAW COURT

Continued from page 11

one-year "observer" apprenticeship, each candidate is placed on a panel of judges, but there the President of the panel reigns supreme. If Mr. President wants an opinion from a panel member, he will ask for it. It is that simple. Not until the candidate has himself been assigned as a President will he really be an active judge, and that time depends upon future vacancies and the academic standards of the candidate. The appointments are for life. They carry great social prestige and command the highest incomes in the profession. Ironically, the production of such high calibre public servants has lead to numerous physical attacks and assassinations. The underworld has learned that these persons cannot be intimidated, swayed or bought so it is resorting to terrorism to try to achieve it's goals. Strangely enough, the profession considers this a high compliment and is prepared to stand firm.

February 1981

CLE AT HARVARD

Harvard Law School will hold its Thirteenth Session of the Program of Instruction for Lawyers (PIL), July 13-25, 1981. The Program is directed by Louis Loss, the William Nelson Cromwell Professor of Law.

Recognizing the need for innovative, up-to-date continuing legal education programs, Harvard Law School has put together a 34-course Program, taught by 30 members of the Law School Faculty, which is designed to inform the participants of the latest developments in numerous areas of the law. Among the courses in the 1981 Program are Antitrust Law, Banking Regulation, Health Care Regulation, Local Govenment Law, Securities Regulation, Accounting for Lawyers, Bankruptcy: The New Law, The Press and the Law, Negotiation: Theory and Practice and Psychiatry for Lawyers, as well as five tax courses. The 1980 Program included lawyers from 22 foreign countries, 95 government lawyers, 30 judges (including 16 federal judges sponsored by the Federal Judicial Center), 29 full-time law school teachers and 20 public interest lawyers.

The combination of a prestigious faculty, an enthusiastic group of participants from almost every area of the law, and a diverse curriculum makes the Program unique in the world of continuing education.

In order to get a $50 discount on the regular tuition rate, the 1981 application must be submitted to the PIL Program Office no later than June 1. The majority of applications are received in April and May, and by June some courses are fully subscribed. Late applications will be accommodated whenever possible; but some classes are constrained by classroom size. For information, write or call the Program Office, Pound Hall 205, Harvard Law School, Cambridge MA 02138 (tel. (617) 495-3187).

FOOTNOTES
for
Arbitration in Montana and the Need for New Legislation
by William L. Corbett

[1] The statute did have the positive effect of eliminating the common law obstacle to existing dispute arbitration mentioned in category #1 discussed above.

[2] A party could, of course, receive judicial review of the award and upon an appropriate showing have the award vacated, corrected or modified. This will be discussed infra. pp. 9-10.

[3] The statute provides: "Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract, by the usual proceedings in ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void. 28-2-702 MCA.

[4] The Montana Court has held that a provision requiring the arbitration of a future dispute involving an issue of "value or quality" is valid and enforceable. However, the court has consistently held that an arbitration award in a dispute involving an issue of "value or quantity" must be based solely on a question of fact, and that once the arbitrator relies on the "intent and meaning" of the contract in reaching his decision, he is involved in an issue of law and the award is void and unenforceable. State ex rel. Cave Co. v. Dist. Ct., supra 150 Mont. at 22, Palmer Steel Structures v. Westech, Inc., supra, 35 St. Rept. 1356-1357.

[5] Most frequently the contract will provide for a grievance procedure which establishes an agreed method of dispute settlement. Often the grievance procedure will provide that unresolved grievances are to be submitted to arbitration, e.g. "grievance arbitration." A second method of arbitration occasionally provided for in a collective agreement calls for arbitration in the event the parties are unable to reach agreement on the specific provisions to be included in a subsequent contract. This method of labor dispute settlement is referred to as "interest arbitration."

[6] The National Labor Relations Act after which most state public employment acts are patterned, including the Montana Act, provides for judicial enforcement of collective bargaining agreements in a manner not unlike the enforcement of any other contract. 27 USCA 185(a).

7. The Montana statute which provides for the enforcement of agreements to arbitrate existing disputes specifically exempts disputes involving title to real property, §27-5-101 MCA. The Model Act has no such exemption.

8. The Montana statute that authorizes arbitration on matters currently in dispute provides that the parties may stipulate that their agreement to arbitrate may be entered as an order of the district court, § 27-5-104. For arbitration awards not covered by the statute but authorized by common law, the Montana Court will enter an order enforcing a contract duty to arbitrate. School Dist. No. 1 v. Globe and Republic Ins. Co., supra 146 Mont. at 212-213. Where a party seeks to litigate an issue subject to arbitration, the Court had held that the action or proceeding must give way to the agreed upon arbitration settlement procedure. Id. Additionally, the Court has recognized that under a valid arbitration agreement, it is the function of the arbitrator, not the court, to evaluate the issue in dispute. Id.

9. The Model Act does, however, integrate these motions. Thus, on motion to confirm the award, any grounds for vacating, correcting or modifying the award must be asserted by opposing party. U.A.A. § 13. Similarly, upon an unsuccessful motion to vacate, correct or modify, the Court will confirm the award. U.A.A. § 5 12(d) and 13(b).

10. (1) the award was procured by corruption, fraud or other undue means;
(2) there was evident partiality by the arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
(3) the arbitrators exceeded their powers;
(4) the arbitrators refused to postpone the hearing upon sufficient cause being shown therefor, or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of . . . (the Act concerning the hearing procedure), as to prejudice substantially the rights of a party; or
(5) there was no arbitration agreement and the issue was not adversely determined in proceedings under . . . . (the provisions of the Act concerning judicial enforcement of the duty to arbitrate) and the party did not participate in the arbitration hearing without raising the objection. U.A.A. § 12.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 11
DATE 012183
BILL NO. SB 63 + 110

11 There are, however, differences, e.g., Montana provides that the Court may vacate an award if it is indefinite or cannot be performed, while it does not provide for vacating an award where the arbitrator was in fact not neutral. See 27-5-301 MCA.

12 The Model Act does provide that a Court may not vacate or refuse to confirm an award because the relief granted was such that could not be granted by a court of law or equity. U.A.A. § 12(a). The leading draftsman of the Model Act has indicated that the necessity for this provision is based on situations where corporate stock is evenly held by stockholders who cannot agree on a question of corporate policy. "It is an increasingly frequent practice to submit such disputes to arbitration and avoid dissolution." Pirsig, Maynard E., Toward a Uniform Arbitration Act. 9 Arb. Journal 115, 118 (1954). Of course, there is no applicable treatment under Montana common law, Montana will not even enforce arbitration awards involving legal issues.

13 The Court may appoint the arbitrator or arbitrators in the absence of an agreement between the parties, or if the agreed method fails, U.A.A. § 33; arbitrators may subpeona witnesses, records, etc. with court enforcement, and take depositions, U.A.A. § 37.

14 In the absence of an agreement to the contrary, and upon application by a party, the Court may fix the period of time after the hearing for the award, U.A.A. § 8(b); final awards are to be based on majority vote of arbitrators, U.A.A. § 5(c).

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 11
DATE 01-21-87
BILL NO. SB 63 + 110

(This sheet to be used by those testifying on a bill.)

NAME: William Jordan DATE: 1/21/85

ADDRESS: Box 5004, Great Falls, MT 59401

PHONE: 761-7310

REPRESENTING WHOM? Blue Cross/Blue Shield

APPEARING ON WHICH PROPOSAL: SB 63, 110

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 18
DATE 012185
BILL NO. SB 63+110

(This sheet to be used by those testifying on a bill.)

NAME: Scott J. Burnham DATE: 1/21/85

ADDRESS: University of Montana School of Law, Missoula MT 59812

PHONE: 243-6603

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: 63, 110

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 19
DATE 01.21.85
BILL NO. SB 63+110

Re: SB 63 and SB 110

Scott J. Burnham
Associate Professor of Law
University of Montana School of Law

Personal Background

I teach Contracts Law, emphasizing the importance of preventive law and dispute resolution; that is, using the court system as a last resort for resolving disputes.

I have worked as an Administrative Law Judge for the City of New York, resolving disputes for the Board of Education and the Taxi Commission. I have recently been retained by the Better Business Bureau to coordinate arbitration hearings in Montana between automobile manufacturers and consumers.

Position

MCA § 28-2-708 should be repealed insofar as it makes agreements to arbitrate future disputes unenforceable; the Uniform Arbitration Act should be enacted.

Historical Background

The statute is a carryover from common-law England, where agreements to arbitrate were not respected. If breached, there were only nominal damages. It became fashionable to say that they were against public policy because they "oust the jurisdiction of the courts." Some say the real explanation is that courts wanted the cases because judge's salaries were paid from the court fees.

In America, the view that disputes should be resolved in court was especially popular in sparsely populated states such as Montana, where access to courts was readily available.

The Present Situation

The view that courts jealously guard their jurisdiction, if ever true, is no longer true in an era of complex litigation and crowded court calendars. The Montana Supreme Court, in enforcing 28-2-708 has repeatedly said that it would like to enforce the agreement to arbitrate but its hands were tied by the legislature.

In fact, most disputes today are resolved outside of courts. It is said that 70% are resolved by some form of alternate dispute resolution.

Furthermore, the scope of anti-arbitration statutes such as 28-2-708 has been substantially reduced. Judicial decisions have allowed present disputes and disputes of fact to be arbitrated. States allow alternate resolution of many disputes, such as medical malpractice claims in Montana. Federal statutes in many areas, including labor and consumer issues, require arbitration. And the United States Supreme Court has recently held that the federal arbitration act pre-empts state anti-arbitration laws in transactions involving interstate commerce.

Consumer Protection

Arbitration will benefit the average Montanan as a "consumer" when involved in disputes. The advantages of arbitration over court resolution of disputes include speed, economy, simplified procedures, and the opportunity to pursue small claims that might otherwise be abandoned. In the commercial context, experts in the trade or business can be used to arbitrate disputes. It is probably also fair to say that the procedure is less polarizing, which can be important where the parties must continue to interact with each other. Arbitaration can also assist where the parties are unequal and the "little guy" could be smothered by the expense of litigation.

A concern has been raised that the little guy might suffer when arbitration is included in a "contract of adhesion," that is, a printed contract that the consumer is not able to bargain for. I do not agree. Adhesion clauses are suspect when they limit the obligations or the liabilities of the stronger party, or when they are contrary to reasonable expectations. Because of the advantages of arbitration expressed above, I believe the consumer will not lose out when such clauses are included as long as they provide for a fair arbitration, such as use of the American Arbitration Association.

In the area of Uninsured Motorist Coverage in automobile insurance policies, for example, I find the advantages of arbitration outweigh the disadvantages, with one exception. States that allow arbitration under this clause have experienced a tremendous volume of litigation on the question of what issues are arbitrable. The result is exactly what arbitration should prevent. For this reason, the legislature should either exempt this coverage or make clear that all issues are arbitrable under these policies.

Conclusion

The trend toward settlement of claims outside the court system should be encouraged. It must be remembered that 28-2-708 restricts freedom of contract. Repealing the statute would simply give people the option to choose arbitration. In the absence of their free choice of arbitration, the court system remains open to them. Freedom of choice is thereby furthered by repeal.

Should the parties choose arbitration, present Montana statutes govern how it works. However, the Uniform Act, which has been adopted in the majority of states, provides more thorough guidance and should be adopted.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 19
DATE 01285
BILL NO. SB 63 + 110

Montana Trial Lawyers Association

Executive Office
#1 Last Chance Gulch
Helena, Montana 59601
Tel: 443-3124

Proposed Amendment to Senate Bill 110, Uniform Arbitration Act

Page 2, Line 5: Delete "." after "contract" and add the following: "provided, however, that an arbitration provision in a written contract to which all parties to the contract have not agreed with full knowledge of the effects of that arbitration provision is not valid, enforceable and irrevocable."

OR

Page 2, Line 2: After "contract" add the following: "to which all parties have agreed with full knowledge of the provisions contained therein"

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 20
DATE 01.21.85
BILL NO. SB 110

(This sheet to be used by those testifying on a bill.)

NAME: Terrence R Cassidy DATE: _____

ADDRESS: 910 Helena Ave, Helena, MT.

PHONE: 443-4032

REPRESENTING WHOM? Mont Assoc of REALTORS

APPEARING ON WHICH PROPOSAL: SB-63 & 110

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENT: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 21
DATE 012185
BILL NO. SB63+110

(This sheet to be used by those testifying on a bill.)

NAME: Riley Johnson DATE: 1-21-85

ADDRESS: 491 So. Park Ave

PHONE: 442-6424

REPRESENTING WHOM? Montana Homebuilders Ass'n.

APPEARING ON WHICH PROPOSAL: 110

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENT: Saves time, money and lets us get the job completed. But need model code adopted.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 22
DATE 012185
BILL NO. SB 110

(This sheet to be used by those testifying on a bill.)

NAME: Mike Rice DATE: 1/21/85

ADDRESS: Box 379, Black Eagle

PHONE: 727-7500

REPRESENTING WHOM? Transystems

APPEARING ON WHICH PROPOSAL: SB-63

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 23
DATE 01/21/85
BILL NO. SB 63

JAN 21

MONTANA ARBITRATORS ASSOCIATION

January 19, 1985

Senator Joe Mazurek, Chair
Judiciary Committee
Montana Senate
Helena, Montana 59620

Dear Senator Mazurek:

I am sorry that I will not be able to be in Helena to testify in favor of SB 110 and would appreciate it if you will read this letter to the members of the committee.

The Montana Arbitrators Association is an organization composed of both neutral arbitrators and advocates. We encourage the resolution of contractual disputes through the use of arbitration. The arbitration process can provide quick and equitable solutions to problems contracting parties have not been able to solve. We believe the process can be enhanced by the passage of SB 110.

Contracting parties find arbitration desirable because it is faster than the court system,it can provide an equitable solution to a specific problem and it is considerably cheaper than a breach of contract action in the courts.

Legislatures and courts throughout the country are increasingly looking upon arbitration as a process which, if used, can put the brakes on the increasing cost of the court system.

There are several flaws in the arbitration system as it exists in Montana today. SB 110, The Uniform Arbitration Act, would cure these flaws and allow the system to operate in the most optimum manner. I will mention only one of these flaws and leave those testifying to discuss others. Presently, arbitration awards are not enforceable in court. An arbitrating party which does not like an award can refuse to abide by it. Fortunately, most parties act in good faith and the situation does not occur. However, the whole system is undermined everytime a party refuses to abide by an arbitrator's award. Awards should be enforceable in court. Sections 14 and 15 of SB 110 address the problem. Section 14 makes arbitration awards enforceable in court and Section 15 protects arbitrating parties from fraud, corruption and misconduct by arbitrators.

A voluntary arbitration system can take pressure off the court system, it is cheaper for parties engaged in the process and it can cut costs for the taxpayers. We urge the passage of SB 110.

Sincerely,

Kenneth D. Bryson

Kenneth D. Bryson
President

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 24
DATE 01/21/85
BILL NO. SB 110

The Montana Arbitrators Association is a non-profit service organization which promotes dispute resolution through mediation, factfinding, and arbitration.