

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

February 5, 1985

The twenty-first meeting of the Senate Judiciary Committee was called to order at 10:12 a.m. on February 5, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present.

CONSIDERATION OF SB 200: Senator Chris Christiaens, sponsor of SB 200, presented written testimony in support of the bill (see Exhibit 1).

PROONENTS: John L. Hansen, on behalf of himself as President of COP Construction Co. presented written testimony (see Exhibits 2 and 3). James L. Jones, an attorney from Billings, appeared in support of the bill. He stated five or six years ago, they had only one or two punitive damage claims in their office. Today, they represent dozens of individuals throughout Montana on punitive damage claims. They are in support of a limitation on punitive damages. He suggests there are people who are abusing the system and view the punitive damage claims as Montana's legalized lottery system. He believes punitive damage claims create anxiety in those who are the targets of these claims, as it is difficult to explain to a client why they have no insurance coverage for a punitive damage claim. It is also difficult to explain why there are no limits on the amount for which they can be sued or the amount the jury can assess against them. He believes what we don't see are the dozens of smaller punitive damage claims that occur each week where insurance companies pay unjustified claims and unjustified amounts for justified claims just so they are not involved in punitive damage suits. These costs are passed on to the insureds. Mr. Jones testified the costs of his defending a recent punitive damage claim were in excess of \$100,000. Attorneys defending punitive damage claims must defend them to the hilt, as punitive damage claims in a civil case can double or triple the costs of a lawsuit. The Montana Supreme Court has removed the traditional and historic limitation on compensatory damages.

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business in Montana. Tuck Vosberg, President of the Pacific Hide & Fur Co. from Great Falls, presented written testimony in support of the bill (see Exhibit 4). Don Allen, on behalf of the Montana Hospital Association, appeared in support of SB 200. He stated in the case of concern over rapidly rising health care costs, there is a concern that in order to be able to provide the care they are charged with, punitive damage claims are very unfair to those who must use the hospital facilities since those costs must be passed on. (See witness sheet attached as Exhibit 5.) Ben Hadvahl on behalf of the Montana Motor Carriers Association, stated they want to go on record as supporting SB 200. George Allen, on behalf of the Montana Retail Association, stated if a small businessman were to get hit with a punitive damage suit, it would be devastating for him, so they go on record in support of this bill. Dave Goss, from the Billings Chamber of Commerce, addressed the businessman who is unable to get insurance. If he is lucky, he can pass that cost on to the consumer, but if he is in a highly competitive market, he cannot pass the cost along. They urge the support of SB 200. Irvin E. Dellinger, Executive Secretary of the Montana Building Dealers Association, submitted written testimony in support of SB 200 (see Exhibit 6). Leo Berry, Director of the Department of Natural Resources and Conservation, appeared in support of this bill for reasons of personal liability of state administrators due to punitive damage suits. He related the story of the one time he was sued while he served as a department director. He believes there is an indirect pressure for settlement of these cases because an administrator or a private employer cannot take the risk of putting his own assets and the education of his children on the line. This committee and the legislature ought to undertake a study of the matter to get a handle on the public policy issue as to where we are going with punitive damages, as it is becoming a major public policy issue. The proper place for those issues to be addressed is by the legislature and not by the courts. He believes everyone needs to be responsible for his own actions, but that is not the issue here, since it has gone beyond that. Terry Screnar, President of Blue Cross of Montana in Great Falls, stated they support the bill as a common sense approach to the situation that now exists with punitive damages. He believes this bill will provide for accountability while putting limits on the dollar amount of punitive damages. There is a new theory now called implied malice instead of outrageous conduct. He stated the plaintiffs' attorneys must seek punitive damages in all cases or they are in great danger of getting a malpractice claim from their clients. R. A. Ellis, Chairman of the Board of the Helena Valley Irrigation District, appeared in support of the bill. He stated that up until two years ago, they were unable to get liability insurance on their commissioners. Unless SB 200 is passed, it will increase the cost of their insurance prohibitively. Ed McHugh, President/Manager of Cloverleaf Dairy in Helena, appeared in support of this bill. He recently dismissed a man who had stock in his company. His attorney has

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suggested that he pay the man an extra \$150,000 so they won't be sued for wrongful discharge. Those threats cause large settlements outside of court. If they were to lose a case like this, they would have to close their doors.

OPPONENTS: Karl Englund, on behalf of the Montana Trial Lawyers Association, stated he had made arrangements for a number of witnesses to testify in opposition to this bill. Tom Boland, who practices law in Great Falls with the law firm of Regnier, Lewis & Boland, stated they represent the kinds of people who bring the lawsuits, who are from all walks of life, and they are here testifying not on behalf of themselves, but on behalf of those who don't go to hearings like this. Their firm represents smaller businessmen. Proponents are concerned that accountability is something the people are entitled to. The essence of punitive damages is they are not designed to reward a plaintiff. The terminology is important. When compensatory damages are discussed, they are awarded. When punitive damages are discussed, they are assessed. Punitive damages try to deter such conduct in the future. The state of Montana has always been a leader in the business of personal rights. Enacting a bill that prohibits or limits punitive damages would be a step in the opposite direction. He suggests that the litany of federal statutes is inappropriate. A plaintiff should not get a fraction of what he is entitled, nor should a defendant be punished for only a portion of what he did. They think that any company should have nothing to fear because Montana, in its legislature and its people, wants a course of conduct that is open to scrutiny. Jim Regnier, an attorney from Great Falls, stated he has represented many individuals in punitive damage claims. He would like to focus on the aspect that there was really no testimony given on the safeguards we have at the present time: the jury system, the judicial review at the trial level, and the judicial review at the supreme court level, are not working. He believes these safeguards are working. When legislation such as this is passed, what you are doing in the legislature is compromising and taking away the constitutional right to trial by jury in at least one fashion. In a punitive damage claim, the most heinous type of conduct is that which involves the small claim. Those are the type of claims large insurance companies will ignore, because the people that have those type of claims do not have the economic resources to press them, so there is nothing to prevent the insurance companies from ignoring them. Punitive damages under its present format is a significant deterrent to that type of conduct. Putting a limitation on a percentage of net worth or determining what the pecuniary ability a defendant is able to pay are very difficult. He questioned how you would determine what the net worth of a company is. He believes it would be unworkable for both sides. This bill or any bill that affects punitive damages is not a piece of legislation which is going to somehow hurt the small businessman in every case. We have a jury system in this country and in

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this state that has been working very effectively that should not be jeopardized. Sharon Morrison, President-elect of the Montana Trial Lawyers Association, spoke in opposition to SB 200 (see witness sheet attached as Exhibit 11). She was particularly opposed to the section which limits punitive damages. She stated punitive damages are appropriate under Montana law. She stated they are already limited by law and are only awarded where a defendant has acted with fraud or malice, actual or presumed. Presumed malice is that type of activity that creates a high risk of harm to another, when the person goes ahead and acts knowing it will result in a high risk of harm to another. She stated SB 200 takes from the jury the authority to award punitive damages. Punitive damages have been here since 1895; they have never been limited. She would like the committee to give some consideration to the other side of the coin as to what punitive damages mean in Montana law. She urged the committee to keep in mind the types of cases where the manufacturer goes ahead and manufactures a product knowing he will make more money selling the product than the claims will cost him. She urges the committee to allow Montana juries to continue as they have in the past to determine what type of conduct merits punitive damages and to what extent they are warranted. Ed Butcher, a rancher from Winifred, testified in opposition to the bill. Punitive damages in his own experience was very critical in protecting his life and his family's lives. He related his own experience with his neighbor, concerning which he was not getting any satisfaction through the normal legal channels. The only way he could solve it was to file for punitive damages. It took three years before the case went to trial, during which time they went through many moments of harrassment. They felt punitive damages was the only way to get retribution, as the money that was taken out of the defendant's pocket has made the defendant think twice. It is important that the courts and juries have the latitude to be able to award punitive damages so cases like his would become a deterrent to any such further action. John Hoyt, a lawyer from Great Falls and a rancher with a ranch north of Belt, testified in opposition to the bill (see witness statement attached as Exhibit 12). As an employer, he is not in the least concerned about being sued for punitive damages, because he will not, nor will his employees, be permitted to conduct themselves in a manner that will invite a punitive damage claim. He thinks the concept of punitive damages is to either prevent, diminish, or deter the type of conduct you would not permit. Punitive damages have two major benefits for all: they provide each Montana citizen a tool or shield against anyone who would do such a thing, and there is no cost. It is a right given to us by common law which we can use to protect ourselves. It deters those who would use an undue advantage of power, greed, or wealth. It is the threat of punitive damages that is the big deterrent. It is the fear of the potentially large punitive damage verdict that deters this type of conduct. If a limit is imposed, the fear is gone. He questioned who was complaining about a punitive

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damage system. Each and every one of them are protected by our jury system. He believes the victims are the Montana residents. He stated no business has refused to come into this state because of punitive damages. He believes jurors deal with each case on an individual basis; they have nothing to gain and nothing to lose. He questioned why Montana's juries should have their hands tied. Steve Barrett, a lawyer from Bozeman, stated he represents the same kind of people as Mr. Jones. He believes the fundamental issue is it benefits insurance companies. He contends we must be held responsible for our acts. He has faith in the jury system of this state. The punitive damage awards didn't come out of thin air or the mouths of any lawyers; they came out of juries. They made those decisions carefully and logically and with all of the facts of that true case in front of them. These same people elect the people of this body. Everyone believes we have the right of access to the courts. We submit the most complicated things and matters of life and death to these juries; now we are going to say there is this one little area where we don't trust you. It is inconsistent and not common sense. Lon Dale, an attorney in Missoula, testified in opposition to SB 200 for three reasons: (1) The bill in its present form is unnecessary and unwarranted. (2) The proposed bill will substantially erode the effect of the punitive damage statute. (3) In his opinion, the bill is unconstitutional because of the language concerning the limitation, "whichever is less." That language should be changed to "whatever is more." Where are the facts? Where is one Montana businessman that has been put out of business because of a punitive damage award or because of excessive punitive damages? Monte Beck, an attorney from Bozeman, testified in opposition to this bill. He believes the jury speaks the conscience of the community. He referred to a newspaper article attached as Exhibit 13. He submits that the voice of the community (the jury) took a message to the company. He believes the system works. He feels the jury needs the chance to tell the powerful, the wealthy, and the greedy what they are doing is wrong. Lewis Brown appeared in opposition to this bill as a citizen and as a concerned attorney. He called the attention of the committee to Section 27-1-302, MCA, which states damages must be reasonable. He submits the system works--juries do not always return verdicts for the plaintiff; they also return verdicts for the defense. He thinks the only way we will get them to treat people fairly is to stick them with an extensive damage award. Howard Strauss testified and challenged the committee to vote in favor of this bill if this committee does not trust the jury system. If it trusts the jury in one case, he believes it can trust it in this case. He challenged the committee to vote in favor of this bill if it is not in favor of victims' rights or the free market system. Michael Wheat, an attorney from Bozeman, testified that the bill will not reduce the number of lawsuits that are filed which demand punitive damages, nor will it reduce the pressure of settlement when these cases are filed; however, he believes it will reduce the amount of exposure to large

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corporate clients that do business in this state, and it will allow them to conduct themselves in an abusive and outrageous manner. He does not think our jury system is out of control. Sandra Watts, a lawyer from Great Falls, addressed herself to the last provision of that act stating the effective date would be on passage and approval. She thinks there are due process problems with that. Eric Theuson submitted written testimony on the bill (see Exhibit 14). He stated the committee might want to review the history of final judgments for punitive damages in the state of Montana. Prior to 1984, there has not been a punitive damage award approved by the Montana Supreme Court that approached \$100,000. The only case that did so was the 1984 case of Gibson v. Western Fire Insurance where the award was \$400,000.

QUESTIONS FROM THE COMMITTEE: Senator Crippen addressed a question to Roger McGlenn, from the Independent Insurance Agents Association of Montana. He stated there were comments about insurance. One side claims they can't get policies and the other side says the only ones that will benefit are the insurance companies. He questioned what coverage was available in Montana to cover these claims. Mr. McGlenn said there are companies that exclude coverage for punitive damages believing it is wrong to shift the burden of wrongful conduct to insurance companies. There are other companies that do not. He interprets the 1984 decision of First Bank Billings v. Transamerican to encourage insurance companies to exclude punitive damages. This bill does not benefit the big insurance companies. Senator Pinsoneault asked Mr. Hoyt if we were talking about punitive damages, why shouldn't the standard be beyond reasonable doubt such as in a criminal case, instead of clear and convincing evidence. Mr. Hoyt stated the distinction that needs to be made is in criminal law, you need to know only if the person committed the crime. If you get into the area of damages, it is built into the instructions of the court defining the type of conduct they must find before they even review the issue. Senator Pinsoneault asked if he saw a danger in young lawyers throwing in punitive damage claims. Mr. Hoyt responded we do have means of addressing frivolous lawsuits. The people who spoke in favor of this bill talked about the enormous effort that went into their case because of punitive damages. He contends that is not true. The only difference in the trial is what you ask the jury for. Senator Crippen asked Mr. Hoyt if he were stating as an attorney defending a client being sued for punitive damages, little effort would be required on his part in order to defend his client. Mr. Hoyt stated he would represent that client who is being sued for punitive damages as zealously as one who wasn't. Researching the law is the same; preparing the case is the same. The only difference is in a punitive damage claim, when it gets to the point where the jury is requested to award punitive damages, you must get the latest annual report of the corporation that is being sued and refer to it as an exhibit. Senator Crippen asked Mr. Hoyt to clarify he stated

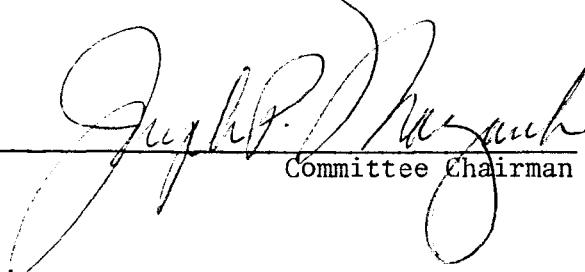
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the real reason for punitive damages is the fear, or the threat, that punitive damages can bring to an employer. Mr. Hanson stated that fear is more like a wedge to force an employer to settle. Senator Crippen questioned whether Mr. Hoyt felt there is a real problem in that area. Mr. Hoyt stated he sure doesn't. Senator Crippen commented there is a vagueness about standards and questioned how an employer could feel comfortable with our jury system if the standards are vague. Mr. Jones stated anyone being sued for punitive damages cannot feel anything but fear under any circumstances. The supreme court said it acknowledged and admitted it doesn't know what the standards are and, therefore, it is going to allow punitive damages to be covered by insurance companies and it will let them exclude it if they want to. Senator Mazurek asked Mr. Jones if the problem were the standard. Mr. Jones responded we should address standard.

CLOSING STATEMENT: Senator Christiaens stated he believes this is a public policy issue and this bill attempts to give legislative guidelines to the issue. In the case of punitive damages, the legislature should ensure that fair administration of justice be established while ensuring responsibility for improper conduct.

Hearing on SB 200 was closed.

There being no further business to come before the committee, the meeting was adjourned at 12:15 p.m.



Guy P. Mazurek
Committee Chairman

ROLL CALL

SENATE JUDICIARY

COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date 620585

DATE

February 5, 1985

COMMITTEE ON

Judiciary

VISITORS' REGISTER

SB 200

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
John C Hoyt	self	SB 200		✓
John J Hansen	self	SB 200		
De Wosbury	Pacific Pilot Fun	SB 200	—	
Don Beck	self	SB 200		✓
BOB JAMES	STATE FARM INS. CO. NATIONAL ASSOC. OF IND. INSURERS	SB 200		✓
Geoff Quich	MISSOURI CHAMBER	SB 200	✓	
R. A. Ellis	Self	SB 200	✓	
Dore Goss	Biggs Chamber of Commerce	SB 200	✓	
RAYMOND M. HART	HART-ALBIN CO. BILLINGS	SB 200	✓	
R. Lewis Brown	Self	SB 200		✓
R. Bruce McWhin	D.C.R.	SB 200		
Terry Kennedy	Mont. Assoc. of RETAILERS	SB 200	✓	
Jim Regnier	self			✓
Howard Hansen	self	SB 200		✓
Dandra J. Taft	self	SB 200		✓
Tom Boland	Self	SB 200		✓
Ed McFie	Self	SB 200	✓	
George Ollan	Mt. Retailers Assn	SB 200	✓	
S. Keith Anderson	Montana Taxpayers Assn.	SB 200	✓	
Ben Hardin	Mont Motor Carriers Assn	SB 200	✓	
Terry human	Mont. Assoc. of mont	SB 200	✓	
Bonnie Lissay	Alliance of America Insur.	SB 200	✓	
James J. Blige	Farmers Ins. Co. of	SB 200	✓	
De Bottomly	Self	SB 200		✗
Rita Lissay	"			✗
Mate Beck	Self			✓

COMMITTEE ON

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
James L. Jones	self	SB 200	✓	
Michael C. Wherry	self	SB 200		✓
P. O. Cefelt	self	SB 200		✓
Sharon Morrison	MTA	SB 200		✓
Erik Thueson	self	"		✓
Bob Holland	"	"		✓
Blair Dick	Om Jus Olson	"	✓	
Roger McGraw	INDEPENDENT INSURANCE AGENTS OF MT	"	✓	
Ed Dolce	MT. CHAMBER	"	✓	
John F. Edwards	Huntington Co. Hospital	SB 200		
Ed Butcher	self	SB 200	✓	
Wiley Anderson	self	SB 200	✓	
Redmond Bullitt McNamee	self	SB 200	✓	✓
Chester Bullock	self	SB 200		✓
Carol Harrison	MT. Trial Lawyer Assoc.	SB 200		✓
Dan Allen	MT. Hospital ASSN	SB 200	✓	
Al Hanson	MT. TECH COUNCIL	SB 200	✓	

SB 200 - LIMITATION OF PUNITIVE DAMAGES

WHAT ARE PUNITIVE DAMAGES?

Punitive damages are those awarded to a plaintiff to punish the defendant. The plaintiff receives this money in addition to his actual damages. Actual damages include such economic losses as lost wages, past and future medical expenses, and loss of earning capacity. It also includes non-economical and intangible items such as loss of established way of life, which would include such things as the inability to hunt, ski or play tennis--or any loss of the "enjoyment" of life which a plaintiff partook prior to injury. It also includes loss of consortium, emotional distress, and any pain or suffering caused by the injury.

Actual damages are intended to fully compensate an injured person for both his economic and non-economic losses. Punitive damages are essentially a windfall to the plaintiff.

The common-law origins of punitive damages are found in 18th Century England. Theories differ as to the initial rationale for awarding those damages. One theory is the courts used the concept of punitive damages to justify excessive jury verdicts. Another theory used to justify punitive damages was that it would compensate plaintiffs for mental anguish, humiliation or hurt feelings. These non-pecuniary type of injuries were not recoverable under English common law. Punitive damages, therefore, compensated victims for elements of personal harm that otherwise were not recoverable.

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BILL NO. SB 200

Neither of these historical rationales justifies retention of punitive damages today. American courts have well-established standards to measure actual damages in contracts, property and personal injury cases and the courts regularly review jury awards.

Why then do we have punitive damages? The basic contemporary objective of punitive damages is to assist the judicial system in enforcing established norms of conduct by punishing the defendant for violating those norms and thereby deterring others from similar behavior. Punitive damages also serve as a public and tangible expression of society's disapproval of certain particularly outrageous conduct, and provide enhanced incentives for private civil enforcement of legal norms.

For example, in the case of Funk v. Kerbaugh, 222 Pa. 18, 19, 70 A. 953, 954 (1908), the defendant decided it would be "cheaper to pay damages" for carrying out blasting that destroyed the plaintiff's building than to alter his blasting methods. The possibility of punitive damages removes the financial temptation to engage in this sort of deliberately wrongful conduct.

In addition, there are numerous examples of criminal behavior that may not adequately be deterred by the criminal justice system alone. The county attorney may decide not to prosecute a drunk driver. Punitive damages for a plaintiff injured by drunken driving enhances society's capacity to deter such behavior by supplementing criminal prosecution with civil punishment.

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EXHIBIT NO. 36-200

SENATE JUDICIARY COMMITTEE

BILL NO. _____
DATE _____

EXHIBIT NO. _____

In brief, punitive damages for certain types of behavior fills gaps in the criminal law.

WHY SHOULD THE PRESENT PUNITIVE DAMAGES STATUTE BE CHANGED?

In short, punitive damages have been stretched far beyond the limits of their validity. The historical justification for such damages has disappeared. Seizing upon the retributive and the current function served by punitive damages, the courts have expanded the shapeless doctrine of punitive damages into allowing astronomical awards and essentially arbitrary amounts bearing no relation to the actual harm suffered.

There is no question that the law in Montana is adequate to provide full compensation for injuries based upon appropriate measures of a person's damages in contract, property and personal injury cases. Punitive damages are neither intended nor needed to assure adequate compensation to plaintiffs.

Moreover, recent punitive damages awards go far beyond any reasonable measure of what is necessary to assure appropriate punishment and deterrence. In addition, it must be recognized that the need to impose additional damages for the purpose of deterrence and punishment must be weighed against equally important public policy considerations of fairness and economic impact.

Many business activities which were common and lawful only ten or twenty years ago now are considered to be tortious and subject to punitive damages. Imposing devastating

punitive damages upon an individual or business for malice, oppression and the like has not been clearly demonstrated is a fundamentally unjust form of punishment; it is an unfair and arbitrary windfall to certain individuals beyond that which is necessary for full compensation. It is unnecessary to achieve the valid contemporary objective for punitive damages, i.e. punishment and deterrence.

The standards for determining the amount of punitive damages to be assessed against a defendant are vague. The amount is generally left to the sole discretion of the jury, guided only by certain ill-defined factors relating to the nature of the defendant's misconduct and the wealth of the defendant. The lack of standards in the rationale for assessing punitive damages prompted the United States Supreme Court to comment on the arbitrary and prejudicial nature of punitive damages awards. Justice Powell stated in Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1973):

In most jurisdictions jury discretion and the amount [of punitive damages] awarded is limited only by the general rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.

The Supreme Court of Montana has also recognized this uncertainty in the area of punitive damages. In First Bank (N.A.)--Billings v. TransAmerica Insurance Company, 679 P.2d 1217 (1984), the Court noted that, "juries and judges typically award punitives for a broad range of conduct not often described as willful or wanton, but merely reckless or unjustifiable." Id. at 1222. The Supreme Court further

stated that, "Fact-finders. . . wrestle with concepts like recklessness and reasonableness, such that defendants may not know that their conduct constituted presumed malice until after trial, and that a defendant in one case may never know of the sting of punitive damages, while another defendant in a similar case may be faced with financing a sizeable award."

In addition, punitive damages exemplify characteristics which are inherently criminal. Since you cannot put a business in jail, punitive damages punish certain conduct and ideally deter the defendant and others from engaging in similar acts. Unlike criminal actions, however, punitive damages provide none of the constitutional protections accorded to criminal defendants. These would include a unanimous jury verdict, proving that a defendant acted with fraud, oppression or malice beyond a reasonable doubt, protection against double jeopardy and the privilege against self-incrimination.

Most important, however, is the fact that every person and every employer in the State of Montana--whether they be a hospital, a local chapter of the Salvation Army, or a farmer or a rancher--is subject to punitive damages. In many instances, the business or individual cannot obtain insurance to protect himself against a punitive damage award. In many instances, there may not be insurance available to purchase for certain wrongs. For example, in many cases where an employee sues his employer for wrongfully discharging

him, the employer's general liability policy may not afford coverage to the defendant. The employer, therefore, may have to retain his own attorney and pay any judgment rendered against him. This would apply to a farmer who hired temporary help during the summer months; it would apply to a local YMCA or Boy Scout troop whose insurance policy expressly excludes punitive damages.

Recent punitive damage awards in Montana have reached astronomical proportions. They are inconsistent with contemporary justifications for imposing such damages. They conflict with other important public interests. The punitive damages law does not help the little man; it may cripple him financially for life. Punitive damages may not be a dischargeable debt in bankruptcy if the defendant's conduct was malicious or fraudulent.

WHY SHOULD A "CAP" OF THREE TIMES THE AMOUNT OF ACTUAL DAMAGES OR FIVE PERCENT OF THE NET WORTH OF EACH DEFENDANT, WHICHEVER IS LESS, BE INCLUDED IN THE NEW LAW?

While the doctrine of punitive damages has a proper place in Montana law, there is an evident and increasing danger that many defendants are being punished unjustly.

Trial judges currently have responsibility for seeing that punitive damages are applied in principled manner, but this task is far from easy to carry out given the nearly total absence of legislative guidance. In criminal proceedings, by contrast, judges are guided by both minimum and maximum penalties established by the legislature. While the

jury determines criminal liability, the judge holds a special hearing, at which time additional information is received in order to carefully determine the appropriate punishment or penalty.

In civil trials, at which punitive damages are sought, however, neither the judge nor the jury is provided with any similar guidance. Consequently, grossly inconsistent and excessive punitive damages have occurred all too frequently.

The "cap" in the proposed legislation would represent an effort by the legislature to provide some guidance for courts in balancing society's interest in using punitive damages for deterrence and punishment against equally fundamental public interests in basic fairness and economic cost. This form of legislative guidance is common. Both federal and state laws currently place ceilings on damages in particular cases.

With respect to federal law, the following limitations apply:

1) 15 U.S.C. §1640 (Truth and Lending Act). The creditor who fails to disclose required information and who fails to meet certain mitigating criteria, is subject to damages of twice the amount of the finance charge in connection with the transaction, but not in excess of \$1,000.00, nor less than \$100.00;

2) 15 U.S.C. §1691e (Equal Credit Opportunity Act) provides that a creditor who fails to comply with any requirement from the ECOA is liable for punitive damages not

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greater than \$10,000.00, or in the case of a class action, not to exceed the lesser of \$500,000.00 or one percent of the creditor's net worth;

3) 15 U.S.C. §1693m (Electronic Fund Transfers Act) states that a person failing to comply with EFTA is subject to minimum actual damages of \$100.00, but not more than \$1,000.00;

4) 15 U.S.C. §1989 (Odometer Act) provides a person who, with intent to defraud, violates odometer requirements is subject to the greater of \$1,500.00 in punitive damages, or treble damages;

5) 15 U.S.C. §1692k (Debt Collection Practices Act) provides a debt collector who violates ACPA is subject to individual action to liability for up to \$1,000.00 over injured parties' actual damages; in class actions, the maximum amount of the lesser of \$500,000.00 or one percent of the net worth of the debt collector;

6) 15 U.S.C. §15(a) (Clayton Anti-Trust Act) provides that a private anti-trust plaintiff's recovery is limited to threefold the damages by him sustained;

7) 15 U.S.C. §2051 (Consumer Products Safety Act) provides that civil penalties are limited to \$500,000.00 per defective product.

With respect to damages set by the Montana legislature, the examples are numerous:

1) Bad Checks - §27-1-717. "Damages shall be equal to the greater of \$100.00 or three times the amount for which the check, draft or order was issued. Damages may not exceed the value of the check, draft or order by more than \$500.00."

2) Breach of Agreement to Convey Real Property - §27-1-314. "The detriment caused by the breach of an agreement to convey an estate in real property is considered to be the price paid and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon. If the breach was in bad faith and the agreed price was less than the value of the estate, the detriment is also considered to include the difference between the agreed price and the value of the estate at the time of the breach and the expenses properly incurred in preparing to enter upon the land."

3) Breach of Contract - §27-1-311. "For the breach of an obligation arising from contract, the measure of damages, except when otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment which was proximately caused thereby or in the ordinary cause of things would be likely to result therefrom. Damages which are not clearly ascertainable in both their nature and origin cannot be recovered for a breach of contract."

4) Motor Vehicle Damage - §27-1-306. "The measure of damages in a case in which the cost of repairing a motor vehicle exceeds its value shall be the actual replacement

value of the motor vehicle rather than its 'book value'. Actual replacement value is the actual cash value of the motor vehicle immediately prior to the damage."

5) Appeal Without Merit - §25-33-304. Damages not exceeding 25% of the judgment appealed from.

6) Sale on Execution - §25-13-702. "An officer selling without the notice prescribed by §25-13-701 forfeits \$500.00 to the aggrieved party in addition to his actual damages; and a person willfully taking down or defacing the notice posted, if done before the sale or satisfaction of the judgment (if the judgment be satisfied before sale), forfeits \$500.00."

7) Insurance Companies--Fraternal Benefit Societies-- Misrepresentation - §33-7-518. "Any person who violates any provision of this section . . . shall in addition be liable for civil penalty in the amount of three times the sum received by such violator as compensation or commission, which penalty may be sued for and recovered by any person or society aggrieved for his or its own use and benefit in accordance with the provisions of civil practice."

8) Penalty for Deceit - §37-61-406. Attorney forfeits to the party injured by his deceit or collusion treble damages.

9) Penalty for Delay - §37-61-407. Attorney forfeits to the party injured treble damages.

10) Contribution or Expenditure Violations - §13-37-128. Person liable for an amount up to \$500.00 or three times the amount of the unlawful contributions or expenditures, whichever is greater.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 1
DATE 020585
BILL NO. S13-300

11) Motor Carriers--Procedure to Recover Excess Charges - §69-12-511. In Subsection 2 it states that if upon the trial of such action it satisfactorily appears to the court or to the jury that such an overcharge was willfully made, the person or shipper bringing the action shall be awarded damages in treble the amount of such excess or overcharge.

12) Railroads--Actions to Recover Excess Charges - §69-14-322. In subsection 1 it states that if the charge was willfully made, the person or shipper bringing the action shall be awarded damages in treble the amount of such excess or overcharge, together with the costs and expenses of the action, including reasonable attorney's fees.

13) Railroads--Maintenance of Fireguards - §69-14-722. In subsection 3 it states that if any railroad company fails to comply with any of the provisions of this section, the Board of County Commissioners of the county wherein such violation incurs may cause the neglected plowing, burning, or both to be done and may, in a suit to be brought in their name as said board and the district court having jurisdiction, recover double the amount of cost of such plowing, burning or both, with reasonable attorney fees to be fixed by the court. Such railroad company shall be liable further for all damages caused by its failure to comply with this section.

14) Regulation of Carriers--Confiscation of Fuel - §69-11-108. "Any person, railroad company, or common carrier who shall confiscate or take any coal or fuel,

either for his or its own use or for the use of another, shall be liable to the consignee or owner of such coal or fuel in double the value of such coal or fuel at the point of shipment and such other damages as may be caused by the confiscation of such coal. Such liability shall be exclusive of and in addition to any and all charges for the transportation of such coal or fuel, which charges for the transportation shall be paid by the party confiscating such coal or fuel."

"(3) Any person, corporation, or common carrier who shall violate the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than \$50.00 or more than \$200.00.

15) Liability for False Claims - §17-8-231. "A person who knowingly presents or causes to be presented a false, fictitious or fraudulent claim for allowance or payment to any state agency or its contractors forfeits the claim, including any portion that may be legitimate, and in addition, is subject to a penalty of not to exceed \$2,000.00 plus double the damages sustained by the state as a result of the false claim, including all legal costs."

16) Unfair Trade Practices--Injunctions - §30-14-222. In subsection 2 it states that in addition to such injunctive relief in violation of §30-14-205 through §30-14-218, the plaintiff is entitled to recover from the defendant three times the amount of actual damages sustained.

17) Injunctions--Damages--Production of Evidence (Consumer Protection) - §30-14-222. "(2) In addition to such injunctive relief, the plaintiff is entitled to recover from the defendant three times the amount of actual damages sustained."

18) Liability of Clerk Relating to Duties as Recorder - §7-4-2623. "A county clerk is liable to the party aggrieved for three times the amount of the damages which may be occasioned thereby. . ."

19) Offices and Employees--Itemized receipt for Fees - §7-4-2517. "[I]f he refuses or neglects to do so when required, he is liable to the party paying the same in treble the amount so paid."

20) Offices and Employees--Prohibition Upon Receiving Other Fees - §7-4-2519. "[T]he party demanding or receiving any fees not herein allowed is liable to refund the same to the party aggrieved, with treble the amount as damages, in addition to the cost of suit."

21) Elected Energy Producers License Tax--Penalty for Violation - §15-51-113. Persons shall be liable for three times the amount of the unpaid or delinquent tax in a civil action.

22) Trust and Fiduciary Relationships--Action for Misappropriation of Estate Prior to Appointment - §72-12-601 "If any person, before the granting of letters, testamentary or of administration, commits theft of or alienates any of the monies, goods, chattels, or effects of a decedent, he

is charged therewith and liable to an action by the executor or administrator of the estate for double the value of the property so mishandled to be recovered for the benefit of the estate."

23) Finder Failing to Make Discovery - §70-5-209. "If any person find any money, property or other valuable thing and fail to make discovery of the same as required by this chapter, he forfeits to the owner double the value thereof."

24) Forceable Entry and Detainer - §70-27-205. "[T]he judgment shall be rendered against the defendant, guilty of the forceable entry or forceable or unlawful detainer, for three times the amount of the damages thus assessed and of the rent found due."

25) Forceable Entry and Detainer - §70-27-206. "If a person recovers damages for a forceable or unlawful entry in or upon or detention of any building or cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed.

26) Rights and Obligations--Action for Waste - §70-16-106. "If a guardian, tenant for life or years, joint tenant, or tenant in common of real property commits waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages."

27) Rights and Obligations--Injury to Timber - §70-16-108. "For wrongful injuries to timber, trees, or underwood upon the land of another or removal thereof, the measure of damage

is three times such a sum as would compensate for the actual detriment . . ."

28) Containment of Livestock--Trespassing Animals in Herd Districts - §81-4-307. In subsection 5 it states that if the person is guilty of a misdemeanor he shall also be liable to the party entitled to such damages and charges in double the value of the stock.

29) Residential Landlord and Tenant Act--Unlawful Ouster - §70-24-411. "[T]he tenant may recover possession or terminate the rental agreement and, in either case, recover an amount not more than three months periodic rent or ~~treble~~ damages, whichever is greater."

30) Failure of Landlord to Deliver Possession - §70-24-405. "(2) If a person's failure to deliver possession is purposeful and not in good faith, and aggrieved party may recover from that person an amount not more than three months periodic rent or ~~treble~~ damages, whichever is greater."

31) Residential Landlord and Tenant Act--Holdover Remedies - §70-24-429. "[I]f the tenant's holdover is purposeful and not in good faith, the landlord may recover an amount not more than three months' periodic rent or ~~treble~~ damages, whichever is greater."

32) Residential Landlord and Tenant Act--Disposition of Personal Property Abandoned by Tenant - §70-24-430. In subsection 5 it states that if the landlord purposefully damages tenant's personal property, the landlord is liable for double damages.

SENATE JUDICIARY COMMITTEE
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33) Residential Landlord and Tenant Act--Prohibited Provision in Rental Agreement - §70-24-403. If a party purposefully uses a rental agreement containing a prohibited provision, the other party may recover in addition to his actual damages an amount up to three months' periodic rent.

34) Residential Landlord and Tenant Act--Noncompliance of Tenant - §70-24-422. In Section 4 it states that the landlord may recover actual damages and obtain injunctive relief for any noncompliance by the tenant with the rental agreement or §70-24-321. If the tenant's noncompliance is purposeful, the landlord may recover treble damages.

35) Residential Tenant Security Deposit--Wrongful Withholding of Security Deposit - §70-25-204. Subsection 1 states that any person who wrongfully withholds a residential property security deposit or any portion shall be liable in damages to the tenant in the civil action for the amount equal to double the sum determined to have been wrongfully withheld or deducted.

36) Sales and Distribution of Motor Vehicles--For Injury to Business or Property - §61-4-406. Any person who is injured in his business or property by any other person or corporation or association or partnership by reason of anything forbidden or declared to be unlawful by this part may sue and recover twofold the damages by him sustained and the cost of the suit.

37) Sales and Distribution of Motor Vehicles--Penalties - §61-4-210. In subsection 3 it states that if any new motor

vehicle dealer incurs pecuniary loss due to a violation of this part by a manufacturer, distributor, importer, or factory branch or representative or agent thereof, the dealer may recover damages therefor in a court of competent jurisdiction in amount equal to three times the loss, together with costs including reasonable attorney's fees.

38) Sales and Distribution of Motor Vehicles--Civil Damages - §61-4-137. Any dealer who suffers pecuniary loss due to a violation of §61-4-131 through §61-4-137 is entitled to damages equal to three times the loss, together with court costs and reasonable attorney's fees.

39) Parent and Child--Destruction of Property by Minors - §40-6-237. Any aggrieved party is entitled to recovery damages in a civil action in an amount not to exceed \$2,500.00 from the parents of any person under the age of 18 years who shall maliciously or willfully destroy property.

CONCLUSION

The legislature should restrain the doctrine of punitive damages ill-advised and economically devastating effects. The law is continuously changing. In the case of punitive damages, the legislature should insure the fair and responsible administration of justice by establishing reasonable damages by which appropriate conduct can be punished or deterred.

NAME: John L Hansen DATE: Feb 5, 1985

ADDRESS: Box 20913 Billings, Montana 59104

PHONE: 252-8421

REPRESENTING WHOM? Self as President of COP Construction Co

APPEARING ON WHICH PROPOSAL: SB 200

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

COMMENTS: The infinite risk under the present law ~~as~~ is unfair.

We need help and we need it now

Montana needs help and Montana needs it now

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 2 + 3

DATE 020585

BILL NO. SB 200

C O P C O N S T R U C T I O N C O.

General Contractors



AN EQUAL OPPORTUNITY EMPLOYER
P.O. BOX 20913
PHONE 406 252-8421
BILLINGS, MONTANA 59104

February 4, 1985

Senate Judiciary Committee
Montana Senate
Helena, MT 59601

Re: Senate Bill 200

Dear Senator Mazurek and Members of the Senate Judiciary Committee:

I request your support for Senate Bill 200. Montana needs to control the present unlimited punitive damages in civil actions.

At present by Section 27-1-221 MCA any individual, public servant, businessman, rancher, teacher, or professional can be sued in civil action and be assessed punitive damages that will totally wipe them out. This all on presumed guilt.

I am the president of a construction corporation that has survived the 1980 to 1983 construction depression. In 1980 the corporation did \$16,000,000 volume, in 1981 \$11,000,000, and in 1982 \$7,000,000. The corporation is closely held by individuals who actively work in the corporation. The corporation also provides a pension to its employees by an Employees Stock Ownership Trust. The employees own thirty six (36) percent of the stock through the Employees Stock Ownership Plan.

During the period of depressed business volume, employees were laid off because of the economic conditions. I personally, and the corporation, are being sued by an employee so laid off. The courts will determine the facts of the suit.

The fearful problem we cope with is that an unlimited adverse judgment based on a jury's perception of presumed guilt could wipe me out, an individual, the corporation, and the life pension of people employed by the corporation. Such an oppressive fear of such infinite exposure has caused us to attempt to negotiate the suit. We strongly feel that the employee was fairly treated. The corporation has experienced an increase in volume, and has offered re-employment to the laid-off employee. He refuses employment and continues suit.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 020585
BILL NO. SB 200

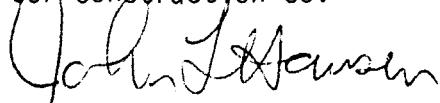
Senate Judiciary Committee
February 4, 1985
Page 2

In spite of our strong feelings of innocence in this suit, we simply cannot stand the exposure to unknown, infinite loss if a pretrial settlement can be made, however unjust we may feel the accusation. I am sure that part of the plaintiff's drive for bringing suit is that he may acquire all the assets of the corporation, of myself, and of the pension trust. To the manager of a business, or ranch, or professional corporation, or an individual, such a prospect is almost paralyzing.

I strongly request that you vote yes for Senate Bill 200 and do what is necessary to correct this unfair situation.

Very truly yours,

COP Construction Co.



John L. Hansen
President

JLH:sd

cc: Reading File #1

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 020585
BILL NO. SB 200

A&E
PARTNERSHIP
ARCHITECTS[®]

February 4, 1985

The Honorable Jack Ramirez

Re: Senate Bill 200

Dear Jack:

In Senate deliberations of the bill that I understand would limit punitive damages, I seek your strong support of such a measure. Having been one of sixteen defendants (including a District Judge) in a land development case in Bozeman, it's apparent that punitive damages have gotten way out of hand. As an example, our partnership and our realtor were recently sued for damages amounting to the purchasers cost of a particular piece of land, plus interest, and attorneys fees for a total of about \$30,000.

The plaintiff's attorney was on a contingent fee and he almost immediately wanted more for his services than his client (a young woman) was asking for damages. It appeared to be a classic case of the naive young woman against the "established" group of investors including realtors, lawyers, engineers, architects and other business people. We tried over a period of a year to negotiate a settlement to avoid the time and expense of court but each time we made an offer her attorney raised the ante. Finally they re-filed the law suit asking for \$1,000,000 in punitive damages in addition to her original actual damages.

Our final offer prior to trial was about \$45,000. The trial had been scheduled for four days, but was strung out over three weeks in an obvious effort by plaintiff's attorney to take up as much professional time as possible and confuse the jury with obscure legal rhetoric. The defense took less than a day and the jury deliberated only a couple of hours before delivering a complete defense verdict with the plaintiff getting absolutely nothing.

Plaintiff's attorney then went through a lengthy re-trial motion and now is in the process of an appeal to the Supreme Court. Our attorney fees and expenses are now over \$30,000, not counting the time and personal expenses of the defendant group.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 3

DATE 020585

BILL NO. SB 200

Chairman: Senator James A. Bos, James R. Baker, Partnership
Members: Senator William F. Willey, Members: American Businessmen
of Montana

The Honorable Jack Ramirez
Page 2
February 4, 1985

The plaintiff has, in the last week, agreed to drop the appeal if defendants agree to purchase her property at a greatly reduced value, reportedly below the \$20,000 price she originally paid. She apparently is as tired of this hassle as we are. This entire fiasco was, in my opinion, created by the possibility that the plaintiff's attorney could get a sympathetic jury to award a big punitive damage claim. In his mind it was obviously a reasonable gamble. All he had to "ante" was his time and he was having our deep pocket partnership put up all the money in the pot. His client paid the expenses and he got a big share of whatever he could convince the jury.

Fortunately the jury saw through the scam, but after three weeks of confusing and contradictory testimony it could have gone either way. The losers are the plaintiff (who at this point gets nothing) and the defendants who were innocent but got stuck with over \$60,000 in expenses. The only ones who profited were the attorneys.

I urge your support of Senate Bill 200 to restrict punitive damages and thus curtail this abuse of our legal system by unscrupulous attorneys in search of windfall fees.

Thanks for your consideration.

Sincerely,

Thomas A. Overturf

TAO:cmz

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020585
BILL NO. SB 200

Testimony for SB200
Senate Judiciary Committee

February 5, 1985

Mr. Chairman, members of the Judiciary Committee, my name is Tuck Vosburg, President of Pacific Hide & Fur Depot from Great Falls, Montana. I am testifying on behalf of our company, its employees and shareholders.

My purpose is to provide you with a brief view of what happens within a company when it is sued for a large punitive damage claim. Our company went to trial on two cases last year where large punitive damages were threatened.

Usually rumors of the possibility of a suit come to people within the company. The suit becomes fact when the complaint is served on one of us in the office. We immediately turn over the complaint to our insurance company for defense and coverage. Within days we receive a letter from the insurance company accepting limited coverage but stating, I quote from their letter, "The policy of insurance does not indemnify or cover exemplary damages. Should the plaintiff realize an award for exemplary and/or punitive damages, your client would be responsible for satisfaction of same." In Montana this denial of coverage is a common occurrence because insurance companies have already expressly excluded coverages for punitive damages in their general liability policies.

Next, discovery begins with attorneys fees clicking off and management time mounts. During discovery employees begin to hear about pieces of the suit. The possibility that the company will lose significant dollars begins to circulate around the company. Employees wonder about the effect on the company and the subsequent effect on their own jobs. Will the company have to cutback to pay the punitive damage awards? Will these cutbacks include jobs?

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 4
DATE 020585
BILL NO. SB 200

With all these pressures building, settlement becomes a stronger alternative even though the company feels it did no wrong and will win the suit. Remember, with no punitive damage coverage, the insurance company is not willing to participate to any great extent in settlement amounts.

Then we go to trial. Attorneys' fees range from \$50,000 to \$100,000, usually closer to the latter because the possibility of large punitive damages extends the case far beyond the scope the issues demand. One of our trials took four weeks to complete. Management time becomes totally committed to success at trial. Employees' concerns mount and productivity falls as they or fellow employees are called to testify. Publicity generates more talk for employees to contend with among customers and the employees' friends and family.

If we win there is some rejoicing and a great sense of relief.

If we lose, punitive damage awards could require the company to convert assets to cash to pay the award. That means lowering inventories and accounts receivable or selling equipment, buildings, and land. Cash is rarely available in these sums. Nor would the company's bank credit line be available for this purpose. The next step for the company would be to contract because its assets have been reduced. That contraction results in cutting out jobs.

And why would this happen? Because the punitive damage legislation in this state has no direct relationship with actual damages a jury determines. Additionally, large punitive damage awards against a company affect the people in that company and their jobs. People who had nothing to do with the issue in the first place.

I ask you to put some justice into the punitive damage legislation. Pass SB200!

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 4
DATE 020585
BILL NO. SB 200

NAME: Dale Allen DATE: 2/5/87

ADDRESS: Helene

PHONE: 449-4795

REPRESENTING WHOM? Mr. Hospital Assay.

APPEARING ON WHICH PROPOSAL: SB 200

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

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 5
DATE 020585
BILL NO. SB 200

February 5, 1985

Members Judiciary Committee:

Irvin E Dellinger
Executive Secretary
Montana Building Material
Dealers Association

I appear before you in favor of Senate Bill # 200

You have hear several stories on the effect of punitive damage suits have had on individual lives and their families.

Where I have been fortune and have not had this happen to me, I can relate to a story told to me by one of our dealer members.

He personally along with the company he worked for were each sued for \$1.5. He did not have this-kind of assets or insurance. For a period it disrupted his personal life as his wife felt that they were going to lose everything that they had work so hard for. He would wake up in the middle of the night hearing her sobbing. It caused many sleepless nights. Where as he had faith in the outcome, it was a very trying period in their lives. *Cost in defending himself plus legal expenses*

Carried to the
Punitive damage awards are far to excessive, ~~to the~~ amount of damage awarded. SB 200 will help rectify this problem,

I hope that you will give an affirmative vote to this bill.

Irvin E Dellinger
Irvin E Dellinger
Executive Secretary

*Cost of punitive damage now if available is costly
and has passed on to consumer
means cost are most generally passed to consumer*

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 6

DATE 020585

BILL NO. SB 200

NAME Z.H. Ells BILL NO. SB 200
ADDRESS 1735 Sierra Rd E Helena DATE 2/5/85
WHOM DO YOU REPRESENT Self
SUPPORT 2 OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 7
DATE 020585
BILL NO. SB 200

NAME: Ed M'Hugh DATE: 2-5-85

ADDRESS: 9 Cloverview Dr., Helena

PHONE: 442-0080

REPRESENTING WHOM? SELF

APPEARING ON WHICH PROPOSAL: SB 200

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

COMMENTS: My business needs this protection

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 8

DATE 02-05-85

BILL NO. SB 200

NAME: Tom Boland DATE: 2-5-85
 ADDRESS: 725 3rd Ave North Great Falls
 PHONE: 761-5595
 REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: S.B. 200

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

COMMENTS: If passed this bill would put Montana in the company of only 3 other states in this country which limit or prohibit punitive damages in a civil action.

This bill invades the province of the jury.

This bill is not needed because adequate checks on the awards of punitive damages already exist with the jury itself, the trial court judge & the Montana Supreme Court. Punitives are limited by the enormity of the wrong alleged, the intent of the wrongdoer & the wealth or ability of the wrongdoer to pay punitive. All of these criteria are considered by the jury & then

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

the trial judge who can reduce the award if he thinks its excessive & finally by the Mt. Supreme Court.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 9

DATE 020585

BILL NO. SB 200

NAME: Jim Regnier DATE: 2/5/85

ADDRESS: 3405 Bison GT Falls

PHONE: 761-5595

REPRESENTING WHOM? SELF

APPEARING ON WHICH PROPOSAL: S - 200

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

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 10
DATE 020585
BILL NO. SB 200

NAME: Sharon Morrison DATE: 2/15

ADDRESS: 100 Neil Av

PHONE: 2-8470

REPRESENTING WHOM? MTA

APPEARING ON WHICH PROPOSAL: SB 200

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE?

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 11
DATE 020585
BILL NO. SB 200

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

NAME: Jeh C Hoy DATE: 2-5

ADDRESS: Box 2807 Yet Falls

PHONE: 761-1960

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: _____

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

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 12

DATE C20585

BILL NO. SB 200



Bruce Trumper heaves a bomb off the cornice above the Country Club slopes at Big Sky. The hand charges, inset, contain about 2 pounds of gelatin dynamite.

Avalanche control takes brains and bombs

By ERIC WILTSE
Electronic Staff Writer

More than a ton of dynamite and 500 rounds of 75mm shells should blast most potential avalanches off harmless piles of snow. But Big Sky is also using computers and scientific instruments to control deadly avalanches on Lone Mountain.

front is passing through, we hardly ever get snow because we're so high up. If the wind blows from southeast, we never get snow."

to the ridge above Sundown and the South Wall where they can throw hand charges and break out cornices. Before, they had to climb there. When patrollers reach the top of the rope tow, they can clip on to a new fixed belay line for safety. Tremper also plans to install a rope tow patrolling station off the ridge where

avalanche paths along the ridge, but said the rope tow provides a backup in case the army surplus ammunition runs out.

Tremper was hired in January 1983 and has used his training in snow science and weather to improve the avalanche control program there.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 13
DATE 020585
BILL NO. SB 200



Bruce Tremper heaves a bomb off the cornice above the Country Club slopes at Big Sky. The hand charges, inset, contain about 2 pounds of gelatin dynamite.

Avalanche control takes brains and bombs

By ERIC WILTSE
Chronicle Staff Writer

More than a ton of dynamite and 500 rounds of 75mm shells should blast most potential avalanches into harmless piles of snow.

But Big Sky is also using computers and scientific instruments to control deadly avalanches on Lone Mountain.

"Avalanche control is becoming more high-tech," said Bruce Tremper, avalanche control director at the ski resort south of Bozeman. "It's not just throwing a lot of bombs any more. There's a lot more to it."

Preventing avalanches has become increasingly important at Big Sky since four people were injured and a ski patrolman killed by snow slides in 1982. Tremper was hired in January 1983 and has used his training in snow science and weather to improve the avalanche control program there.

"The program has been turned around significantly," Tremper said. "They've more than doubled manpower, almost tripled the budget and are making an effort to keep qualified people here."

The ski patrol has grown from six members in 1981-82 to 14 today. It is also an experienced patrol with an average age of 31.

The first aid and explosives budgets were about \$3,500 three seasons ago, while now about \$15,000 a year is budgeted for avalanche control.

"Actually that's a real cheap program considering how much we do," Tremper said. "Snowbird spends \$20,000 some months and has two or three times as many people (working on avalanches)."

With 47 avalanches last year, Big Sky ranks third nationally behind Alpine Meadows, Calif., and Bridger Bowl, according to Ski Patrol Director Sean Monahan.

In 1983-84, the patrol shot more than 400 rounds through its big 75mm recoilless gun, and fired about 500 the winter before. Big Sky also bought 50 cases of hand explosives for this year, containing about 2,500 pounds of gelatin dynamite.

All of that blasting power is crucial to preventing avalanches before they become dangerous, but equally important is predicting when avalanches might occur. A Commodore computer system and an anemometer sitting at 10,000 feet on Lone Mountain provide information so ski patrolmen know when potential avalanches are forming.

The anemometer measures wind speed and

"If they're predicting scattered snow for Bozeman, for example, it'll probably snow here. But if a cold front is passing through, we hardly ever get snow because we're so high up. If the wind blows from the southeast, we never get snow."

Another addition to Big Sky's avalanche arsenal is a new rope tow that rises about 800 vertical feet from the top of the triple chairlift. The tow takes patrolmen to the ridge above Sundown and the South Wall where they can throw hand charges and break off cornices. Before, they had to climb there. When patrolmen reach the top of the rope tow, they can clip on to a new fixed delay line for safety. Tremper also plans to install a rope so patrolmen can rappel off the ridge when they're done up there.

avalanche paths along the ridge, but said the rope tow provides a backup in case the army surplus ammunition he uses runs out, as has been rumored. After a new instrument is tripped on the control routes, before they can throw hand charges or break off cornices. Before, they had to climb there. When patrolmen reach the top of the rope tow, they can clip on to a new fixed delay line for safety. Tremper also plans to install a rope so patrolmen can rappel off the ridge when they're done up there.

He also shoots rounds at certain runs that are outside the area's boundaries, such as the Big Coulon in the bowl behind the triple chairlift. Big Sky allows skiers to go out of bounds if they check with the patrol and sign up first, Tremper said.

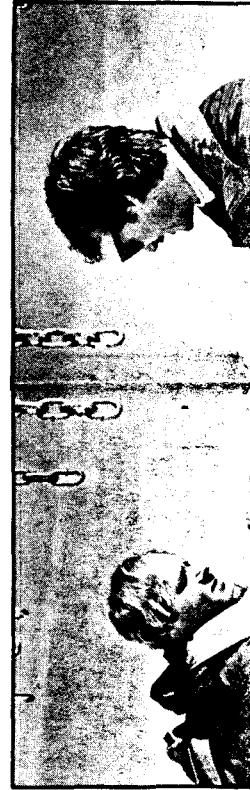
Not much control work is done on Andesite Mountain, Tremper said, because there aren't as many steep, avalanche-prone areas as on Lone Mountain. Bombs are thrown into the Snake Pit, where patrolman Dave Stutzman was killed in an avalanche in 1982. That run was closed to the public, Tremper added. Patrolmen also blast the cornice at the top of Mad Wolf in the beginning of the year.

Lone Mountain "is a very complicated mountain" for avalanche control, said Tremper, who has also worked at Bridger Bowl.

"At Bridger all the chutes faces the same direction — east. Here they face almost every different direction. It's much more complex here."

With the Lone Peak chairlift reaching 9,800 feet, Big Sky is also almost 2,000 feet higher than Bridger, he noted. "That causes colder temperatures and makes our snowpack different."

The size of the mountain also means that Big Sky patrolmen cover seven avalanche control routes, compared to four at Bridger, Tremper said. "The improvements seem to have paid off. Tremper said that since 1983 only one skier — a patrolman — has been hurt in an avalanche at Big Sky."



Rich Baerwald, right, Big Sky's certified gunner, and Tremper demonstrate the 75mm recoilless gun. The chains give Baerwald something to aim at when "blind firing" in poor visibility.

adding that Jackson Hole, Wyo., and Snowbird, Utah, are also using computers for avalanche control. A television in the patrol room receives a 24-hour-a-day weather channel that patrolmen regularly consult. Predicting mountain weather at Big Sky is crucial to forecasting avalanche hazards, Tremper said. The computer is also programmed with 11 years of avalanche data from the Forest Service's Westwide Avalanche Service.

In the future, a patrolman will be able to enter avalanche information for the day into the computer and then let the machine search through its records to find a day that had similar conditions. "Then you'll have an idea of what's going to happen when you go up the mountain," Tremper said, meteorology, has become adept at predicting mountain weather.

PROPOSED LIMITATIONS ON PUNITIVE DAMAGES

A. PURPOSE:

Since the House and Senate are deliberative bodies, this paper provides factual research regarding the following important issues:

- (1) Are there already limitations in place that prevent unjust punitive damage awards?
- (2) If so, are they working?
- (3) Are the proposed limitations necessary or will they adversely affect the purpose and effect of punitive damages?

Each of these issues are discussed separately below.

B. JUDICIAL RESTRAINTS ALREADY EXIST TO PREVENT UNJUSTIFIED AWARDS.

At the current time, no less than five separate safeguards exist to prevent unjustified punitive damage judgments. These are:

- (1) The jury cannot award punitive damages unless the defendant's conduct falls within certain definitions.
- (2) The trial court can take the case away from the jury, if the defendant's conduct does not fall within the definition which triggers punitive damages.
- (3) The jury must limit the punitive damages according to the circumstances of the case.
- (4) The trial court can eliminate a verdict if it is not justified by the circumstances.
- (5) The Supreme Court can eliminate an award if either the trial court or jury abused its' power.

Authority for each of these statements follows.

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1. The conduct necessary to trigger punitive damages is carefully defined. Punitive damages cannot be awarded unless a preponderance of the evidence shows that the defendant's conduct meets the following definitions:

The defendant "knows or has reason to know of facts which create a high degree of risk of harm to the substantial interest of another, and either deliberately proceeds to act in conscious disregard of or indifference to that risk, or recklessly proceeds in unreasonably disregard of or indifference to that risk". See Owens v. Parker Drilling Co., 41 St.Rptr. 66, 69 (1984).

Furthermore, the Montana Supreme Court has emphasized that punitive damages cannot be awarded unless the complained of conduct does, in fact, affect the "substantial interest" of the plaintiff. Owens, supra.

Thus, the jury cannot award punitive damages in every case, but only where there is a preponderance of evidence that the defendant acted "recklessly" and that said conduct invaded a "substantial interest" of a person.

2. The judge can take the case away from the jury. If there is inadequate evidence to allow the jury to determine that the defendant's conduct fits the definition set forth above, the trial court has the power and authority to disallow punitive damages altogether. This is precisely what occurred in Johnson v. Super Save Market, Inc., 41 St.Rptr. 1495 (1984). In that case, the plaintiff had been arrested because a store had complained that he had written a bad check. In reality, the store had

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negligently failed to recognize that the plaintiff had made good on the check. The jury awarded actual damages for the store's negligence which caused the arrest, but the trial court would not allow the issue of punitive damages to go to the jury. The Montana Supreme Court affirmed stating:

Conduct sufficient to support punitive damages in this case would have to meet the standard of implied malice set forth in Owens v. Parker Drilling (Mont. 1984), 676 P.2d 162, 41 St.Rptr. 66. The trial court did not feel there was sufficient evidence of reckless conduct to create a submissible issue for the jury. We agree. Id. at 1502.

Thus, the threshold hurdle for an award of punitive damages is that both the jury and the trial court must agree that the facts are sufficient to bring the defendant's conduct within the definition set forth in Owens, supra.

3. The jury's discretion is limited. Assuming that the Court and the jury find that there is sufficient evidence to award punitive damages, the jury's discretion in determining the proper amount of damages is then limited. In Lauman v. Lee, 626 P.2d 830 (Mont. 1981), the Montana Supreme Court ruled that in determining the amount of damages, the jury should consider:

Such attendant circumstances as the malice or wantonness of the act, the injury intended, the motive for the act, the manner of commission, and the deterrent affect on others, as well as defendant's wealth.

Thus, awards will be smaller if the defendant did not act with unusual harshness or did not maliciously intend to

injure the plaintiff. Moreover, if the defendant does not have a great deal of funds to pay the punitive damages, the jury must consider this and award a lesser amount of punitive damages. On the other hand, if the defendant is quite wealthy, a larger award may be needed to punish the defendant, as well as to deter others.

Suffice it to say, that the jury's discretion is limited. The factors that must be considered, allows the jury to consider the circumstances of every case rather than woodenly apply rules that may well defeat the laudatory purpose of punishment and deterrence in certain cases.

4. If the jury abuses its' discretion, the trial court can grant a new trial. All damage awards, including punitive damage awards, are subject to review for excessiveness. If the award is such that it "shock[s] the conscious and understanding of a court" it should be reduced or eliminated. See e.g., Sheehan v. DeWitt, 150 Mont. 86, 93 (1967). Moreover, as mentioned above, the trial court can reconsider the evidence and determine that the issue of punitive damages should never have gone to the jury at all. See Johnson v. Super Save, supra.

Thus, before a verdict for punitive damages can even become a judgment and be subject to review by the Montana Supreme Court, it must be upheld by the trial court, which has considerable discretion in this matter.

5. If the district court incorrectly allows a punitive damage award to stand, the Montana Supreme Court can reverse or even eliminate it. Finally, all actions of the district court and the jury are, of course, subject to review by the Montana Supreme Court. If the Montana Supreme Court determines that the facts are insufficient to show that the defendant's conduct was reckless, it can eliminate an award of punitive damages. Similarly, if the Montana Supreme Court believes that the jury acted out of passion and prejudice and the amount of the verdict "shock[s] the conscious", they can reduce or eliminate the award.

Thus, before an award of punitive damages can become a final judgment that can be collected, it must be approved by 12 jurors, one district court judge, and five to seven Supreme Court justices. As shown above, no less than five separate hurdles must be passed before the award becomes final.

C. JUDICIALLY CREATED RESTRAINTS ARE, IN FACT, WORKING.

A review of the history regarding punitive damages in Montana shows that as of this date, the above judicial restraints are working. It is true that on a few occasions in recent history, juries have awarded punitive damages in excess of a million dollars. It is also true that lawsuits are often filed in which the plaintiff requests that the jury award punitive damages in excess of

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one million dollars. However, to the current date, there has never been a final collectable judgment in the State of Montana that anywhere even approaches one million dollars. In fact, it is the undersigned's understanding that until 1984, there had never been a final collectable judgment in this state which even reached \$100,000.

The only final collectable judgment which the undersigned knows of that exceeded \$100,000 was in Gibson v. Western Fire Ins. Co., 41 St.Rptr. 1048 (1984). In that case, an insurance company knew that it was under-evaluating the value of an injury caused by the malpractice of its insured, the plaintiff, Dr. Gibson. Nevertheless, it required the case to go through the litigation process, through trial, and in the process, it destroyed the reputation of Dr. Gibson. As a consequence, the jury awarded \$400,000 in punitive damages, as well as over \$100,000 in damages to compensate Dr. Gibson for the loss to his reputation and for mental anguish. The insurance company itself was worth hundreds of millions of dollars, and therefore, the \$400,000 award constituted only a small fraction of its net worth.

It should also be mentioned that, by and large, allowing jurors to determine punitive damage awards, subject to the review by our court system, has not caused any hardships or injustices in other states either. As one author notes:

The insurance industry knows that with one recent exception (Sparks v. Republic Nat'l Life Ins. Co., Arizona Supreme Court, \$ 4,631,000.00 verdict, including \$ 3,000,000.00 punitive damages) not a single multi-million dollar bad faith punitive damage verdict against an insurance company has ever been upheld by the Court or collected by the plaintiff.

California, which has the majority of multi-million dollar verdicts, is no exception. As of this writing [1983], I believe the highest such verdict upheld on appeal is \$ 1,125,000.00, including \$ 1,000,000.00 in punitive damages.

So the specter of punishing insurance companies [or similar institutions] through punitive damage verdicts is largely in the mind of the press and the public.

See McCarthy, Punitive Damages in Bad Faith Cases (3 ed 1973).

In summary, claims for punitive damages and preliminary jury verdicts may seem high when reported in the press, but by the time the verdict goes through the many safeguards provided by our judicial system, few of them survive. No high verdicts have survived in the State of Montana. Under these circumstances, it can be concluded that the judicial safeguards are working and there is no factual basis for adding further limitations.

D. LEGISLATIVE LIMITATIONS BEING PROPOSED WILL BE HARMFUL RATHER THAN HELPFUL.

The current judicial standards allow each case to be determined on its own merits and circumstances. The gravity of the harm, the need for deterrence, and the defendant's wealth govern the amount of damages that are

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appropriate in each given case. See Lauman v. Lee, *supra*.

On the other hand, proposed legislation takes away this case by case discretion and imposes a mandatory limit on punitive damages. The mandatory guidelines will defeat the proper affect of punitive damages in many case. For instance, limiting punitive damages to three times the actual damages will provide little or no punishment and deterrence to a multi-million dollar defendant that recklessly or oppressively deprives many persons of small amounts of money. For example, if the defendant deprives a thousand persons of \$100 each and gets caught only once, it gains \$1,000,000.00 through its unlawful conduct and loses \$300 in punitive damages.

Similarly, rigidly limiting punitive damages to five percent of net wealth will have no affect on persons who have no money. For instance, one can imagine a situation where a drunk driver kills a citizen of this state, but has no economic assets. Under those circumstances, a five percent limitation would result in no punitive damages at all and consequently, neither punishment nor deterrent for this type of reprehensible conduct.

In short, the appropriateness and amount of punitive damages must be considered on a case by case basis and cannot be properly or adequately addressed by imposing rigid legislative standards.

DATED this 4th day of February, 1985.

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