

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

March 24, 1986

The first meeting of the Senate Judiciary Committee for the 49th Second Special Session was called to order at 1:05 P.M. on March 24, 1986, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present.

CONSIDERATION OF SB 1, SB 3 and SB 4: Senator Halligan, Senate District 29, Missoula, sponsor of SB 1, gave testimony in support of the bill. He stated this bill amends Article II, section 16, of the Montana Constitution to give the legislature, by a two-thirds vote of each house, the ability to impose monetary limits on legal redress currently available for injuries of persons, property and character. He stated the limits would not violate the equal protection clause that was used in the Supreme Court Decision in the Pfost case. Although the language change seems simple the bill is not. This bill relates to the smallest operator of a day care center to corporations and professional people. He would not necessarily propose that this is the solution to the problem but one alternative to get a handle on the cost and availability of insurance and provide stability in the private sector. At the present time, because of cost and availability of insurance, there are businesses closing and jobs being lost. Whether this amendment begins to address the insurance crises, will be studied and investigated in the next six months.

Senator Towe, Senate District 46, Billings, sponsor of SB 3 and SB 4, gave testimony in support of these bills. He stated this is a very complex subject and it is critical that we appoint an interim committee to study this subject. He does not feel it is wise to jump into the various proposals before we know where we are and what impact there will be. He stated it is important that the constitutional changes be addressed in this special session. The problem is clear that the availability of liability insurance protection and coverage is a critical issue facing most businesses and professional people today. Some people cannot get insurance coverage and others who can get coverage must pay a price they cannot afford to pay. With the cost of medical malpractice insurance we are likely faced with losing doctors in rural areas in Montana. He stated there are a lot of things that can be done that do not require a constitutional change and can be reviewed by an interim committee. He sees

a problem with addressing the issue in one section of the constitution. His bills address the problem in Article II, section 4 and 16 and he feels this is the best approach for the problem. His bills would provide a limit with some exceptions. He read the amendment he proposed to the committee.

PROPOSERS: Keith Colbo, Director of the State Department of Commerce, gave testimony in support of SB 1 on behalf of the Governor's office. He stated there are economic concerns that he has encountered in recent months at meetings throughout the state of Montana. They are continually bombarded by business men and women about the insurance availability and affordability. This is not a problem just in Montana but other states are dealing with the same problem. He presented the committee with a memorandum from the Governor's Council on Economic Development Insurance Subcommittee, attached as Exhibit 1, and stated that the Governor's Council is trying to address the problem and will continue to work on the problem. He said the Governor's office has received a tremendous amount of mail concerning the liability insurance problem and as a result the Governor felt this should be addressed in this special session. He stated SB 1 represents the Governor's commitment to address the concerns of the people of this state.

George Bennett, Helena attorney, attorney for the Montana Bankers Association and a spokesman for the Montana Liability Coalition, gave testimony in support of this bill. He stated we are just as concerned about the rights of victims, as are the trial lawyers, but there is a crises and it is of gigantic proportions. The banking business also has problems obtaining insurance coverage and he gave some examples of the problem. In this country we have one lawyer for every 350 people and we sue at the drop of a hat. In Japan there is one lawyer for every ten thousand people and we all know how efficient their economy is. Part of the problem is the legislature because of the nature of our tort law. In almost every other area the legislature has brought in certainty. Part of the problem in the civil liability is uncertainty created by the fact that our courts are making the law. There is nothing wrong with the development of the common law. Most of the court law is judge made and the courts have essentially said to please give us help in this area. The Coalition feels that

like any other area of the law, it is the legislature's responsibility to address what constitutes negligence, strict liability, no fault, all of the things that have to be addressed in tort reform and you can't do that under the decision of the Pfost case. Under the decision of the Pfost case, essentially everybody has the right of full legal redress and the legislature can't touch that and if the legislature attempts to step into that area for limiting something, that the Supreme Court can ignore those findings and substitute its own. The Coalition supports the concepts of the three bills presented. He stated if you have to have tort reform with a two-thirds vote you will not get tort reform. He has some concerns about the interplay of the federal constitution and the state constitution and due process, which he does not think are addressed in these bills. He stated the civil liability crises will be with us for a long time. Insurance availability and tort reform will take time. He stated the Workers' Compensation took away the employee's right to sue his employer and took away his right to a jury but it works.

Forrest Bolz, President of the Montana Chamber of Commerce, and a member of the Montana Liability Coalition, gave support of this bill in representation of the many people for the Montana Liability Coalition that were present at the hearing.

OPPONENTS: Joe Brand, Montana State Director of the United Transports Union, representing the Brotherhood of Railroad and Railline Workers, gave testimony in opposition to these bills. He stated these bills will have a great effect on the railroad workers and put them in great jeopardy if passed. He stated he would like John Hoyt to give testimony on behalf of the railroad workers in Montana.

John Hoyt, a lawyer from Great Falls, representing the United Transports Union, gave testimony in opposition to the bills. He stated many people do not realize the impact that these bills will have on the people who run our trains back and forth across the state. Railroad workers have no Workers' Compensation Insurance. In 1908 the Congress of the United States passed the FELA, which recognized that railroad workers worked in an extremely hazardous business with many injuries and provided a remedy whereby the workers could bring suit against their employer. There is no insurance. These bills would leave

the workers bare. The system would be destroyed by what is proposed by this legislative hearing. He does feel there is a problem of insurance availability. He stated these bills will not alter the availability of insurance, they will not speed it up or slow it down.

Jim Murry, Executive Secretary of the Montana State AFL-CIO, gave testimony in opposition to these bills. He stated that he did not appear as an expert on the issue of insurance and liability under the law but he does appear with reservations to change the state constitution to allow the legislature to limit liability. He represents the little guy whose only redress is through the courts. Any attempt to limit that redress should be given very careful thought and consideration. He feels that before this is done the insurance industry should give the legislature and the people of Montana proof that insurance coverage will be available to those that cannot get it and that insurance rates will be impacted in favor of consumers of Montana.

Gary Hendricks, a wheelchair victim due to an unsafe product accident, gave testimony in opposition to these bills. His only recourse for the negligence that rendered him a wheelchair victim for life, was to the courts and if the constitution is changed to limit liability then the legislature would be denying full redress, which the constitution now guarantees. Redress to the courts for liability addresses the monetary aspect but the quality of life is also a factor. He referred to a book entitled "Outrageous Misconduct", written by a journalist from The New Yorker, which explains why insurance companies are unjustified in not insuring and their rates. The book states that the crisis is mostly made up and that doctors are in fact against limiting liability. He closed by stating if you restrict the amount of redress, you are taking away part of the judiciary process.

Kelly Jean Beard, representing the Women's Law Caucus from the University of Montana School of Law, gave testimony in opposition to these bills. A copy of her testimony is attached as Exhibit 2.

Kim Wilson, representing the Montana Chapter of the American Civil Liberties Union, gave testimony in opposition to these bills. He feels very strongly that these amendments will limit civil liberties of Montana citizens. Regardless of who is to blame for the current crisis the injured party

will be the actual victim if the amendments are passed. The bills raise three major constitutional problems: 1) the bills will weaken the victim's rights to a trial by jury, 2) will limit the constitutional right to redress, and 3) will allow affordability for corporate and private businesses to drop their standard in safe products and working places. If the victim of an accident does not receive full compensation for injuries from the responsible party and is unable to continue work in his normal manner, the taxpayers will be responsible for the injured party and his welfare. He would urge the legislature to study the issue before limiting constitutional rights.

Terry Trieweller, attorney from Whitefish, Montana, gave testimony in opposition to these bills. A copy of his statement is attached as Exhibit 3.

Bill Rossbach, attorney from Missoula, President of Montana Trial Lawyers, gave testimony in opposition to these bills. In these bills we are talking about a method to limit liability and as a result we are talking about limiting the rights of a person who has suffered catastrophic injuries. These are the people who will be taxpayer burdens instead of the wrongdoer's burden. If the constitution is changed, is there any proof insurance companies will insure where they would not before or that their rates will be reduced. He questioned the need for this amendment. The Medical Association came out last week in favor of a study of the situation. The insurance companies are pushing us into a panic situation. He closed by stating there is support for a study committee.

George Ochenski, Montana Environmental Information Center, gave testimony in opposition to these bills. He stated that Montana Power is going full steam ahead in developing a hazardous waste area that will service a five state area and the long range plan is for a nine state area. He does not feel that we can afford a limited liability policy in view of this.

QUESTIONS FROM THE COMMITTEE: Senator Mazurek said the hearing focused on insurance availability and rates and it was suggested that there could be some changes in other areas such as wrongful discharge and tavern owner liability. He would like Mr. Hoyt and Mr. Bennett to respond to the question of whether or not the legislature can act in areas other than setting limits or monetary caps without a constitutional amendment.

Mr. Bennett said his understanding of the Pfozt and White cases is that it is absolutely necessary in Montana for any kind of tort reform to have a constitutional amendment. Put basically, the court has said that there is an absolute right of full legal redress in Montana. His feeling is that what we have is a power struggle between the court and the legislature as to where public policy will be made.

Mr. Hoyt responded by reviewing several cases with the committee and stating that the legislature can do anything that addresses a legitimate state interest. He suggests that the legislature look to the law to solve the problem. That we should use the laws because they are there to be used.

Senator Shaw asked Mr. Hoyt if we would be in the same liability problem as we are today under the old constitution. Has the new constitution changed the concept so that it made it easier to collect compensation?

Mr. Hoyt said we would have gotten to the same point as we are regardless. The constitution has always attempted to guarantee the rights of the individual.

Senator Towe asked Mr. Hoyt if in view of the language on page 20 of the Pfozt decision, which states, "Under the record in this case, we doubt that the legislature could pass even the lenient rational basis test but we do not reach that argument here." and other language throughout the decision, if he thought that any limitation on private liability would pass constitutional muster in view of that language.

Mr. Hoyt said that without being asked a special situation it is difficult to answer. He is convinced that this legislature can do almost anything that is legitimately in the welfare of the interest of our people.

Senator Towe asked Mr. Rossbach if his organization of trial lawyers would still agree to the package agreed to with the independent insurance agents.

Mr. Rossbach stated their understanding with the independent insurance agents was based upon a common opposition to the amendment. His organization is committed to working with the medical association and independent insurance

associations that will have a positive effect for the citizens of Montana. The problem is this hasn't been demonstrated. If it can be demonstrated to have a legitimate effect then it will be upheld.

Senator Towe said he questions whether an agreement commitment to work on some of the other matters might not be more important than a constitutional amendment. He asked Mr. Bennet to respond.

Mr. Bennett does not feel the legislature has to justify by evidence its legislation and show that it is required by a compelling public interest.

Senator Blaylock asked Mr. Hoyt if he felt that the legislature can do whatever it wants to do.

Mr. Hoyt said if it is reasonable and in the interest of the citizens.

Senator Blaylock asked Mr. Hoyt to explain the Supreme Court's action in the Pfost case.

Mr. Hoyt said the legislature passed legislation which does not demonstrate a compelling state interest. The state can be made the compelling interest and then it will be constitutional. All the Pfost case is saying is if you are going to discriminate you must do it legally.

Senator Crippen said Mr. Rossbach had eluded to a proposed agreement by independent insurance agents and trial lawyers relating to certain issues. He asked Mr. Rossbach how that related to the public liability issue in the proposed amendment that we have to work and the stand of trial lawyers.

Mr. Rossbach said we didn't take a position on that at that point. The agreement did not take a position on public liability. He stated we have not seen the language of the public liability proposal to be able to perform an official position on public liability. He said there is a big difference between the public sector and the private sector.

Senator Crippen asked Mr. Rossbach if his organization would look kinder on limits that are constitutional.

Mr. Rossbach said he could not speak for the organization specifically but the feeling is different between state and private.

Senator Crippen stated he is concerned for the ability of an injured party to seek adequate redress whether that person be a public employee or an individual with private cover. He asked Mr. Rossbach if he was suggesting that the public employee should not receive the same amount of compensation redress as the one under the private cover given the same circumstances.

Mr. Rossbach said our position has been and is that if there are demonstrable, actuary, economic justification for alteration in the right of redress, they would have to be seriously considered.

Senator Crippen asked how that could be explained to the city employee.

Mr. Rossbach said in the confines of the state of Montana, it is his understanding that there has never been a claim, outside the Jock case, other than the Pfost case, in excess of \$300,000 anyway. Maybe there is justification for limits from the state. The problem is we do not have a basis for making a legitimate decision.

Senator Crippen said what you are saying to me is there is a difference between the private sector and the public because the private sector would be able to pay. He asked Mr. Rossbach if what he really was saying is that it is the ability to pay and not the right to obtain insurance and the cost of insurance, as has been testified to today.

Mr. Rossbach said it is not necessarily the ability to pay. The question is the ability to actually conduct the business of insurance. The business of insurance is selling large amounts of premiums with the risk value involved. With the county it is because you have a definite resource. It is important to recognize the difference between the private and public sector.

Senator Pineseault asked Mr. Rossbach why the agreement fell through with the insurance agents.

Mr. Rossbach said he did not know the answer to that.

CLOSING STATEMENTS: Senator Halligan closed by stating, given the language of the Supreme Court Decision, any limits imposed by the legislature would never pass a

concerned state interest test. We have to do something with the constitutional language. He stated there are business failures and job losses. Important vital services are being eliminated or curtailed because they cannot provide themselves with liability insurance. It is not his intent, as sponsor, that this referendum, if passed and adopted by the people, be viewed as an absolute license for the legislature to ignore the rights of victims of catastrophic injury or to shift the burden of paying for someone else's negligence onto the families of victims or the victims themselves. He stated by protecting each person's access to the court system of legal redress we can accomplish the liability issue stability.

Senator Towe closed by stating we have seen that this is a complex issue and it will not be solved overnight. Maybe it would be best to go back to the agreement that was worked out between the trial attorneys and the independent insurance agents and implement that agreement. He has some questions about how effective limitations will be. He stated this is a constitutional amendment and still needs a two-thirds vote of the legislature to implement and may be necessary in view of the language in the court decision. We have to recognize that a problem exists and this deals with the problem.

There being no further business to come before the committee, the meeting was adjourned at 3:20 P.M.


COMMITTEE CHAIRMAN

ROLL CALL

SENATE JUDICIARY

COMMITTEE

49th SECOND SPECIAL LEGISLATIVE SESSION - 1986

Date 3-24-86

[illegible]

DATE

March 24, 1986

COMMITTEE ON

SENATE JUDICIARY

VISITORS' REGISTER

SB 1, SB 3, SB 4

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Kelly Jean Bland	Ps low concn. J.M.	1		X
John C Hoyt	Self & U.T.U.	3, 4, 15		X
Keith L. Colbo	Commerce Dept	1	X	
F.H. BOLES	MONTANA CHAMBER	1		
GOV. T. Bennett	LIABILITY COALITION	1	X	
Marie Durkee	Mont. Tobacco Assoc	1	X	
Boris Durkee	" " "	1	X	
Deep Abetz	Montana N.E. Co. Pres.	1	X	
JOHN + MARY ALSTAD	INSUR ADVERS	1	X	
David Hughes	Service Supply			
Ernest Toffe				
Debra Hanson	Out Back Comm. Workers			
George Allen	Mt. Retail Comm.			
T.M. Rollins	ASARCO, INC	1	X	
Deborah K Brammer	MACD	1	X	
Robert ORREA	Boys. Chamber of Comm.	1	X	
Gordon Morris	MA Co.	1	X	
Bob Mullen	MA Co. Richland Co	1	X	
Lillian Leary	MHA, Helena	1	X	
Joe Brandt	U.T.U.	34 15		X
Kim S. Williams	UNITED - ALSO.			
Kim Wilken	ACLU	1345		X
John H. Hyslop	Dept. of Commerce			
Kim Waterman	USF	1	✓	
Carl Enomoto	USF	1	✓	

(Please leave prepared statement with Secretary)

March 24, 1986

SENATE JUDICIARY

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
J. Riley Johnson	PIA & NFIB	1	X	
Thomas Garry	NCCIA	1		
Chip Erdmann	MSBA	5	X w/ changes	
Bonnie Jorgensen	Ad. Home & H. Council			
Bob Pyfer	Mont. Grp. Home Indus. Assoc	1		
Sharon Morrison	Ins. Guar. Assoc. MIA			
George Ochenski	Mt. Env. Inf. Center	1,345		✓
James D. Jensen	Mt. Environmental App. Center	1,345		X
Jim Thacker	Nat. Indus. Assoc	1,345		
Jim Murray	Mont. State AFL-CIO	"		X

(Please leave prepared statement with Secretary)

GOVERNOR'S COUNCIL ON ECONOMIC DEVELOPMENT
INSURANCE SUBCOMMITTEE

March 24, 1986

MEMORANDUM

TO: Judiciary Committee
 Montana Senate

FROM: Kay Foster, Chairperson

RE: Referenda on Private and Public Liability Caps

The Insurance Subcommittee of the Governor's Council on Economic Development has held extensive deliberative sessions and has heard a great deal of informed testimony on the crisis related to liability insurance in Montana. While we are not yet in the final stages of preparing specific recommendations on this complex problem, we have arrived at some preliminary conclusions regarding the issues of public and private liability caps.

The subcommittee recommends that referenda on giving the Legislature authority to enact both private and public caps be placed before the voters. However, the subcommittee also recommends that the issues be presented as separate referenda items.

These conclusions were reached after hearing the viewpoints of defense and plaintiffs' attorneys, the Montana Trial Lawyers Associations, representatives of the insurance industry, and representatives of the Insurance Commissioner and the Office of the Governor.

Because the insurance crisis is causing such widespread damage to the operations of public and private entities statewide, the legislature must have before it the best range of possible solutions to bring the situation under control. The authority to enact liability caps may prove to be a vital tool in the control process.

Keeping public and private caps separate in presenting referenda to the electorate will allow the clearest presentation of the issues without the cloud of additional legal problems. Sufficient testimony was received to convince the subcommittee that the issues are so inherently different in terms of passing constitutional muster that combining them in one referendum is not advisable.

Please accept this as the subcommittee's formal testimony as part of the legislative process during this special session. Feel free to contact me through the Department of Commerce if we can provide further information.

SENATE-JUDICIARY-COMMITTEE
EXHIBIT NO. 1
DATE 032486
FILE NO. SB1

Submitted by Keith Colbo

ADDRESS: _____

PHONE: 441 2027 1458125

REPRESENTING WHOM? _____

APPEARING ON WHICH PROPOSAL: 051

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

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Specimens attached

CHARGE INDICTMENT COMMITTEE

2

032486

CALL NO. SB1, SB3, SB4

TESTIMONY IN OPPOSITION TO SENATE BILL _____

March 24, 1986

My name is Kelly Jean Beard, and I am representing the Women's Law Caucus from the University of Montana School of Law. The Women's Law Caucus opposes SB_____, as a nugatory and irresponsible way to address tort reform.

One of the fundamental tenets of our judicial system is that every wrong should have a right, and those who commit wrongs should be held accountable for their actions. This fundamental right is secured by the consitutional guarantee of full legal redress. The Montana Constitution, Article II, Section 16. Legislation designed to deny the rights of individuals as guaranteed by our consitution must be deflected by responsible legislators.

Recently, a journalist from the New Yorker visited the University of Montana and shared a story of corporate misconduct that I'd like to share with you. The manufacturers of D.E.S. had been testing the drug in England for about six months when the 20 men working in their laboratories became impotent and started to develop breasts. Instead of heeding this blaring cautionary signal, the manufacturers let the 20 men go, hired women replacements, and continued to test the drug that we all know was ultimately marketed with horrifying results.

We cannot afford a system that allows conduct like this to exist with impunity. We cannot afford legislation that paves a path toward an administrative no-fault system designed to

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 2

DATE 032486

BILL NO. SB1, SB3, SB4

insulate corporate or individual misconduct at the expense of people.

Nor can we afford a system that harbors the insidious discriminatory effect evident in this legislation. Should caps be placed on "non-economic" benefits, women clearly stand to suffer disproportionately. For example, suppose a faulty light fixture fell on heart surgeon while he was standing in line at the bank. Now this heart surgeon makes \$150,000/yr., so when he takes the case to court, he receives compensation for his economic loss for the next ten years. Now imagine a homemaker who focuses her life on non-economic intangibles such as volunteer work, and primary child care, standing in line at the bank and that faulty fixture falls and injures her. If she goes to court in a system that recognizes economic but not non-economic losses, one readily sees the huge disparity between damages granted to the heart surgeon and damages granted to the homemaker. We must not allow a system of feigned justice that validates the myth that homemakers or women or any class of persons is less valuable and therefore less compensable as a matter of law.

I understand that the insurance industry has effectively frightened or angered some of the people in this state---your constituents---- into writing or calling you in support of this legislation. All over the state people are upset about the skyrocketing costs of insurance, and they're looking for someone to blame, some easy answer that will take care of their premium problems. So we hear the stories of how multimillion

SENATE HUSBAND C. HOUSE

EXHIBIT NO. 2

DATE 032486

SAL NO. SB1, SB3, SB4

dollar awards are being granted for hangnails, and these huge verdicts are leading us to ruin. But it's important to pause here a moment and reflect on who these lunatics are that are throwing all this money away on hangnails. They're jurors. Men and women from your community---men and women selected from voter registration lists. Men and women, who for the most part probably have families, jobs, and pay their own insurance premiums. This legislation is telling jurors, who are voters in your districts--- that although they are bright enough to vote for their legislators, they are not bright enough to sit on a panel with their peers and decide from the specific facts before them, fair compensation for someone's injuries.

The tort system is unquestionably imperfect. But the bottom line is, the courts remain the last resort for people needing redress, and that last resort should not be circumvented unless informed interim study is conducted for this body. Right now, we just don't have the facts. The insurance industry must allow this body to peer behind the corporate veil to discover whether or not their assertions are justified based on actual claims.

One of the legislators from the Bitterroot told a friend of mine that he was raised with the idea that the Bible and the constitution are sacred, and you shouldn't destroy either at will or at whim. On behalf of the Women's Law Caucus, I'd like to reiterate his sentiment. I urge you to support the resolution to study this issue, and to abandon SB____. A fast

SENATE JOURNAL
JOURNAL NO. 2
DATE 032486
BILL NO. SB1, SB3, SB4

and faulty identification of the problem will surely result in
a fast faulty solution.

SERIAL NUMBER 0000000000

EXPIRY NO. 2

DATE 03 24 86

REF NO. SB1, SB 3, SB 4

STATEMENT TO SENATE JUDICIARY

The Constitution is a very important document.

The Constitution establishes certain rights which are so fundamental that we consider them too important to be taken away by the whims of a mob. And I do consider the coalition headed by Mr. Boles similar to a mob.

It is a group of people who are angry over some perceived danger and demand action whether or not that action is a reasonable solution to their problem.

You are now being asked to amend the Constitution. You are being asked to take away the Constitution's guarantee to full legal redress for people who are victims or are injured by another person's unlawful act.

You are being told that there is an insurance crisis in Montana and there may be.

You are being told that insurance costs are doubling and tripling over the past year or two, and that may be true.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3

DATE 032486

FILE NO. SB1, SB3, SB4

¹Submitted by Terry Trieweiler

You are being told that liability insurance is unavailable to people in some businesses and to some forms of local government and that may be true.

However, you are also being told that these problems result from laws and Court decisions and Jury Verdicts in the State of Montana, and that is simply not true.

You are being asked to change these laws in an effort to solve the problem. However, you have absolutely no actuarial data that would permit you to conclude that by taking such a drastic step as amending our Constitution and changing our laws you would improve the current insurance situation by even 1%.

You have no data which indicates the average jury verdict in Montana over the past five years. My understanding from a jury verdict research group is that Montana's jury verdicts are below the National average.

You have no data to tell you the rate at which jury verdicts in Montana have increased over the past five years. My understanding is that Montana verdicts in comparison to other states have actually lessened over the past year.

You have no information regarding the value of the average settlement in Montana over the past five years.

You have no information about the rate at which settlements for similar claims have increased over the past five years.

You have no information comparing the amount of premium dollars taken out of Montana by insurance companies to the amount of claims paid in Montana by insurance companies.

You don't have one bit of actuarial information that would permit you to conclude what part claims made in Montana have played in these radical rate increases.

You haven't yet even attempted to find out what role interest rates, that is the money that insurance companies are able to earn on their reserves, have played in the sudden unavailability of insurance and the sudden radical increases in insurance rates.

Neither have you made any effort, nor do you know, what role poor underwriting policies have had in the sudden radical increases in rates. For example, a few years ago, when returns on investments were 15% to 20%, insurance companies wrote a lot

of high risk policies on which they are now paying claims. These are policies that they wouldn't have written during periods of lower interest. They were simply written in an effort to raise money to invest, rather than for prudent underwriting considerations.

Before you can take rights as fundamental as those in our Constitution and throw them away for all of our futures, don't you think you owe it to the people of Montana to at least get the answers to these questions so that you can assure them that the measures you take are reasonably related to some solution to the problem that they are complaining about?

I wholly concur in the Montana Medical Association's call for the establishment of an interim committee with subpoena powers, if necessary, to gather the information that would enable you to answer these questions before you determine whether a Constitutional amendment is necessary and before you determine what, if any, corrective legislation is necessary to solve the problems that you have heard people complain about.

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032486
SB1, SB3, SB4

Based upon what I have heard from other Bar Presidents around the country, I think you will find that it is not Montana's laws or Court decisions which are responsible for the current insurance crises. Let me give you a few examples:

1. In 1979, the State of Wyoming placed a cap of \$500,000.00 on all claims against the State or other governmental entities. In 1984, the premiums paid for governmental liability coverage in Wyoming amounted to \$1.2 million. Of that amount, \$296,000.00 was paid out in claims and yet, in 1986, in Wyoming, liability coverage for municipalities is unavailable.

2. In South Dakota, they have sovereign immunity. You can't make claims against the government at all, except in very rare circumstances, and yet, in 1986, municipalities are unable to get liability coverage.

Several years ago the South Dakota Supreme Court held that you could make claims against bar owners for injuries caused by their patrons when they were intoxicated. The South Dakota legislature immediately reversed that decision and gave bar owners immunity regardless of their conduct.

3
032486
SB1, SB3, SB4

In spite of that legislation, last year, bar owners in South Dakota experienced radical increases in the cost of their liability insurance coverage.

3. In Montana, lawyers are faced with the same 200% to 700% increases in their liability premiums that all other professions are facing, and yet, to my knowledge, there has never been a malpractice verdict against an attorney in the State of Montana. Neither have there been claims paid out for malpractice by attorneys to justify those kinds of increases.

4. Over 10 years ago, the State of Indiana enacted severe limitations on malpractice claims that could be made against doctors. Practically a model of what the American Medical Association is pushing in legislatures all over the country and yet, Indiana's malpractice rates are doubling and tripling and coverage is unavailable to many doctors.

5. Canada is a model of tort reform. For years, they have had restrictions on attorney's fees, caps on general damages, no collateral source rule, and more restrictive statutes of limitations. Yet, they are experiencing the same radical

increases in rates and unavailability of insurance that we are experiencing in Montana.

6. The State of New Hampshire does not and never has permitted juries to award punitive damages. Neither has there ever been in the State of New Hampshire a significant verdict against a doctor for malpractice. And yet, insurance companies are pulling out of New Hampshire, municipalities can't get insurance coverage even though they are very protected against claims, and doctor's premiums are escalating dramatically in the State of New Hampshire.

All of these unexplainable crises and hardships are occurring while in 1985 the property and casualty insurance industry earned profits of \$6.6 billion.

I agree that something is wrong. I agree that this is an appropriate area for the legislature to take action. I simply suggest that before you members of the legislature are overcome by the hysteria that has been whipped up by the mob led by Buck Boles, you get at the facts and find out the real causes for the problems that people are experiencing before changing a

Constitution and wiping out laws that have been part of our American traditions for 100 to 200 years, and which may not, in any way, be to blame for the current problems that people are experiencing.

DATE 11/11/11
PAGE 3
CASE 032486
FILE SB1, SB3, SB4