MINUTES OF THE MEETING
BUSINESS & INDUSTRY COMMITTEE
MONTANA STATE SENATE

March 9, 1987

The thirtieth meeting of the Business & Industry Committee was called to order by Chairman Allen C. Kolstad on Monday, March 9, 1987 at 10 a.m. in Room 410 of the Capitol.

ROLL CALL: All committee members were present with the exception of Sen. Williams who was excused.

CONSIDERATION OF HOUSE BILL NO. 240: Rep. Fred Thomas, House District 62, Stevensville and Florence, chief sponsor, said the bill generally reforms and updates the Unfair Claim Practices Act of Montana. The bill provides that an insured or third-party claimant has a separate cause of action against an insurer for certain unfair claim settlement practices. The insured who suffers damages as the result of the mishandling of an insurance claim may bring an action only for breach of the insurance contract, for fraud, under the provisions of this bill and not under any other theory of recovery. The insurer is not liable under this bill if the insurer had a reasonable basis in law or fact for contesting a claim. A third-party claimant may not file an action under this bill until the underlying claim is resolved.

He said the biggest thing it does with the Unfair Claim Practices Act is it increases the fine for being guilty of such from $5,000 to $25,000 in order to bring it into further compliance with this Act.

PROPONENTS: Jim Robischon, Montana Liability Coalition, appeared in support of HB 240. He referred to section 33-18-201 which was the main subject of the legislation and initially adopted by the legislature as a regulatory statute in which it set forth certain claims practices by insurance companies that should be proscribed and prohibited insurance companies from engaging in these practices with reference to their insureds as a general business practice. He gave further background of the Act. The Supreme Court interpreted the statute as creating a cause of action both in the insured and in third-party against the insurance company. He said that HB 240 attempts to settle some of the questions that have been presented in the cases that have been prosecuted in the courts since the Cloudt v. Flink decision. He touched essentially, section by section, on what was provided for in HB 240. He said the bill provides for an updated procedure. He urged passage of the bill.

Randy Gray, representing State Farm Insurance and the National Association of Independent Insurers, said the insurance bad faith climate in Montana had, more than any other single cause, discouraged insurance companies from doing business in the state in the past four years since the Supreme Court decision in 1983. He said they believed the legislature and not the court should be addressing the question of the recovery system under bad faith

in Montana. He said the problem with bad faith is particularly acute in low limits insurance cases and the problem comes up very frequently in automobile liability coverage, which everybody has to have in the amount of at least 25/50,000. The insurance companies settle, in many cases for the $25,000, because they feel if they don't they expose themselves to much greater amounts of awards for bad faith. This spill-over effect is causing low limits claims to be settled for more than what they are really worth. He said for these reasons the insurance industry strongly supported HB 240, however, he stated the bill didn't go nearly as far as they would like it to; the bill has been substantially watered down from the introduced version, but even so they felt it was an improvement over the present law. He mentioned that HB 442, the punitive damage bill, in conjunction with this bad faith bill, will improve the insurance climate in the state and would attract more companies to do business here. He said he was reluctantly proposing an amendment having to do with the $25,000 fine authority of the commission. He said they have no objection to the $25,000 fine but they did have an objection to the fine authority as presently contained in the bill because that fine authority would apply to any violations of the insurance code, not just violations of the Fair Claims Practices Act. He closed his testimony stating that State Farm and the NAIA strongly supported the bill with his amendment.

Thomas A. Grau, partner in Century Agency, Great Falls, said there has been no single incident in the last five years that has had a greater impact than the development of the tort of bad faith. This has caused markets to seriously consider the continued interest in doing business in the state of Montana and has adverseley affected him and many of his clients. He said he knew of two companies that have ceased to do business in the state. Since the tort has been developed it has swung the pendulum clearly in favor of the plaintiff and has put undue burdens on the companies. The single biggest implication is that tort, as developed by the Court, did not set a standard of conduct under which it could measure conduct. He said he thought the bill was a first step in establishing a code of conduct that companies could have to view and act upon and believe they would then be in compliance with the laws of the state. He asked that the committee seriously consider passage of the bill.

Ralph Yeager, Governor's Council on Economic Development, Department of Commerce, appeared on behalf of the Council. He said the Council, through its subcommittee on insurance, spent nine months studying tort reform and liability insurance issues. They developed a recommendation in the area of bad faith calling upon the legislature to develop clear and more concise definitions of bad faith as it pertains to insurance claims, policies with financial institutions and wrongful discharge. The Council felt that HB 240 would go a long way toward alleviating some of the problems associated with insurance bad

faith and urged the committee to support the bill.

OPPONENTS: Carl Englund, Montana Trial Lawyers Association, said they primarily represent the insured persons. He said HB 240 deals with what has been described as insurance bad faith and what is really properly described as the right to a private cause of action for lawsuit by someone who has been injured by the failure of an insurance company to comply with the Unfair Claims Practices Act, a 1977 law requiring companies to do and not do certain things to their insured and to people who are injured by the insured. The important part of the bill is found on pages 2, 3 and the top part of page 4 which lists all of the things that are prohibited. To this day, the Act is not vigorously enforced by the insurance commissioner. He went through the Cloudt v. Flink case which was taken to the Supreme Court. This was the first time that the insurance company had been sued, besides the insured, for its failure to comply with the provisions of the Unfair Claims Practices Act and, in particular with #6 which requires an insurer to effectuate settlement after liability has become reasonably clear. This case asked the Supreme Court the question of whether or not the Unfair Claims Practices Act created a private right of action in someone who is injured by a violation of the Act and the Court answered affirmatively in 1983. He said that justice delayed is often justice denied and public policy calls for a meaningful solution to the problem. The Cloudt decision and those following it are the most important decisions for consumers of insurance and for injured persons in the state. They stand for one very simple proposition; insurance companies must abide by the Unfair Claims Practices Act and if they don't they're in big trouble. He said that HB 240 would take some of the teeth out of the law, however, not all. It would do that by limiting the kinds of prohibitive acts which give rise to an individual or a private cause of action and urged the committee to give the bill a do not pass recommendation.

John Hoyt, attorney from Great Falls, said they were not active in the Montana Trial Lawyers Association but were independent attorneys and were at the hearing because they believe independent attorneys need to be heard. He said, after listening to the testimony from both sides, he had a couple of comments. First of all, he said, if a bill is a good bill it has to be fair and workable and that means fair to both parties. He said the insurance companies have an insurance claims settlement manual and everything is set forth in these manuals that is now in the statutes before this bill. They know when they are doing wrong and they know what they have to do to do things right. They are professionals and they know all about this. He said as far as the pendulum swinging toward the claimant, that is rapidly swinging in favor of the insurance industry and the committee should recommend legislation only that is good and if necessary and didn't think the bill was necessary at all. He asked if the committee was going to consider the bill that they consider putting into it the things that are going to protect the consumer

from an insurance company that wants to get away with something it shouldn't. That only affects a few insurance companies; most of the insurance companies in Montana are pretty good and would not be affected by this bill.

DISCUSSION OF HOUSE BILL NO. 240: Chairman Kolstad called for questions from the committee.

Sen. Neuman asked Mr. Hoyt if he had any specific suggestions as to what should be put into the bill to protect the consumer. Mr. Hoyt said he noticed some very large voids in the bill and referred to section 3, page 5, part 3, line 15 - the language says that an insured who has suffered damage as the result of the handling of an insurance claim may bring an action against the insurer for the breach of the contract. One of the worst and most vicious things that happens in our society, and not only insurance companies, is attempted fraud and when there is fraud that is consumated, somebody gets hurt. This provides no action against the insurance company for trying to disobey the law, trying to do things wrong and trying to injure others. If there was such a provision provided, it would be more acceptable. He also said sections 7 and 8 should certainly be in the bill.

Sen. Neuman asked Mr. Robischon to respond to Mr. Hoyt's statement. Mr. Robischon said fraud has to be manifested in several different ways and in several different acts. If the committee would review (a) at line 6 on page 2 of the bill, this is one of the causes of action that is recognized specifically by the bill; prohibiting insurance companies from misrepresenting pertinent facts or insurance policy provisions relating to coverage it issues. Clearly, these facts could be what he believed Mr. Hoyt was describing as attempted fraud, and as you look down these other areas that are specifically being carried over, you'll see again factual situations and relationships that would probably be the grounds for the so-called attempted fraud.

Sen. Neuman then asked Mr. Robischon if the commissioner fined a company for a violation of this Act, could the insurance company then argue that they couldn't be sued by the insured because they had already paid the penalty for the wrong-doing. Mr. Robischon said that wasn't true, however, in the original version of the bill introduced in the House there was that alternative type of remedy set out but it is not in the bill at the present time. The insurance commissioner's actions sanctions a separate, apart from, and in addition to, the rights that are being created under the bill.

Sen. Neuman asked if the $25,000 is a steep enough fine for violation of the other sections. Mr. Robischon stated that at the hearings in the House committee, the increase of the fine was discussed and the testimony was for whatever value, this amount should get the attention of the insurance company as to the commissioner's sanctions. He said to also keep in mind that

this is in addition to liabilities that would be imposed under the Fair Claims Practices Act.

Sen. Neuman asked Mr. Robischon, of the sections that are not enumerated in the bill, if there are problems, then the only recovery comes to the auditor's ability to fine for violations of those sections 2, 3, 6 or whatever sections that are not enumerated. Mr. Robischon said that was not true and the provisions for sanctions apply to all the subsections of the Act. Sen. Neuman then stated that if someone who is injured can't bring an action because of #7 or #8, that are not in the bill, could they complain to the auditor and she could then fine the company. Mr. Robischon answered affirmatively.

Sen. Walker asked Rep. Thomas to refer to page 6, lines 6-9, where it stated an insurer was not being held liable under this section, if the insurer had a reasonable basis in law or in fact for contesting the claim - he said he did not have much problem with that but asked why the words "or in fact" on line 8 are in there and said it appeared to him to be pretty loose. Rep. Thomas deferred to Mr. Robischon who explained that there are two issues that could be presented by an insurance company as a justification for what they had done. One would be that there is a dispute as to the factual situation; that the facts alleged by the third party are not the true facts. The other would be assuming that the facts are agreed to, or there is no dispute as to the facts, then there could be a dispute as to in law, whether or not on the basis of those agreed facts, there was a reason for denying the claim. So, it deals with the factual aspects and the legal aspects of the claim.

Sen. Walker asked if the factual aspect isn't taken care of under a contractual agreement. Mr. Robischon said this section deals more with the third party claims and that is a claim in which there is a claim against the insured for negligence and there is a dispute surrounding the facts of the accident that gives rise to the claim of negligence. This is directed more toward the third party claim than it is to the first party insured.

Sen. Walker inquired of Mr. Hoyt if this would leave some loop-holes where they could just dispute the facts. Mr. Hoyt said what worries the insurance industry is that when they get caught violating the law they may have to pay punitive damages. He said that HB 442 has tightened up the punitive damages law very drastically, too drastically in some instances, but part of it is there must be clear and convincing evidence. But, this language is in the law now.

Sen. Weeding asked Mr. Hoyt his response to Mr. Robischon's statement concerning 30-18-201 on page 2 being adequate to deal with the area of attempted fraud. Mr. Hoyt said he did not agree at all and said attempted fraud is a peculiar species of a problem. If there is no penalty for attempted fraud and

they are not caught they get off "scot free" unless there is some damage. He referred the committee to line 15, page 5 which says that an insured who has suffered damages as a result of the handling of insurance claim is attempted fraud and attempts to do something vicious, wrong or unlawful and they are caught so they don't get away with it - there may be no damages. He suggested at line 15, page 5 they substitute "an insurer who has damaged or attempted to damage an insured or third party claimant may bring an action against the insurer, etc." and felt that would cover that loophole.

Sen. Thayer stated that Mr. Hoyt had mentioned a problem with #7 and #8. Mr. England said in the discussions in the House as to which sections would be included in the new section 3, they were trying to include only those very serious violations of the Unfair Claims Practices Act. Therefore, they excluded things that were basically minor. He agreed that some of the prohibitions listed in the Act are not as important as others. He felt that #7, which is basically an insurance company compelling an insurer to initiate litigation in order to receive what he should have received and #8 which is an attempt to settle claims for less than the amount to which a reasonable man believes he is entitled to - these are both serious violations of the Act and ought to be included in the list in section 3, so on page 5, line 11, following #6, he said #7 and #8 should be added and the same thing on line 25.

Sen. Neuman asked why #7 and #8 were not included. Mr. Gray said the idea of the bill as originally proposed was to create a balancing and the bill as introduced had only four specific violations of 30-18-201 as grounds upon which to bring bad faith claims. Those four have now been expanded to six; now there is a proposal to add two more which would be eight out of the original fourteen prohibited conducts under that section. He believed that #7 and #8 were already covered under other provisions of the bill. There is a penalty under this bill if there is attempted fraud; the insurance commissioner can still fine a carrier $25,000 - up to that - for even these attempted acts. He wished to assure the committee that $25,000 is a substantial fine and would get the attention of the insurance company.

Sen. Neuman asked about the statement that the commissioner is not enforcing this now and wondered if there were a number of these things arising now or if it was pretty rare. Rep. Thomas deferred to Ms. Irigoin of the Insurance Department. She said the auditor's office had only brought one administrative hearing under the Unfair Claims Practices Act and that was in 1982. She said they do use the Act on a daily basis to address consumer complaints; they do use it a lot but only had one administrative hearing under the Act. (See EXHIBIT 1)

There being no further questions, Rep. Thomas closed on HB 240, and asked Mr. Robischon to respond on the #7 and #8 question and the fraud question.

Mr. Robischon said he would pass on #7 and #8 as he believed Mr. Gray had accurately explained those sections. He asked the committee to refer to the proposal by Mr. Hoyt referring to fraud on line 18, page 5. This provision specifically reserves to the insured his right to bring an action for fraud. Fraud, in the contract sense, which is what this is as it is a contractual relationship between the insured and the insurer - fraud includes not only the actual fraud but implied fraud which is a lesser degree of fraud and is defined in the contract law already. He said he was not aware of any definition in any statutes or in any of the cases in Montana of attempted fraud. He believed that attempted fraud is covered by the law of implied fraud and that cause of action is reserved to the insured under this statute.

In closing further, Rep. Thomas stated that litigation of bad faith is too lucrative to refer a case to the auditor and ask that office to please punish the company. He said that increasing the fine would definitely increase the use of the Unfair Claims Practices Act and felt that $5,000 was not too high and $25,000 would get more attention. He said the bill defines the rules of the game and makes them far more fair and equitable than they are now. He felt the bill is fair and equal and would not carry the bill if he did not think so. Any client should be treated as fairly, as honestly and as equally as they should be.

The hearing was closed on HB 240.

CONSIDERATION OF HOUSE BILL NO. 803: Rep. Bud Campbell, House District 48, chief sponsor, said the bill cuts through the red tape and streamlines the licensing procedures for the insurance industry. It generally revises certain provisions of the insurance laws relating to licensing and regulation of agents, solicitors, adjusters, consultants, and administrators. Section 1 contains a definition of "consultant."

Chairman Kolstad stated that he was confused with the Statement of Intent that was with the bill. Rep. Campbell said the wrong Statement was attached to the bill in the House. He thought Ms. Irigoin would clear up the Statement of Intent problem.

PROPONENTS: Kathy Irigoin, representing the State Auditor and Commissioner of Insurance, said that the bill is to clear up some of the irregularities in the agent licensing law. She submitted her written testimony. (EXHIBIT 2) Following her testimony she explained the Statement of Intent. (EXHIBIT 3) The House of Representatives struck the Statement of Intent on 3rd Reading under the impression that it was the wrong Statement. She felt they thought it was the wrong one as the Statement refers to sections 15 and 16 as giving the commissioner rulemaking

authority when it should have referred to sections 17 and 18. Also, the original Statement did not refer to section 2 as providing rulemaking authority even though it does so. The Auditor's office asks this committee to adopt the corrected version of the Statement of Intent for HB 803. (See EXHIBIT 3)

Roger McGlenn, Executive Director of the Independent Insurance Agents Association of Montana, said they wished to be on record in support of the bill as necessary to improve the paper blizzard that exists in the Montana licensing laws as they exist in the statutes today. He said they had worked with the insurance department on the bill since December; they were aware it was coming out and they were concerned as it directly affects them. They were working with the insurance department on some technical and administrative questions and were convinced that these can be cleared up through the department's assistance in their rulings. They asked for a do pass recommendation as it was amended in the House.

Sen. Neuman assumed the Chair in Chairman Kolstad's absence.

DISCUSSION OF HOUSE BILL NO. 803: Sen. Neuman asked Ms. Irigoin about requiring the separate trust account - has that been a problem? Ms. Irigoin deferred to Mr. McGlenn.

Mr. McGlenn stated that this would simply require that a separate trust account be maintained. Many of their members, before this bill, had maintained a separate trust account; others had not but still maintained that fiduciary responsibility. He said there has been cases where the agent has not paid the accounts current, etc. The separate trust account does raise some questions as far as how agents are expected to comply with it; in some cases, company service is running 90-100 days after the renewal or issuance date. It is a rare occurrence, he said, that an agent is unethical, but it has happened. The agents have pledged to work with the department on how the agents should comply with the law.

Sen. Neuman asked about the section where the commissioner is able to suspend or revoke or refuse to continue a license without conducting an investigation. Mr. McGlenn said he believed the committee heard one bill dealing with the automatic stay and also a cease and desist bill and they were convinced due process still would exist under the law. These laws that are referred to are part of the insurance code.

There being no further questions from the committee, Rep. Campbell closed on HB 803.

Chairman Kolstad resumed the Chair.

CONSIDERATION OF HOUSE BILL NO. 806: Rep. Bob Pavlovich, House District 70, Butte-Silver Bow, sponsor, said the bill generally revises the laws relating to the Montana life and health insurance guaranty association. The association is a nonprofit legal entity comprised of health and life insurers authorized to do business in the state. The association is organized to protect policyholders and insureds against the insurer's failure to meet contractual obligations because of impairment. He said the bill was a committee bill and was drafted in the Business and Labor committee in the House. It was requested by the Montana Life and Health Guaranty Association. He said he had one amendment on page 8, line 22; eliminate the word "domestic"

PROPONENTS: Kathy Irigoin, State Auditor and Commissioner of Insurance Office, presented written testimony regarding HB 806. (EXHIBIT 4)

Mike Mulroney, Montana Life and Health Insurance Guaranty Association attorney, said he would answer any questions of the committee and they supported HB 806 with the change mentioned by Ms. Irigoin with regard to the word "domestic".

Tom Hopgood, representing the American Council of Life Insurance and the Health Insurance Association of America, submitted technical amendments and briefly explained them to the committee. (EXHIBIT 5) He asked the committee to give it a do pass.

OPPONENTS: There were no opponents.

DISCUSSION OF HOUSE BILL NO. 806: Chairman Kolstad asked for questions from the committee.

Sen. Walker questioned Rep. Pavolovich about the amendments, however, he said he had not had time to go over them and in talking to Ms. Irigoin and Mr. Mulroney they objected to the amendments. (This refers to the amendments in Exhibit 5.)

Chairman Kolstad asked Mr. Mulroney to address the objection to the amendments. He replied that they had done a great deal of work on the bill before it was presented in the House and they had also discussed it with the insurance commissioner. He said they were satisfied with the bill; they looked at the model act before this and they just tried to simplify it. He said he was convinced the bill did the job they intended it to do. Ms. Irigoin also concurred with Mr. Mulroney on the amendments.

There being no further questions, Rep. Pavlovich closed on HB 806.

CONSIDERATION OF HOUSE BILL NO. 417: Rep. Jan Brown, House District 46, Helena, sponsor, stated that the bill revises the provisions of law concerning preferences for resident bidders. It allows a 5% preference to a resident bidder selling Montana

made products if competing against a non-resident bidder. It requires a bidder claiming a preference to have on file or submit an affidavit specifying the basis for claiming the preference and provides a penalty for submitting a false affidavit.

PROPONENTS: Pat Melby, attorney from Helena representing Columbia Paint Company, said the bill was drafted at the request of Columbia Paint but it was not a Columbia Paint bill. He pointed out there are a number of other Montana manufacturers who are in support of the bill and would benefit by it. They were trying to clarify the application of the preferences as they now exist. Mr. Melby distributed testimony on HB 417 for illustrative purposes. (EXHIBIT 6) He said about 30 states have preference and about 12 have percentage preference as in this bill; about 10 of those have 5% and some up to a 10% preference, such as Hawaii. Another 20 states have what is called reciprocal preferences. He also submitted a proposed amendment to HB 417, (EXHIBIT 7) and a copy of the present statute, 18-1-102 (EXHIBIT 8)

Eric Schindler, Financial Administrative Vice President for Columbia Paint, Helena, said they had pursued this bill in trying to clarify the existing legislation. He said they have four different legal opinions on current statutes. They don't know what they are dealing with and want it clarified. He said they currently have stores in four states; Montana, Idaho, Washington and Wyoming. He agreed with the testimony of Mr. Melby. He asked the committee to support the bill.

Al Eli, President and Chief Executive Officer of Northern School Supply in Great Falls, commended the people for doing some very fine work on cleaning up an area that needed clarifying for a long time. He said the corporation is more than 50% owned by Montana residents and has been operating in the state of Montana since 1932. He said they have always suffered the 3% penalty because they are a foreign corporation having been incorporated in North Dakota in 1911. This means, in some instances, that some school districts have had to pay 3% more for a product from a bidder across the street than they would have from Northern School Supply. He felt it was time to eliminate this penalty for state and local public agencies, however, he said he was a proponent of the bill and not an opponent. He proposed that HB 417 get a recommendation do pass with an amendment to protect public agencies from the type of penalties that he outlined. When a bonafide Montana business, even though a foreign corporation, is bidding, it should be permitted to bid as a resident bidder without the 3% penalty. He suggested an amendment to consider an out of state bidder should be treated as a resident bidder if the branch has had a bona fide business operating within the state for a period of not less than 1 year, owns real estate or pays rent to an

owner who, in turn, pays real property tax on that rental and has at least 10 employees on their payroll and the payroll is subject to Montana state withholding tax. He asked the committee to consider the above suggested amendment.

James Hodge, Columbia Chemical, said they were in the business of manufacturing laundry chemicals and cleaning chemicals and the only one in the state of Montana. He urged support of HB 417.

K.M. Kelly, Milk Industry Processors, appeared in support of HB 417 and submitted a written statement. (EXHIBIT 9)

Jack D. Harrison, Branch Manager, Johnson Controls, Inc., Great Falls, said that Johnson Controls is a national company but has 120 branches throughout the U.S. and Canada. The Great Falls branch has been in operation since 1952 and the company has been providing services in Montana since the turn of the century and presently employs 24 persons. He supported the bill but asked that the committee consider Mr. Eli's proposed amendment concerning out of state corporations so they wouldn't be subject to the 3% penalty.

OPPONENTS: A letter was introduced as EXHIBIT 10 from Patrick E. McKelvey, Helena, and will be included in the minutes.

DISCUSSION OF HOUSE BILL NO. 417: Chairman Kolstad called for questions from the committee.

Sen. Meyer asked Mr. Melby to comment on the proposed amendment. Mr. Melby replied that there were two things they determined not to do in the bill; they weren't going to get involved in the preference requirements on public contractors, the other one was they didn't want to fool with the definition of resident. He suggested that some discretion could maybe be given to the department and they could determine who is a resident and who is not - give them some rulemaking authority to implement some of this language.

Sen. Walker questioned Mr. Harrison where the profit goes from his store. Mr. Harrison said it ultimately ends up back with Johnson Controls. Sen. Walker then asked where the profits go from Northern School Supply. Mr. Eli said the profits that aren't kept directly here and spent here, or 57% are spent right here and go back into the state of Montana. They are more than 57% owned by Montana residents and if it does pay dividends it pays them to Montana residents. Approximately 60% of Northern School Supply's profit, this year, was made in the state of North Dakota and at least 57% of that would come here to the state of Montana.

Chairman Kolstad asked Mr. Eli how many businesses would be affected with the proposed amendment. Mr. Eli said he was not sure how many. Chairman Kolstad then stated that he assumed the Fiscal Note probably wouldn't be affected appreciably by the amendment. Mr. Melby stated that he did not believe it would be because the Fiscal Note was the maximum that could possibly ever happen and said there would still be a tremendous amount of competition among all the bidders. He said he did not have a problem with the amendment, only that it would not apply to the public works portion.

Chairman Kolstad asked if the amendment took care of it adequately by excluding the public works segment. Sen. Boylan suggested the committee give the proponents some time to work on the amendment to assure that this is taken care of. Chairman Kolstad remarked that they would not take action on the bill as it was a very substantive piece of legislation and agreed with Sen. Boylan's suggestion.

Sen. Thayer wondered if, although they were going to help some individuals would they also be hurting other companies in Montana with the preference. Mr. Melby said there may be some that would experience an adverse effect but most of them would be helped. Mr. Eli said there is a 5% preference penalty at the present time. This bill, he thought, said the "maximum of 3% or the preference penalty that is proposed by the neighboring state" - this puts Montana on the same footing as Wyoming. North Dakota has no preference law. Montana provides 3% preference for a resident over a non-resident. If they have a higher preference then that is applied.

There being no further questions from the members, Rep. Brown closed her presentation of HB 417 saying that she and Pat Melby were very willing to work with the committee to work on the amendments.

The next meeting of the Business and Industry committee was scheduled to meet on Tuesday, March 10, 1987.

The meeting adjourned at 12:15 p.m.

Allen C. Kolstad

SEN. ALLEN C. KOLSTAD, CHAIRMAN

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ROLL CALL

Business & Industry COMMITTEE

50th LEGISLATIVE SESSION -- 1987 Date 3/9/87

NAME	PRESENT	ABSENT	EXCUSED
ALLEN C. KOLSTAD, CHAIRMAN	✓		
TED NEUMAN, VICE CHAIRMAN	✓		
PAUL BOYLAN	✓		
TOM HAGER	✓		
HARRY H. McLANE	✓		
DARRYL MEYER	✓		
GENE THAYER	✓		
MIKE WALKER	✓		
CECIL WEEDING	✓		
BOB WILLIAMS			✓

Each day attach to minutes.

DATE 3/9/87

COMMITTEE ON Business & Industry

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Oppose
K.M. Kelly	Milk Industry - Processors	HB417	✓	
Mike McGuney	Mont. Life & Health Ins.	HB806	✓	
Pat Melby	Columbia Paint Co.	HB417	✓	
Ralph [illegible]	Governor's Council on Ec. Dev.	HB240	✓	
Thomas A. Gran	Century Agency	HB240	✓	
Roger McGlenn	Independent Ins. Agents of Mt Assoc. of Mt	HB-240 HB-803	✓	
William H. Francis				
Jean Farmer				
Sandy [illegible]	State Farm Mut. Assn of Independent Insurers	HB240 HB803	✓	
Tom Hopgood	American Council of Life Ins. Health Ins. Assn. of Amer		✓	
Jim Robertson	Sport Liability Coalition	HB-240	✓	
John C. Hoyt	Hoyt & Bennett	HB-240		✓
Arthur H. Bell	Northern Industrial Supply Co	HB417		
Jack D. Atkinson	Johnson Conlin & Assoc	HB 417	✓	
Kathy Irigoin	State Auditor's office	HB240 HB803/HB806	✓	
Bryan Endorle	Missoula Chamber	HB 240	✓	
Eric Schlosser	Columbia Paint Co	HB 417		
James Holt	Columbia Chem.	HB 417	✓	

(Please leave prepared statement with Secretary)

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 1
DATE 3-9-87
BILL NO. HB 240

WRITTEN TESTIMONY OF STATE AUDITOR'S OFFICE
HOUSE BILL 240
March 9, 1987

The State Auditor and Commissioner of Insurance supports House Bill 240. The State Auditor supports House Bill 240 because insurance is based on predictability. House Bill 240 makes an insurer's liability for bad faith more predictable. Its passage should consequently improve the business climate in this state.

When testifying before the Joint Interim Subcommittee on Liability Issues and the House of Representatives, the State Auditor's office suggested that House Bill 240 would have fiscal impact on the State Auditor's office. Initially, the intent of House Bill 240 was to encourage insureds and third-party claimants to bring alleged violations of the unfair claim settlement practices statute before the State Auditor rather than before a district court. To enforce House Bill 240, as introduced, the State Auditor would have needed one attorney to handle administrative hearings, two compliance specialist to investigate and process consumer complaints, one paralegal to assist in preparing for administrative hearings, clerical personnel, and data processing personnel. House Bill 240 was amended by the House and appears to leave review of bad faith claims with the District Court, not the State Auditor. If House Bill 240 is not intended to have bad faith claims heard by the State Auditor's office, it has no fiscal impact to the State Auditor's office.

The State Auditor supports increasing the amount of the fine that may be inposed upon an insurer for violations of the Montana Insurance Code. The current $5,000 limit is relatively low when compared to the amounts that other states may levy against insurers for violations of insurance laws and is often lower than an insurance code violation warrants.

The State Auditor requests this committee to give House Bill 240 favorable consideration.

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 2
DATE 3-9-87
BILL NO. HB-803

WRITTEN TESTIMONY OF STATE AUDITOR'S OFFICE
HOUSE BILL 803
March 9, 1987

I. Purpose/Background

The purpose of House Bill 803 is to eliminate minor irregularities in the agent licensing chapter of the Montana Insurance Code. Also, House Bill 803 permits the Montana Insurance Department to use a testing service to administer agent licensing examinations (page 12, lines 21 through 24; and page 15, lines 15 through 18). Present law requires that agent licensing examinations be given in Helena. If the Insurance Department could use a testing service, those examinations could be administered where other national examinations like the ACT examination are given. An applicant for an agent license could then take the agent licensing examination in a town closer to home than Helena is.

II. Section by Section Explanation

Section 1 contains definitions. A definition for "consultant" has been added (page 2, lines 20 through 24). Throughout House Bill 803, the word "firm", which is vague, has been replaced with the word "partnership".

Section 2 permits the Commissioner of Insurance to prescribe the insurance agent application form by rule (page 4, line 7; and page 5, line 21).

The purpose of Section 3 is to combine the qualifications for any kind of insurance agent into one statute (page 6, line 15 through line 23, page 8). Presently, the qualifications for a property and casualty insurance agent are listed in one statute, while the qualifications for a life and disability insurance agent are listed in another. The qualifications for both kinds of agents are the same except that a life and disability agent has an additional qualification--he or she cannot be a funeral director, undertaker, or mortician (page 8, lines 7 through 12). Since section 3 combines the qualifications for all insurance agents into one statute, the present statute listing the qualifications for a life and disability insurance agent is repealed (page 28, lines 13 through 14).

Section 4 clarifies that a partnership or corporation acting as an insurance agent in this state must be licensed as an insurance agent (page 9, lines 1 through 3). It also clarifies that any individual selling insurance on behalf of a partnership or corporation must be licensed in conjunction with the partnership or corporation license (page 9, lines 3 through 12). Also, the Commissioner of Insurance may not issue a

license to a partnership or corporation unless the Secretary of State has issued is a valid certificate (page 9, lines 20 through 23).

There are only minor changes to section 5 (page 9, line 24 through line 13, page 12).

Section 6 provides that the Commissioner of Insurance may either conduct the insurance agent licensing examination or arrange for a testing service to conduct it (page 12, lines 21 through 24).

Section 7 removes the requirement that agent licensing examinations be given at the office of the Commissioner of Insurance in Helena, permitting examinations to be conducted at places reasonably accessible to the applicant (page 15, lines 4 through 10).

Section 8 clarifies that an agent appointment runs from June 1 of each year through May 31 of the next year (page 16, lines 10 through 12).

Section 9 clarifies that a nonresident agent may get only a nonresident agent license (page 17, lines 19 through 24).

Section 10 permits an individual to be licensed as a property and casualty administrator (page 18, lines 7 and 20). Presently, an individual may licensed only as a life and health administrator.

The reference to 33-17-605 is deleted in section 11 because House Bill 803 repeals 33-17-605 (administrator's bond to insurer) (page 28, lines 13 through 14).

Section 12 provides 10 days' advance notice of a hearing to suspend or revoke an insurance agent license (page 20, line 25). It also provides that, if an agent is convicted of a felony, the Commissioner of Insurance may revoke or suspend an agent's license without conducting a special investigation or making a special written finding (page 22, lines 5 through 8).

The only changes in Sections 13 (page 22, line 9 through line 15, page 23) and 14 (page 23, line 16 through line 1, page 24) are that "firm" is replaced with "partnership".

Section 15 provides that a resident insurance agent must have an office in Montana; whereas, a nonresident insurance agent may have one (page 24, lines 5 through 8).

Section 16 requires every agent and solicitor to maintain all premiums he or she receives in a separate trust account. It also requires an agent or solicitor to always act in a fiduciary capacity (page 25, lines 6 through 20).

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BILL NO. H.B. 803

Section 17 permits the Commissioner of Insurance to adopt rules clarifying when a property or casualty insurance agent may place insurance with an insurer that has not appointed him or her as its agent (page 26, lines 4 through 12).

Section 18 permits the Commissioner of Insurance to adopt rules clarifying when a life or disability insurance agent may place excess or rejected risks with an insurer that has not appointed him or her as its agent (page 27, lines 10 through 17).

III. Amendments

On third reading, the House of Representatives struck the statement of intent that accompanied House Bill 803. A statement of intent is required for House Bill 803, however, because sections 17 and 18 authorize the commissioner to adopt rules to determine when an insurance agent may place insurance with an insurer that has not appointed him or her as its agent (page 26, lines 4 through 12; and page 27, lines 10 through 17).

The original statement of intent incorrectly referred to sections 15 and 16 as providing the Commissioner of Insurance rulemaking authority when it should have referred to sections 17 and 18. Also, the original statement of intent did not refer to section 2 as providing rulemaking authority even though it does. The State Auditor asks this committee to adopt the corrected version of the statement of intent for House Bill 803.

STATEMENT OF INTENT PROPOSED BY STATE AUDITOR

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 3
DATE 3-9-87
BILL NO. HB 803

50th Legislature HB 0803/si

STATEMENT OF INTENT

HB BILL NO. 803

Senate Business and Industry Committee

A statement of intent is required for this bill because section 17 authorizes the commissioner of insurance of the state of Montana (commissioner) to determine by rule the instances in which a property and casualty insurance agent may place insurance coverage with an insurer as to which he is not then licensed or appointed as an agent and because section 18 authorizes the commissioner to determine the instances in which a life or disability insurance agent may place excess or rejected risks in an insurer that has not appointed him as agent. In addition, section 2 authorizes the commissioner to prescribe by the forms required in connection with an application for an insurance agent license. The Legislature intends that the rules, which the commissioner adopts to implement this bill, be designed to protect Montana insurance consumers.

The Legislature further intends that the commissioner adopt those rules in accordance with 33-1-313, MCA, which grants the commissioner general rule-making authority and which permits the commissioner:

(1) to make only reasonable rules that do not extend, modify, or conflict with any law of this state or with any reasonable implication of those laws; and

(2) to make or amend those rules only after a hearing of which notice has been given as required by 33-1-703, MCA.

SENATE BUSINESS & INDUSTR
EXHIBIT NO. 3
DATE 3-9-87
BILL NO. H.B. 803

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 4
DATE 3-9-87
BILL NO. HB 806

WRITTEN TESTIMONY OF STATE AUDITOR'S OFFICE
HOUSE BILL 806
March 9, 1987

The State Auditor and Commissioner of Insurance supports House Bill 806. The proposed changes to the Montana Life and Health Insurance Guaranty Association Act are in line with the model Life and Health Guaranty Fund Act of the National Association of Insurance Commissioners. Those that do not come from the model act, particularly Section 1 of the bill, recognize the unique situation Montana faces by not having employees of insurance companies serve on the Montana Life and Health Guaranty Fund board.

Section 1 of House Bill 806 adopts the language that other states use to define the extent of coverage provided by the guaranty fund. Under House Bill 806, the Montana Life and Health Guaranty Fund would only be responsible for residents of this state (page 1, lines 22-24). In all pending actions, and particularly the Life of Montana situation, coverage would still be provided under existing law.

Section 2 of House Bill 806 allows for compensation of the board of directors of the Montana Life and Health Guaranty Fund, who are not full-time employees of an insurance company. Montana's board is unique in that it is made up entirely of insurance agents (page 3, lines 11-18). As agents, they do not receive compensation for serving on the board. The compensation provision of the bill recognizes the substantial commitment of time and service that board members give the state and its citizens.

Sections 3 (page 3 line 19 through line 1, page 5) and 4 (page 5, line 2 through line 18, page 7) of House Bill 806 further implement the change in the scope of coverage in Section 1. By limiting coverage to policies of Montana residents, it is no longer necessary to distinguish between domestic and foreign insurance companies. The policies of only Montana residents are covered regardless of the location of the insurance company issuing those policies.

Section 4 of House Bill 806 includes a new protection that the Life and Health Guaranty Fund may offer Montana residents. The guaranty fund, with the approval of the Commissioner of Insurance, may offer replacement or substitute policies to residents if the company they were previously insured with fails (page 7, lines 11-18). This is an option that could benefit a Montana resident depending on his or her circumstances when the original insurance company fails.

The reference to subsection (4) of 33-10-220, MCA, is deleted in Section 5 of House Bill 806 because of the deletions in Section 4 of the bill (page 8, line 1).

Section 6 of House Bill 806 reflects changes necessary because Section 1 changes the scope of the Montana Life and Health Guaranty Fund Act and Sections 3 and 4 eliminate the distinction between domestic and foreign insurers. By creating only one type of coverage there is no longer a need for three classes of assessments. The Class A assessment remains for general administrative expenses. The Class B assessment becomes the only assessment necessary to pay on covered claims of Montana residents.

Section 7 of House Bill 806 establishes a premium tax off-set of the assessments made for Class B. If House Bill 806 were to pass, only those assessments directly related to paying on covered policies of Montana residents would qualify for the premium tax off-set.

Section 8 of House Bill 806 extends rulemaking authority to include the changes incorporated in this bill. Section 9 establishes an applicability date so that any action filed before the effective date of this act will not be governed by these changes. Since Montana and other states have made decisions and assurances based on the current status of the law, those actions will be governed by existing law.

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 5
DATE 3/9/87
BILL NO. HB806

HB 806

Amendments Proposed by the
Health Insurance Association
of America (HIAA)

1. Title, line 7.
Following: "SECTIONS"
Insert: "33-10-201,"

2. Page 1.
Following: line 12
Insert: Section 1. Section 33-10-201, MCA, is amended to read:

"33-10-201. Short title, purpose, scope, and construction. (1) This part shall be known and may be cited as the "Montana Life and Health Insurance Guaranty Association Act".

(2) The purpose of this part is to protect policyowners, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, health insurance policies, annuity contracts, and supplemental contracts, subject to certain limitations, against failure in the performance of contractual obligations due to the impairment of the insurer issuing such policies or contracts.

(3) To provide this protection:

(a) an association of insurers is created to enable the guaranty of payment of benefits and of continuation of coverages;

(b) members of the association are subject to assessment to provide funds to carry out the purpose of this part; and

(c) the association is authorized to assist the commissioner, in the prescribed manner, in the detection and prevention of insurer impairments.

(4) This part shall apply to direct life insurance policies, health insurance policies, annuity contracts, and contracts supplemental to life and health insurance policies and annuity contracts issued by persons authorized to transact insurance in this state at any time.

(5) This part shall provide coverage for covered policies:

(a) to persons who are owners of or certificate holders under such covered policies, and who

(i) are residents of this state, or

(ii) are not residents of this state, if:

(A) the insurers which issued such policies are domiciled in this state,

(B) such insurers never held a license or certificate of authority in the state in which such persons reside,

(C) such states have associations similar to the association created by this Act, and

(D) such persons are not eligible for coverage by such associations;

(b) to persons who, regardless of where they reside (except for non-resident certificate holders under group policies or contracts), are the beneficiaries, assignees or payees of the persons covered under subparagraph (a).

(6) This part shall not apply to:

(a) any such policies or contracts or any part of such policies or contracts under which the risk is borne by the policyholder;

(b) any such policy or contract or part thereof assumed by the impaired insurer under a contract of reinsurance, other than reinsurance for which assumption certificates have been issued.

(7) This part shall be liberally construed to effect the purpose under subsections (2) and (3) which shall constitute an aid and guide to interpretation.

(8) Nothing in this part shall be construed to reduce the liability for unpaid assessments of the insureds of an impaired insurer operating under a plan with assessment liability."

Renumber: all subsequent sections

3. Page 1, line 22.
Strike: "held by a resident of this state"

4. Page 1, line 24.
Following: "(4)"
Insert: ","
Strike: "and"

Following: "(5)"
Insert: ", and (6)"

5. Page 3, line 13.
Following: "and"
Insert: "the representatives of"

Alternative A:
6. Page 7, line 11 through line 18.
Strike: subsection (6) in its entirety.

Alternative B:
6. Page 7, line 11 through line 18.
Strike subsection (6) in its entirety.

Insert:

"(6) When proceeding under Section 33-10-220, the Association may, with respect to life and health insurance policies

(a) Assure payment of benefits for premiums identical to the premiums and benefits (except for terms of conversion and renewability) that would have been payable under the policies of the insolvent insurer, for claims incurred

(i) with respect to group policies, not later than the earlier of the next renewal date under such policies or contracts or 45 days, but in no event less than 30 days, after the date on which the Association becomes obligated with respect to such policies;

(ii) with respect to individual policies, not later than the earlier of the next renewal date (if any) under such policies or one year, but in no event less than 30 days, from the date on which the Association becomes obligated with respect to such policies;

(b) make diligent efforts to provide all known insureds or group policyholder with respect to group policies 30 days notice of the termination of the benefits provided; and

(c) with respect to individual policies, make available to each known insured, or owner if other than the insured, and with respect to an individual formerly insured under a group policy who is not eligible for replacement group coverage, make available substitute coverage on an individual basis in accordance with the provisions of paragraph (4), if the insureds had a right under law or the terminated policy to convert coverage to individual coverage or to continue an individual policy in force until a specified age or for a specified time, during which the insurer had no right unilaterally to make changes in any provision of the policy or had a right only to make changes in premium by class.

(d)(i) In providing the substitute coverage required under paragraph (3), the Association may offer either to reissue the terminated coverage or to issue an alternative policy.

(ii) Alternative or reissued policies shall be offered without requiring evidence of insurability, and shall not provide for any waiting period or exclusion that would not have applied under the terminated policy.

(iii) The Association may reinsure any alternative or reissued policy.

(e)(i) Alternative policies adopted by the Association shall be subject to the approval of the

Commissioner. The Association may adopt alternative policies of various types for future issuance without regard to any particular impairment or insolvency.

(ii) Alternative policies shall contain at least the minimum statutory provisions required in this state and provide benefits that shall not be unreasonable in relation to the premium charged. The Association shall set the premium in accordance with a table of rates which it shall adopt. The premium shall reflect the amount of insurance to be provided and the age and class of risk of each insured, but shall not reflect any changes in the health of the insured after the original policy was last underwritten.

(iii) Any alternative policy issued by the Association shall provide coverage of a type similar to that of the policy issued by the impaired or insolvent insurer, as determined by the Association.

(f) If the Association elects to reissue terminated coverage at a premium rate different from that charged under the terminated policy, the premium shall be set by the Association in accordance with the amount of insurance provided and the age and class of risk, subject to approval of the Commissioner or by a court of competent jurisdiction.

(g) The Association's obligations with respect to coverage under any policy of the impaired or insolvent insurer or under any reissued or alternative policy shall cease on the date such coverage or policy is replaced by another similar policy by the policyholder, the insured, or the Association."

7. Page 8, line 22.
Strike: "domestic"

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 6
DATE 3-9-87
BILL NO. HB 417

HOUSE BILL 417

The following are examples of how the current preference law effects the awarding of contracts for the purchase of goods by public agencies and how the changes in the preference law proposed in House Bill 417 would effect the awarding of those contracts.

For illustrative purposes:
Montana Widget is a resident bidder with Montana Made goods;
ABC Distributing is a resident bidder with non-Montana made goods;
Out-of-State, Inc., is a nonresident bidder.

EXAMPLE 1: Current Law*

Montana Widget	$103.00
ABC Distributing	100.00

Difference in bids - 3%: Contract to Montana Widget.

EXAMPLE 2: Current Law*

ABC Distributing	$103.00
Out-of-State, Inc.	100.00

Difference in bids - 3%: Contract to ABC Distributing

EXAMPLE 3: Current Law*

Montana Widget	$103.00
Out-of-State, Inc.	100.00

Difference in bids - 3%: contract to Montana Widget.

EXAMPLE 4: Current Law - Attorney General's interpretation

Montana Widget	$102.00
ABC Distributing	101.00
Out-of-State, Inc.	100.00

Difference in bids of Montana Widget and ABC Distributing - .9%
Difference in bids of Montana Widget and Out-of-State, Inc.- 2%
Difference in bids of ABC Distributing and Out-of-State, Inc. - 1%

Contract goes to ABC Distributing: Under Attorney general's opinion Montana Widget does not get a 3% preference over ABC Distributing when Out-of-State, Inc., is also bidding.

* Under House Bill 417, these examples would be the same.

EXAMPLE 5: Current Law - Our interpretation

Montana Widget	$106.00
ABC Distributing	103.00
Out-of-State, Inc.	100.00

Difference in bids of Montana Widget and ABC Distributing - 3%
Difference in bids of Montana Widget and Out-of-State, Inc.- 6%
Difference in bids of of ABC Distributing and Out-of-State, Inc. - 3%

Contract to Montana Widget: ABC Distributing has a preference over Out-of-State, Inc., as its bid is not more than 3% higher, so Out-of-State, inc., is out and Montana Widget has a 3% preference over ABC distributing.

EXAMPLE 6: House Bill 417

Montana Widget	$105.00
ABC Distributing	103.00
Out-of-State, Inc.	100.00

Difference in bids of Montana Widget and ABC Distributing - 1.9%
Difference in bids of Montana Widget and Out-of-State, Inc. - 5%
Difference in bids of ABC Distributing and Out-of-State, Inc. - 3%

Contract to Montana Widget: Montana Widget's bid is not more than 3 % higher than ABC Distributing's nor more than 5% higher than Out-of-State, Inc.'s.

EXAMPLE 7: House Bill 417

Montana Widget	$105.10
ABC Distributing	103.00
Out-of-State, Inc.	100.00

Difference in bids of Montana Widget and ABC Distributing - 2.04%
Difference in bids of Montana Widget and Out-of-State, Inc. - 5.1%
Difference in bids of ABC Distributing and Out-of-State, Inc. - 3%

Contract to ABC Distributing: While Montana Widget's bid is not more than 3% higher than ABC Distributing's bid, it is more than 5% higher than Out-of-State, Inc.'s.

EXAMPLE 8: House Bill 417

Montana Widget	$105.00
ABC Distributing	101.00
Out-of-State, Inc.	100.00

Difference in bids of Montana Widget and ABC Distributing - 3.9%.
Difference in bids of Montana Widget and Out-of-State, Inc. - 5%
Difference in bids of ABC Distributing and Out-of-State, Inc. - 1%

Contract to ABC Distributing: While Montana Widget's bid is not more than 5% higher than Out-of-State, Inc.'s, it is more than 3% higher than ABC Distributing's.

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 6
DATE 3-9-87
BILL NO. H.B. 417

3/3/87

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 1
DATE 3-9-87
BILL NO. HB 417

PROPOSED AMENDMENT TO HOUSE BILL 417

I. Page 4, Line 15

Following: "5%"

Insert: "; and, when both subsections (b)(ii) and (iii) are applicable to bids for a contract, the contract shall be awarded to the resident bidder whose offered goods are Montana-made only if its bid is not more than 3% higher than that of the resident bidder whose offered goods are not Montana-made and not more than 5% higher than that of the nonresident bidder"

18-1-102. State contracts to lowest resident bidder. (1) In order to provide for an orderly administration of the business of the state of Montana in awarding contracts for materials, supplies, equipment, construction, repair, and public works of all kinds, it shall be the duty of each board, commission, officer, or individual charged by law with the responsibility for the execution of the contract on behalf of the state, board, commission, political subdivision, agency, school district, or a public corporation of the state of Montana to award such contract to the lowest responsible bidder who is a resident of the state of Montana and whose bid is not more than 3% higher than that of the lowest responsible bidder who is a nonresident of this state.

(2) In awarding contracts for purchase of products, materials, supplies, or equipment, such board, commission, officer, or individual shall award the contract to any such resident whose offered materials, supplies, or equipment are manufactured or produced in this state by Montana industry and labor and whose bid is not more than 3% higher than that of the lowest responsible resident bidder whose offered materials, supplies, or equipment are not so manufactured or produced, provided that such products, materials, supplies, and equipment are comparable in quality and performance.

(3) In awarding contracts for construction, repair, and public works of all kinds, bids received from nonresident bidders are subject to the 3% preference, or that percent that applies to a Montana bidder in the award of public contracts in the nonresident bidder's state of residence, whichever is greater.

(4) This requirement shall prevail whether the law requires advertisement for bids or does not require advertisement for bids, and it shall apply to contracts involving funds obtained from the federal government unless expressly prohibited by the laws of the United States or regulations adopted pursuant thereto.

NAME: E. M. Kelly DATE: 3/9/87

ADDRESS: Helena, MT 59601

PHONE: 458-5861

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 9
DATE 3-9-87
BILL NO. HB 417

REPRESENTING WHOM? Montana Dairy Industry - Processors

APPEARING ON WHICH PROPOSAL: HB 417

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

COMMENTS:

This Bill will clear up some inconsistencies in the present purchasing act and allows the Department of Administration to promulgate rules for bidding on state contracts both by resident and non-resident bidders.

E. M. Kelly

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 10
DATE 3/9/87
BILL NO. HB 417

Mr. Chairman and members of the committee.

Unfortunately for me I had to be out of town and unable to tetify on HB 417. Please accept this written testimony in opposition to the bill.

In the house floor debate we heard that this bill is intended to correct a situation that under existing law would allow two preferences to be applied. Proponents say they believe that the 3% resident preferen ce and the 3% for Montana made can be stacked providing a 6% overall preference. The proponents claim that they are willing to give up 1% if in fact this bill giving them a 5% bid preference is passed. The stacking of preferences however, is a situation that does not exist. Under existing statute, an Attorney General opinion of November 1984 (copy attached) clearly states that only one preference can be applied. That means the current actually administered preference is 3%. If this bill is passed it would in fact automatically grant one sole paint company in Montana a 2% bid preference over all other resident Montana bidders. They are not giving up a thing. They are gaining a lot.

The bill is presented as a measure to protect and stimulate Montana business. In the paint business it is in fact a good restraint of trade on many small Montana businesses. Resident businesses across the State who are vendors of brands of goods not made in Montana, but who's nationally recognized brands are used in State, County, City, and School Districts in their market area. This bill can be seen as just one more nail in their business coffin. The State cannot afford it. The fiscal note says that the State will in fact pay more, $75,000.00 per year more, just in the two products it addressed, paint and foodstuffs.

The bill goes on to say that each contract awarded by a public agency for construction projects must contain the requirement that Montana made goods must be preferred on all projects. It provides a penalty of 2 years prohibition from bidding on public projects if the contractor does not use the Montana made goods. How enforceable is that?

I certainly have no complaint with every effort to help Montana business. We need all the help we can get right now. This bill does not help the majority of Montana business and does in fact take the majority out of the public bidding process. If passed it will be bad legislation and I would think something that could be challenged in court as restraint of trade. It certainly would send the message to the majority of Montana businessmen that we really are not trying to build Montana as a whole, but selectively.

Hopefully you will give this a do not pass recommendation. If you would like more information I will be happy to discuss this with you after I return Weds. March 11, 1987.

Sincerely,

Patrick E. McKelvey

Patrick E. McKelvey
124 E. Lyndale
Helena, Mt.
442-6870or 443-2253

VOLUME NO. 40 OPINION NO. 79

CONTRACTS - Preference for resident contractors;

MONTANA CODE ANNOTATED - Sections 1-2-101, 18-1-102(1) and (2), 18-1-103(4);

OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 59 (1977).

HELD: A resident bidder whose materials are manufactured in Montana by Montana labor may not be awarded a state contract under section 18-1-102, MCA, when his bid is more than 3% higher than that of the lowest responsible nonresident bidder.

2 November 1984

Morris Brusett, Director
Department of Administration
Room 155, Sam W. Mitchell Building
Helena MT 59620

Dear Mr. Brusett:

You have requested my opinion on a question which I have stated as follows:

> May a resident bidder whose materials are manufactured in Montana by Montana labor be awarded a state contract under section 18-1-102, MCA, when his bid is more than 3% higher than that of the lowest responsible nonresident bidder?

Section 18-1-102, MCA, deals with the awarding of certain state contracts. It provides, in pertinent part:

> (1) In order to provide for an orderly administration of the business of the state of Montana in awarding contracts for materials, supplies, equipment, construction, repair, and public works of all kinds, it shall be the duty of each board, commission, officer, or individual charged by law with the responsibility for the execution of the contract on behalf of the state, board, commission, political subdivision, agency, school district, or a public corporation of the state of Montana to award such contract to the lowest responsible bidder who is a resident of the state of Montana and whose bid is not more than 3% higher than that of the

lowest responsible bidder who is a nonresident of this state.

(2) In awarding contracts for purchase of products, materials, supplies, or equipment, such board, commission, officer, or individual shall award the contract to any such resident whose offered materials, supplies, or equipment are manufactured or produced in this state by Montana industry and labor and whose bid is not more than 3% higher than that of the lowest responsible resident bidder whose offered materials, supplies, or equipment are not so manufactured or produced, provided that such products, materials, supplies, and equipment are comparable in quality and performance. [Emphasis added.]

....

Subsection (1) grants a preference to a resident with the lowest responsible bid over a nonresident with the lowest responsible bid, so long as the resident's bid is not more than 3% higher than that of the nonresident. (For a discussion of the meaning of the phrase "lowest responsible bidder" see 37 Op. Att'y Gen. No. 59 (1977).) Subsection (2) provides that a preference be granted to a resident with the lowest responsible bid whose supplies are manufactured in-state by Montana labor over a resident with the lowest responsible bid whose supplies are manufactured out-of-state. With respect to contracts for the purchase of products, any bidder whose materials are manufactured in Montana by Montana labor is considered a resident. § 18-1-103(4), MCA.

Current situation

The confusion surrounding the statute arises where the bidders on a contract are made up of both residents and nonresidents and the bids are fairly close in dollar amounts. In the example cited in the legal memorandum that accompanied your opinion request there are two resident bidders and one nonresident bidder. The lowest bidder is an out-of-state company. The first resident company's bid is within 3% of the nonresident's bid; however, the materials offered by that resident company are not manufactured in-state. Nevertheless, applying subsection (1) of section 18-1-102, MCA, the first resident bidder would be awarded the contract. However, the bid of the second resident bidder, whose materials are manufactured in-state, is within 3% of the first resident bidder who was awarded the contract under subsection (1). Your specific question concerns whether, applying subsection (2), the resident bidder whose materials are manufactured in-state should be granted preference over the resident bidder who prevailed under subsection (1). I will use the hypothetical situation that you provided in your opinion as an example. The dollar amounts are as follows:

Can only be 1 - 3% preference

- Bid of resident using out-of-state materials = $101.00.
- Bid of resident using in-state materials = $103.00.
- Bid of nonresident = $99.00.

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 10
DATE 3-9-87
BILL NO. HB 44

cannot STRIKE TWO PREFERENCES.

If both subsections (1) and (2) of section 18-1-102, MCA, are applied to this example, the operation of subsection (1) will result in the awarding of the contract to the resident with the bid of $101, who will, in turn, lose out to the resident with the bid of $103, by operation of subsection (2). The final award of the contract will thus go to a resident whose bid is more than 3% higher than the bid of the nonresident. Such a result is in direct conflict with subsection (1).

It is a rule of statutory construction that a statute is to be construed as a whole, with effect being given, if possible, to every provision so that conflicting parts are made to harmonize. See § 1-2-101, MCA; Montana Automobile Association v. Greely, 38 St. Rptr. 1174, 1180, 632 P.2d 300, 306 (1981); McClanathan v. State, 186 Mont. 56, 61, 606 P.2d 507, 510 (1980); Yurkovich v. Industrial Accident Board, 132 Mont. 77, 84, 314 P.2d 866, 870 (1957). Individual sections of an act should be interpreted in such a manner as to insure coordination with other sections of the act. State v. Meader, 184 Mont. 32, 37, 601 P.2d 386, 389 (1979). Subsections of a statute should be construed to avoid conflict between them. State ex rel. Depuy v. District Court, 142 Mont. 328, 332, 384 P.2d 501, 503 (1963).

Following these rules of statutory construction, I conclude that the two subsections of section 18-1-102, MCA, must operate independently of, rather than in conjunction with, each other. Subsection (1) would apply when the bidders on a particular contract include residents and nonresidents, and where the lowest responsible bid of a resident is not more than 3% higher than the lowest responsible bid of a nonresident. Subsection (2) would apply where the bidders include only residents or where the lowest responsible bidder is not a nonresident. Thus, in the example provided above, subsection (1) would operate to award the contract to the resident whose bid was no more than 3% higher than that of the nonresident, i.e., the bid of $101. Because the factual situation triggers the application of subsection (1), subsection (2) would not come into operation at all. If section 18-1-102, MCA, is not interpreted in the manner described above, one part of the statute could operate in violation of the other, a result not favored in the law.

THEREFORE, IT IS MY OPINION:

> A resident bidder whose materials are manufactured in Montana by Montana labor may not be awarded a state contract under section 18-1-102, MCA, when his bid is more than 3% higher than that of the lowest responsible nonresident bidder.

Very truly yours,

Mike Greely

MIKE GREELY
Attorney General

MG/JB/sr

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SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 10
DATE 3-9-87
BILL NO. H.B. 417