MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

March 18, 1987

The forty-fifth meeting of the Senate Judiciary Committee was called to order on March 18, 1987 at 10:00 a.m. in Room 325 of the state Capitol, by the chairman, Senator Joe Mazurek.

ROLL CALL: All committee members were present.

CONSIDERATION OF HOUSE BILL 470: Representative Joan Miles, Helena, gave the committee a summary on House Bill 470. (Exhibit 1) She agreed with the McGrath amendments.

PROPONENTS: Senator Van Valkenburg, Missoula, supported the bill. He said it will establish a public policy that will help the youth of Montana. He said there is a real need for communication with the youth about the consequences they might face if convicted of a crime. He felt kids that commit adult crimes should be treated as adults.

Mike McGrath, Lewis and Clark County Attorney, went through the bill section by section. He said the bill will make the 16 year-old youth make his own decision when it comes to procedures, after being caught. He said Juvenile Court supports it. He gave the committee amendments to the bill to clear up some language problems. (Exhibit 2)

Patrick Paul, District Attorney for Cascade County, favored the bill.

OPPONENTS: There were none.

DISCUSSION ON HOUSE BILL 470: Senator Mazurek asked on page 26, about the confidentiality part, which a victim is prevented from finding out all the information about the convicted or charged youth.

Mr. McGrath said the law right now, will not let the court disclose to the victim who attacked him. Senator Mazurek asked if there is any prohibition in the bill against the victim going to the press with the name of a youth who committed the crime. Mr. McGrath said no, and would like to leave it that way because you can't restrain people like that. Senator Mazurek said it doesn't make sense to

not have any confidentiality at all in a youth's case.

Senator Mazurek wanted to know what the amendments will do in section 13 of the bill. Mr. McGrath stated it will allow law enforcement records of a youth to be treated like adult records.

Senator Blaylock questioned Senator Van Valkenburg if this bill will prevent kids from committing crimes. Senator Van Valkenburg said yes, this would be a strong effort to prevent crimes. Senator Blaylock said he had doubts if tougher approaches were the best way to go.

Representative Miles closed the hearing on HB 470.

CONSIDERATION OF HOUSE BILL 344: Representative Asay, House District 27, presented the bill to the committee. (Exhibit 3) He said the bill needed an amendment that will allow the provisions of this bill to be applied to any cases that have not been filed.

PROPONENTS: Gary Neely, Montana Medical Assn., supported the bill in its current form. Mr. Neely distributed amendments to HB 344. (Exhibits 4 and 4A)

Chad Smith, Montana Hospital Association, stated in 1986, Columbus Hospital in Great Falls, paid $180,386 for malpractice insurance. He said Billings Deaconess paid $175,000 for 253 beds for malpractice insurance; That was an increase of 34% over last year. He said in 1985, there were only 24 claims throughout the state that only totaled $25,000. He stated that in 1986, all Montana hospitals paid a total of $1,672,000 for insurance. He felt this bill could help, with an amendment he presented. (Exhibit 5) He presented the committee with a letter from Dr. Jeffrey H. Strickler of the American Academy of Pediatrics. (Exhibit 6) Dr. Strickler supported HB 344.

Bill Rossback, Montana Trial Lawyers Assn., said the statute of limitations starts when a child is in school because of the groups of people that can watch a child and can tell if something went wrong when the child was at the age of 0 to 4 years old. He stated that is when the doctors are most involved with a child, at the ages of 0 to 4. He said the statute of limitation is preserved until the child is 8 years old because the big damage cases are usually discovered before they are 8 years old. Mr. Rossback said his group compromised with this bill and cut the statute of limitations in half. He said he didn't agree with the Neely amendment because the statute

of limitations in a medical case is three years, not five as stated in the amendments.

Roger Tippy, Montana Dental Association, supported the bill. (Exhibit 7)

Jim Robischon, Montana Liability Coalition, supported the bill without amendments.

OPPONENTS: There were none.

DISCUSSION ON HOUSE BILL 344: Senator Mazurek inquired if Mr. Neely had a problem with the Smith first amendment. Mr. Neely said yes. Senator Mazurek asked what Mr. Neely thought about the effective date in the Smith amendments. Mr. Neely said this is a more modified version on the effective date. Mr. Neely and Mr. Rossback said they don't like the amendment to section 2.

Senator Blaylock asked how long has it been in Montana's books that one can bring suit against someone 24 years down the road. Mr. Neely said for about 100 years. Senator Blaylock asked why the premiums are so high if the claims are low. Mr. Neely said Montana has had quite a few claims; he said it is more than 24, it is around 134 claims with only 56 hospitals. He said Montana has one of the highest insurance claims rate against doctors in the nation.

Representative Asay closed the hearing on HB 344.

CONSIDERATION OF HOUSE BILL 592: Representative Harp, House District 4, introduced HB 592 to the committee. (Exhibit 8)

PROPONENTS: Jim Robischon, Montana Liability Coalition, supported the bill with amendments and gave written testimony to the committee from the International Franchise Association. (Exhibit 9) He submitted his amendments, which he called the substitute bill for HB 592. (Exhibit 10) He also handed out a Bank Bad Faith Survey to the committee. (Exhibit 11)

John R. Cronholm, Small Business Administration, supported HB 592. (Exhibit 12)

William Parker, First Interstate Bank of Great Falls, supported the bill. (Exhibit 13)

Tim H. Gill, Montana Livestock Ag. Credit Inc., favored HB 592. (Exhibit 14)

Chip Erdman, Montana Savings and Loans, supported the introduced bill and the Montana Liability Coalition amendments.

Bob Pyfer, Credit Unions, supported the bill.

Senator Tveit of Senate District 11, favored the bill.

Stuart Doggett, Chamber of Commerce, supported HB 592.

Ed Landers, Chamber of Commerce, supported the bill.

Kay Foster, Governor's Council on Economic Development, supported HB 592. (Exhibit 15)

Riley Johnson, Montana Dental Assn., testified in support of HB 592.

Irv Dellinger, Montana Builders Assn. supported the bill.

John Cadby, Montana Bankers Association, supported the bill as amended.

OPPONENTS: George Allen, Executive Vice President, Montana Retail Association, opposed House Bill 592. (Exhibit 16)

Representative Kelly Addy, Billings, didn't like the bill because he felt the local banks will be sold more to out-of-state people.

Terry Murphy, Farmers Union, said the bill will not solve any problems at all.

Representative Gary Spaeth, Billings, opposed HB 592.

Joe Brunner, Montana Grange, opposed the bill. (Exhibit 17)

Cliff Edwards, a banker, said the bill will cut Montana business.

Mary Westwood, Montana Sulphur and Chemical Co. opposed the bill. (see witness sheet)

Charlotte White, WIFE, opposed the bill.

Representative Bruce Simon, Billings, explained his story of how his family lost their long surviving clothing store in Billings (Coles) to a bank that left the family business in a bind. He opposed the bill.

Millie Good, representing herself, opposed the bill.

Edward Reeve, representing himself, opposed the bill.

Joseph Moore, Montana People Action, opposed HB 592.

Robert Boucher, Conrad, opposed the bill. (Exhibit 18)

Tom L. Lewis, representing himself, opposed HB 592. (Exhibit 18A)

Karl Englund, Montana Trial Lawyers Association, opposed the bill and the amendments. He said you don't have a bad faith case unless you breach a contract.

DISCUSSION ON HOUSE BILL 592: There was none.

ADJOURNMENT: The committee adjourned at 12:15 p.m.

SENATOR JOE MAZUREK, Chairman

mh

ROLL CALL

Judiciary COMMITTEE

50th LEGISLATIVE SESSION -- 1987 Date March 18

NAME	PRESENT	ABSENT	EXCUSED
Senator Joe Mazurek, Chairman	X		
Senator Bruce Crippen, Vice Chairman	X		
Senator Tom Beck	X		
Senator Al Bishop	X		
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Jack Galt	X		
Senator Mike Halligan	X		
Senator Dick Pinsoneault	X		
Senator Bill Yellowtail	X		

Each day attach to minutes.

DATE March 18

COMMITTEE ON Judiciary

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
ED. REEUE	NORTHERN LINE LAYERS	592		✓
Charlotte Marshall	WIFE	592		✓
Tim Gill	Montana Livestock Ag. Credit	592	✓	
CLIFF EDWARDS	SELF & Clients	592		✓
Terry Murphy	Montana Farmers Union			✓
Tim Robischon	Mont. Liability Coalition	592	✓	
BILL PARKER	FIRST INTERSTATE BANK (GREAT FALLS)	592	✓	
Ben Everett	Self + Clients	592		✓
Kay Foster	Gov. Council on Ec. Dev. & Bigs Chamber	592	✓	
Bryan Enderle	Missoula Chamber of Commerce	592	✓	
Chip Erdmann	MT Savings & Loan	592	✓	
Mary Westwood	Montana Sulphur & Chemical	592		✓
John Cronholm	Small Bus Admin	592	X	
Mikie Grace	self	592		✓
FRED FLANDERS	DEPT OF COMMERCE	592	✓	
Joseph Moore	Montana Peoples Action	592		✓
Bob Conger	Bozeman Chamber of Com	344 592	✓	
Stuart Doggett	MT Chamber of Commerce	592	✓	
[illegible]	[illegible]	592		✓
Bob Ryter	MT Credit Unions League	592	✓	
John Maynard	Tort Claims / Admin.	592		
Robert Johnson	NFIB	592	✓	
Roger Tippy	Mont Dental Assn	344	✓	
Gary Spratt	HD 84	592		✓
Tim Robischon	Mont. Liability Coalition	344	✓	
John Paddock	MT Bankers Assn	592	✓	

(Please leave prepared statement with Secretary)

DATE _____

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
CHAD SMITH	Mont Hosp Assn	HB 344	X w/amendments	
Brian Ellis	Mt. Medical Assn	HB44	X	
Roger McGlenn	Independents Ins. Agents Assoc. of MT	HB592	X	
Don Dellinger	Mont Bldg Mtrl Assn	HB592	X	
Bob Durechon	MWBA	HB592	X	
Monte Beck	self	HB592		X
Bill Rossbach	MTRA	592		X
" "	"	344	X	
Meg Nelson for Sue Olsen	Musselshell Agricultural Alliance	HB592		X

(Please leave prepared statement with Secretary.)

NAME: MARY E WESTWOOD, ATTORNEY DATE: 3/18/87

ADDRESS: P.O. BOX 31118, BILLINGS, MT 59103-1118

PHONE: 252-9324, 248-4907

REPRESENTING WHOM? MONTANA SULPHUR + CHEMICAL CO.

APPEARING ON WHICH PROPOSAL: House Bill 592

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

COMMENTS: As an attorney for a small business, I am very concerned about the abolishment of the covenant of good faith and fair dealing implied in all contracts in Montana. Small businesses, as well as individual consumers, can easily fall prey to the superior economic power of larger companies. In our own case, we found ourselves in a "deal" with a large oil company on some mining property and it was only through the covenant of implied good faith that we were able to pursue damages and defend our property.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Any Montana business which intends to deal fairly with consumers and with other commercial citizens should have no problem with a legal rule that they will deal in good faith. I

the way business was done in Montana, and I don't see why that should change in the current fever over tort reform.

NAME: Miller Muriel DATE: 3-18-87

ADDRESS: Box 551 Greenough Montana 59836

PHONE: 406-244-5293

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: ~~[illegible]~~ HB 592

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

COMMENTS: My husband and I took over a small mining business upon the death of our son - we invested all our income and savings in this business only to have ~~[illegible]~~ a very large out of state Corp come in and [illegible] mine and forced us out causing my husb. to deteriorate to a point he was unable to retire from a very well paying job

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY
EXHIBIT NO. 1
DATE March 18, 19
BILL NO. HB 470

Summary of HB 470: General Revisions of Youth Court Procedures

p 1. Section 1

Amends "Youth in need of supervision" definition to reflect a common situation where we have youths who commit offenses and habitually disobey foster parents and other physical custodians, as well as parents.

p 5. Section 2

Allows each party in a Youth Court proceeding one opportunity to disqualify a judge, rather than 2 chances under present law.

p 5. Section 3

Amends provisions dealing with transfer to criminal court; includes felony assault, provides for "probable cause" - a more widely used and legally understood term, clears up some language, and provides for an automatic transfer to district court if the youth is 16 or older, and is charged with deliberate or mitigated deliberate homicide.

p 9. Section 4

Must be probable cause before petition can be filed (after a youth taken into custody) if the matter is referred to the county attorney. This is a standard that applies in adult cases and broadens rights of youths taken before court.

p 12. Section 5

Clarifies the rights of a youth upon questioning and amends provisions dealing with waiver of rights. "Waiver of rights" section amended out in House Judiciary

p 13. Section 6

Expands authority to fingerprint and photograph youths arrested for felonies, pursuant to a search warrant if supported by probable cause. Also, records could be retained and used in other investigations.

p 15. Section 7

Revises provisions regarding detention and shelter care of youth. Broadens criteria, similar to adults, concerning when a youth can be held. (Bail rights provided under Section 9).

SENATE JUDICIARY
EXHIBIT NO. 1
DATE 3-18-87
BILL NO. H.B. 470

p 17. Section 8

Continues the privilege for communications made by youth to counselor or probation officer. However, if court testimony is in contradiction to privileged statements, the statements may be used for impeachment purposes.

p 17. Section 9

Provides for bail provisions for youth before Youth Court.

p 19. Section 10

Allows the Youth Court to require, if necessary, examination of the parents or guardian prior to a dispositional hearing.

p 21. Section 11

Expands the judge's authority in sentencing a delinquent youth or youth in need of supervision.

p 25. Section 12

Revises publicity provisions to open all court proceedings regarding youths charged as delinquents (except for a transfer hearing). Continues to prohibit publicity regarding youths in need of supervision.

p 26. Section 13

Prohibits the public disclosure of law enforcement's records This conforms the Youth Court Act to the provisions regarding adults.

p 27. Section 14

Youth Court records (documents, petitions, pleadings, etc.) open to public inspection when related to an offense for which access allowed under Section 12 (not a major change from present law).

p 29. Section 15

Provides that fingerprints and photographs (allowed in Section 6) excluded from requirements for sealing youth court records). Record not to be sealed for felony cases where access allowed under Section 12.

p 30. Section 16

New section to require that all youth court proceedings must be scheduled and heard as expeditiously as possible. Section 17 repeals existing statute requiring that a youth court petition must be taken to trial on the merits within 15 days.

SENATE JUDICIARY
EXHIBIT NO. 2
DATE March 18
BILL NO. HB 470

PROPOSED AMENDMENTS

TO HOUSE BILL 470

1.) Section 5, page 13, line 4.
Strike: "IMMEDIATELY AND EFFECTIVELY"

2.) Section 5, page 13, lines 6 and 7.
Strike: "CONSTITUTIONAL RIGHTS AND HIS RIGHTS UNDER THIS CHAPTER"
Insert: "RIGHT AGAINST SELF INCRIMINATION AND HIS RIGHT TO COUNSEL"

3.) Section 5, page 13, line 10.
Following: "~~16~~"
Strike: "UNDER THE

4.) Section 5, page 13, line 11.
Strike: "AGE OF 12"
Insert: "16"
Following: "~~elder~~"
Insert: "OF AGE OR OLDER"
Following: "~~of~~"
Strike: "THE PARENTS"

5.) Section 5, page 13, line 12.
Strike: "OF"

6.) Section 5, page 13, line 13.
Following: "~~under~~"
Strike: "OVER"
Insert: "UNDER"

7.) Section 5, page 13, line 14.
Strike: "12"
Insert: "16"

8.) Section 5, page 13, line 15.
Strike: "HIS PARENTS"
Insert: "A PARENT OR GUARDIAN"

9.) Section 5, page 13, line 17.
Following: "~~under~~"
Strike: "OVER"
Insert: "UNDER"

10.) Section 5, page 13, line 18.
Strike: "12"
Insert: "16"

11.) Section 5, page 13, line 19.
Strike: "PARENTS"
Insert: "PARENT OR GUARDIAN"

12.) Section 13, page 26, line 12.
Following: "(1)"
Strike: "No"

13.) Section 13, page 26, line 14.
Following: "~~records,~~"
Strike: ", EXCEPT TRAFFIC RECORDS,"

14.) Section 13, page 26, line 15.
Following: "public"
Insert: "IN THE SAME MANNER AS ADULT RECORDS UNDER THE PROVISIONS OF TITLE 44, CHAPTER 5"

15.) Section 13, page 26, line 18.
Following: "~~er~~"
Strike: "unless"
Insert: "OR WHEN"
Following: "inspection"
Insert: "OR DISCLOSURE"

SENATE JUDICIARY
EXHIBIT NO. 2
DATE 3-18-87

SENATE JUDICIARY
EXHIBIT NO. 3
DATE March 18 1987
BILL NO. HB 344

SUMMARY OF HB344 (ASAY)
(Prepared by Senate Judiciary Committee staff)

HB344 amends the statute of limitations in which an action can be brought for a medical malpractice action, as it relates to a minor. Under current law, the statute of limitations is 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs last, but in no case later than 5 years from the date of injury. This bill provides that in an action on behalf of a minor who was under the age of 4 on the date of his injury or death, the 3-year period begins to run when the minor reaches his eighth birthday or on death, whichever occurs earlier, and the period is tolled (does not run) during any period during which the minor does not reside with a parent or guardian. The bill applies to causes of action arising after October 1, 1987.

COMMENTS: None.

C:\LANE\WP\SUMHB344.

SENATE JUDICIARY
EXHIBIT NO. 4
DATE March 18 1987
BILL NO. HB 344

MEDICAL MALPRACTICE STATUTE OF LIMITATIONS

A. SUMMARY OF POSITION - House Bill 344

The major concern of Montana physicians with respect to House Bill 344 is that the legislature deal with the matter of the statute of limitations for minors, by reducing the limitation period.

Current law provides for the statute of limitations of minors to run after 19 years. House Bill 344, as amended, provides for a shorter limitation period for minors.

The current version of House Bill 344 attempts to deal with the major problem of birth injuries, consonant with the likelihood that any birth defects will be observed by responsible people.

For purposes of insurance, the time from birth to age 4 is the critical time period.

For example, with respect to the physician-owned carrier Utah Medical Insurance Association, a significant proportion of the losses and reserves of the company are associated with the obstetrical area:

- 36% of the paid losses and reserves for known losses of the company come from obstetrical misadventures, but only 25% of the insureds are family practice doing obstetrical work or obstetricians;

- 90% of the obstetrical misadventure losses and involve birth trauma injuries

Nationwide studies have shown time and again that the bulk of all claims involving minors occurring in any one year have been reported by the seventh or eighth year.

As to any particular calendar year - according to a nationwide survey of closed medical malpractice claims undertaken by the National Association Of Insurance Commissioners - all but 6.5% of the claims against minors have been reported within seven years of the incident occurring, with only 17% of the unpaid indemnity still out at the end of that seventh year.

For this reason, the Montana Medical Association has joined with the Montana Trial Lawyers Association in supporting the current version of the bill.

Below is a comparison of the pertinent part of the original proposal and the compromise bill, and the current law (where applicable):

CLAIMS OCCURING AFTER EFFECTIVE DATE
Statute Of Limitations Begins To Run Against Minor: Injury Claims

Current Law:	At 18th birthday as to all minors
Compromise Bill:	At 8th birthday for minors injured under the age of four, with running of statute stopped during time minor does not reside with a parent or guardian. At 18th birthday as to all other minors.
Original Version:	At 5th birthday as to all minors, with running of statute stopped during time minor does not reside with a parent or guardian.

CLAIMS OCCURING BEFORE EFFECTIVE DATE BUT NOT FILED BY THAT DATE
Statute Of Limitations Begins To Run Against Minor: Injury Claims

Current Law:	At 18th birthday as to all minors
Compromise Bill:	At 18th birthday as to all minors
Original Version:	The longest of 2 years or 3 years from the 5th birthday as to all minors

The original version of the legislation does more than direct its attention to the solution of the most pressing problem - birth defects - rather it goes beyond that into limiting the rights of minors where such a solution is not warranted by the available facts.

According to one medical malpractice carrier, the effect of the compromise version would not be known for about 3 years; neither version would have an effect until the constitutionality of the legislation were settled. To the extent that that constitutional determination is made before the end of 3 years, then to that degree, the effect of the original version would be felt earlier, a marginal period of time.

B. POLICY REASONS FOR LEGISLATIVE PROPOSAL

The general objectives of the legislation are to:

- Requiring the bringing of a legal action on behalf of minors who are injured, while the evidence is still fresh;

- Decreasing the necessity of large reserves by insurance companies, because of uncertainty as to when legal actions might be brought involving minors of tender years, thus stabilizing the insurance rates for the affected professionals;

SENATE JUDICIARY
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C. SCIENTIFIC EVIDENCE OF LINK WITH DOWNWARD IMPACT ON PREMIUMS

One prerequisite to insurability is the ability to measure with certainty the time, place, and amount of harm. One basis of insurance is the theory that a combination and spreading of similar risks will render the probable loss from the risks predictable. A rate of premium payments to cover the risks can then be determined.

If a hazard cannot be calculated, a carrier must charge unusually high premiums to accumulate abundant reserves for guaranteed protection. Such is the case with respect to injury to minors, where the length of time before the carrier knows whether its exposure is present can be upwards of 19 - 25 years.

This type of legislation - shortening the statute of limitations for minors - has been shown to have a stabilizing effect on prices and thus a reduction of the uncertainty with which actuaries must deal:

> "*** changes in the statute of limitations, especially those which limit the time for suits on behalf of minors and other legally disabled persons, will have a significant stabilizing effect on prices, since they will reduce the uncertainty with which actuaries must deal, and should therefore improve actuaries' predictions." 1977 Report Of The Commisaion on Medical Professional Liability. 1977 American Bar Assocation, pp. 58, note 55.

Other studies have shown a statiatically-aignificant effect on pricing of insurance from reductions in the statute of limitations. Adams, E. Kathleen and Zuckerman, Stephen, "Variation in the Growth and Incidence of Medical Malpractice Claima," Journal of Health Politica, Policy and Law, Vol. 9, No. 3, Fall 1984, pp. 475-488.

D. CONSTITUTIONALITY OF LEGISLATION

A. LEGISLATION IN EFFECT. Twenty-one states have adopted special statute of limitation rules for minors.

Several states have amended their statutes of limitations in medical injury cases where minors are involved, typically by providing that the statute applies to a minor upon reaching a certain age.

In Indiana -- for example -- the statute of limitations for medical malpractice against physicians is 2 years, except that in the case of minors injured at birth, it extends to age eight. In Texas, the law allows minors under 12 until their 14th birthday to file. Louisiana and Utah provide that there is no special treatment for minors, so that minors are subject to the same statutory limitation period as applies to adults.

B. GENERAL CONSTITUTIONALITY. States which do not view the common law action for negligence as a "fundamental right" have considered statutes of limitation and repose that bar minors' claims and have regularly found that such statutes do not offend guarantees of due process or equal protection. See, e.g. Johns v Wynnewood School Board of Education, 656 P.2d 248, 249 (Okl. 1982); Licano v Krausnick, 663 P.2d 1066, 1068 (Colo. App. 1983).

The states of Alabama, Indiana, and Utah have also upheld such limitations.

The result is often different for states which have open court provisions, especially if a "strict scrutiny" analysis is applied, as was the case in Montana prior to the passage of Initiative 30. See: Barrio v San Manuel Div Hosp., Magma Copper, 692 P.2d 280 (Ariz. 1984)(a statute which requires minors injured when below the age of seven to a bring negligence action against a health care provider by the time she reaches the age of ten violates the fundamental constitutional right to bring a cause of action for negligence.)

Because of the passage of Initiative 30, the proposed version would pose even less of a constitutional problem than those states which bar minors' claims. However, because of the existence of a constitutional prohibition on "special legislation" which is interpreted on the same basis as the "equal protection" clause in our constitution, care must be taken in drafting the legislation because of the possibility that the Montana Supreme Court would apply the "strict scrutiny" test.

That careful drafting requires that no more than the major problems posed by the current legislation be solved with the proposed legislation, e.g. that the result sought be reasonably related to the means used. The current version of the legislation does this.

Prepared by the Montana Medical Association, 2021-11th Ave., Helena, Montana 59601, G. Brian Zins, Executive Director, 406-443-4000.	STATUTE OF LIMITATIONS - MINORS 3/87

SENATE JUDICIARY
EXHIBIT NO. 4
DATE 3-18-87
BILL NO H.B. 344

HOUSE BILL NO. 344

Third Reading Copy

Amend as follows:

1. Page 2, strike lines 12 through 18 in their entirety and insert in lieu thereof, the following:

"(2) The time limitations in subsection (1) are applicable to minors notwithstanding the provisions of 27-2-401, except that such time limitations are tolled for a minor:

(a) until the minor becomes 5 years of age, or dies, whichever occurs first, and

(b) during any period that the minor does not reside with a parent or guardian."

2. Page 2, line 19, strike everything following the period after the word "Applicability" and strike lines 20 and 21 in their entirety and insert in lieu thereof the following:

"An action referred to in 27-2-205 for injury or death occurring prior to October 1, 1987 must be commenced within 2 years after the effective date of this act or within the time limits in 27-2-205, whichever expires last."

SENATE JUDICIARY
EXHIBIT NO. 4A
DATE March 18, 1987
BILL NO. HB 344

HOUSE BILL NO. 344

Third Reading Copy

Amend as follows:

1. Page 2, strike lines 12 through 18 in their entirety and insert in lieu thereof, the following:

"(2) The time limitations in subsection (1) are applicable to minors notwithstanding the provisions of 27-2-401, except that such time limitations are tolled for a minor:

(a) until the minor becomes 5 years of age, or dies, whichever occurs first, and

(b) during any period that the minor does not reside with a parent or guardian."

2. Page 2, line 19, strike everything following the period after the word "Applicability" and strike lines 20 and 21 in their entirety and insert in lieu thereof the following:

"An action referred to in 27-2-205 for injury or death occurring prior to October 1, 1987 must be commenced within 2 years after the effective date of this act or within the time limits in 27-2-205, whichever expires last."

SENATE JUDICIARY
EXHIBIT NO. 5
DATE March 18, 1987
BILL NO HB 344

AMENDMENT TO HOUSE BILL NO. 344 IS NEEDED

Section 2 of House Bill 344 must be amended to allow for application of the amendments to all cases not yet filed, regardless of when the injury or cause of action occurred. Unless such application is made, the amended statute will have practically no effect on insurance premiums for many years to come.

There is court precedence for such application. It does not amount to an illegal retroactive application of the amendment to incidents which have already occurred. In Castles v. State ex rel Montana Dept. of Highways, 187 Mont. 356, 609 P.2d 1223 (1980), the Montana Supreme Court ruled that application of a statute that modifies a procedure for exercising a vested right or for carrying out a duty does not constitute retroactive legislation. A statute of limitations is a procedural statute which does not create or eliminate vested rights. It prescribes the time within which actions to enforce vested rights must be brought. Statutes of limitations apply to any suit not yet filed.

The proposed amendment to House Bill 344 allows a reasonable time for filing suit after its effective date (October 1, 1987), being no less than 2 years, and reads as follows:

> "An action referred to in 27-2-205 for injury or death occurring prior to October 1, 1987 must be commenced within 2 years after the effective date of this act or within the time limits in 27-2-205, whichever expires last."

The application of amended statutes of limitations to all suits not yet commenced is not new. It has recently been included in a statute enacted in the state of Washington.

Even if the Montana courts found the amendment to be retroactive, it would still be legal. The law of Montana allows for retroactive application of a statute if it is expressly so declared in the statute itself. Section 1-2-109, MCA, provides:

> "1-2-109. When laws retroactive. No law contained in any of the statutes of Montana is retroactive unless expressly so declared."

This statute has been confirmed by the Montana Supreme Court many times, the most recent being in Barrett v. Soyland, 43 St. Rep. 712, 717 P.2d 1090 (1986), wherein the court said "For a statute to be retroactively applied such an intent must be expressly so declared by the legislature." The Montana court specifically recognizes retroactive application where expressly intended. Other Montana cases upholding the application of retroactive statutes are: Neel v. First Fed. S & L Ass'n.

___ M ___, 675 P.2d 96, 41 St. Rep. 18 (1984), Penrod v. Hoskinson, 170 M 277, 552 P.2d 325 (1976), and Harlem v. St. Highway Comm'n, 149 M 281, 425 P.2d 718 (1967). See also O'Conner v. Central School District, 509 N.Y.S.2d 472 (Dec. 11, 1986) wherein the New York Supreme Court held that a shortened statute of limitations is constitutional if it allows a reasonable period of time to file the action. The New York Court cited McGuirk v. City Sch. Dist. of Albany, 501 N.Y.S.2d 477, which found 6 months after the effective date of legislation to be a reasonable time to commence suit.

PREPARED BY
CHADWICK H. SMITH, LOBBYIST
FOR MONTANA HOSPITAL ASSOCIATION

SENATE JUDICIARY
EXHIBIT NO. 5
DATE 3-18-87
BILL NO. HB 344

American Academy of Pediatrics

Montana Chapter
Chairman
Jeffrey H. Strickler, M.D.
1300 N. Montana
Helena, MT 59601
(406) 443-5563
Alternate Chairman
James Feist, M.D.
7 East Beall
Bozeman, MT 59715
(406) 587-5123
Secretary-Treasurer
Ralph Campbell
#4 Third Avenue W.
Polson, MT 59860
(406) 883-2232

SENATE JUDICIARY
EXHIBIT NO. 6
DATE March 18, 1987
BILL NO. HB 344

March 17, 1987

TO: Chairman, Mazurek, and Members of the Senate Judiciary Committee

FROM: Jeffrey H. Strickler, M.D.
Chairman, Montana Chapter
American Academy of Pediatrics

RE: House Bill 344

The Montana Chapter of the American Academy of Pediatrics voted unanimously to support the reduction in the statute of limitations as put out in House Bill 344.

Certainly, it is appropriate to delay discovery of potentially handicapping conditions until after age five, but we feel that by age ten any condition for which a financial award would be indicated could be discovered by reasonable people. The physical risks of birth or brain trauma at an early age as evidenced by blindness, deafness, or cerebral palsy would clearly be evident. I know of no medical handicapping condition resulting from a problem at an early age that cannot be identified in these grade school years.

Particular concern has been expressed about the discovery of mental retardation and learning disabilities. Again, these should all be identified easily by age ten by reasonable people. Furthermore, as Vice-Chairman of Helena School District #1 and as a participant in many Individual Educational Plan meetings, I can assure you that school personnel not only are aware of these conditions but actively seek them out. School personnel in Montana are under the mandate of Federal Law 94-142 which mandates that all potentially handicapping conditions, both physical and educational, be identified and treated. Under federal law the parents and/or guardians must be informed of these findings and plans. Furthermore, by 1990 all school districts in Montana will be federally mandated to identify and treat these conditions from age three onward. Thus, discovery is not only reasonable but is actively pursued under federal mandate.

The pediatricians of Montana strongly urge a do pass to House Bill 344 with consideration of further shortening the exposure to the maximum of age ten.

SENATE JUDICIARY
EXHIBIT NO. 7
DATE March 18, 1987
BILL NO. HB 344

ROGER TIPPY

Attorney At Law

BOX 543
CAPITOL 1 CENTER
208 N. MONTANA
HELENA, MONTANA 59624

(406) 442-4451

March 18, 1987

Senate Judiciary Committee
Montana Legislature

Re: House Bill 344

Dear Chairman and Committee Members:

On behalf of the Montana Dental Association and the over 450 dentists practicing in Montana, I support HB 344. Enactment of this revision to the medical malpractice statute of limitations should improve the tort law of Montana. By encouraging earlier filings of potential claims, dentists can expect their insurers to deal with a somewhat more predictable future.

It has been observed that dental malpractice actions are often filed a number of years after the alleged negligent treatment. A reference work for plaintiffs' attorneys, Handling Dental Cases by Norman L. Shafler (1983), states that patients often wait a long period of time before contacting an attorney. Shafler gives several reasons, such as the patient's procrastination, the dentist's assurance that the patient will get used to a new appliance or treatment, or the referral of the patient's complaint to a local peer review committee. (Shafler, op. cit., §3.40).

Whatever the reasons, these delays in pursuing remedies contribute to a slow settlement of all the potential malpractice claims which can arise out of a year of dental practice. The table shows how in the fifth development year 19% of all asserted claims are paid out and not until the fifth year are half the asserted claims paid out. It takes 14 years to completely close out a development year -- in other words, the last claim for negligent dentistry practiced in 1986 will be paid out in 2000.

DENTISTS' PROFESSIONAL LIABILITY
PAY-OUT PATTERN
AS OF ACCIDENT YEAR 6/30/85

Development Year	Percent of Ultimate Paid Out	Cummulative Effect (%)
1st	1.0	1.0
2nd	6.0	7.0
3rd	11.0	18.0
4th	18.0	36.0
5th	19.0	55.0
6th	14.0	69.0
7th	11.0	80.0
8th	7.0	87.0
9th	7.0	94.0
10th	3.0	97.0
11th	1.0	98.0
12th	1.0	99.0
13th	.5	99.5
14th	.5	100.0
TOTAL	100.0	100.0

The pedodontists, practitioners of children's dentistry, have an especially long tail on their potential liability under current law. A 12-year old who doesn't like his braces could conceivably wait until the day he turns 23 and sue the dentist. HB 344 should restore some balance in this area.

SENATE JUDICIARY
EXHIBIT NO. E
DATE March 18, 1987
BILL NO. HB 592

SUMMARY OF HB592 (HARP)
(Prepared by Senate Judiciary Committee staff)

HB592 provides that the common-law causes of action for bad faith and breach of the implied covenant of good faith and fair dealing exist only when expressly provided by statute. **Under current law,** there are judicially created causes of action for bad faith and breach of the implied covenant of good faith and fair dealing. These causes of action have been the basis of large awards in recent years in what traditionally have been contract type cases (limited to contract type remedies; i.e., not emotional damages or other types of tort, non-economic type damages). This bill is an attempt to prevent tort-type recoveries in contract-type cases [such as the Baskin Robbins case from Butte that was discussed before the Committee last week]. **The bill** would prohibit any such action unless it is expressly provided for in statute. The bill expressly does not prohibit insurance bad faith cases or such cases brought under the Uniform Commercial Code. The bill is effective on July 1, 1987, and applies to cause of action arising after that date.

COMMENTS: I am not aware of any statutes that provide for such remedies, except for the Insurance Code and the Uniform Commercial Code. This bill would prohibit such actions for wrongful discharge, among others.

C:\LANE\WP\SUMHB592.

SENATE JUDICIARY
EXHIBIT NO. 9
DATE March 18, 1987
BILL NO. HB 592

STATEMENT OF THE
INTERNATIONAL FRANCHISE ASSOCIATION
ON MONTANA HOUSE BILL 592
BEFORE THE SENATE
COMMITTEE ON JUDICIARY
MARCH 18, 1987

The International Franchise ASsociation (IFA), a trade association based in Washington, D.C., supports the passage of House Bill 592. IFA represents more than 600 domestic and international franchisors and has served as a spokesman for franchising since 1960. The passage of Bill 592 would re-establish the positive climate for franchising which existed prior to the Montana Supreme Court's decision in Dunfee v. Baskin-Robbins.

Background on Franchising

Franchising has come to represent fully one-third of all retail sales in the United States economy, according to the United States Department of Commerce. Sales of goods and services through franchised businesses are expected to reach $591 billion in 1987 and account for the employment of an estimated 7 million people. Franchising is a method of business expansion being employed by approximately 2,300 franchisors nationally, and there are an estimated 500,000 franchised establishments. The most recent figures available indicate that in 1985 there were approximately 1,200 franchised businesses or franchisor-owned businesses in Montana - and this figure excludes automobile and petroleum dealerships. Two prominent franchisors -- Kampgrounds of American and Americlean Corporation -- which are members of IFA are based in Montana.

Franchising promotes the establishment of new small businesses and the creation of jobs. The success rate of businesses owned by franchisees is significantly better than the rate for other independently owned small businesses. Studies for the United States Small Business Administration have shown that almost one-third of business start-ups fail in their first year of operations and 65 percent within five years. In contrast, in 1985, less than five percent of franchisee-owned businesses ceased operation.

In summary, franchising is and should continue to be an important and growing part of Montana's economy.

The legislation before this committee -- House Bill 592 -- addresses a recent Montana Supreme Court decision which was widely interpreted as being severely damaging to the growth of franchising in the state. See: Dunfee v. Baskin-Robbins, Inc., 43 Montana 964, 720 P.2d 1148 (1986).

The Supreme Court's decision in Dunfee was widely reported and discussed in the franchising community and has already begun to have a chilling effect on franchising in Montana. Franchisors planning expansion in the state will likely expand elsewhere or will open company-owned stores, thus denying small business ownership opportunities to Montanans.

This legislation amended as proposed by the Montana Liability Coalition, would enact safeguard provisions which would protect companies involved in franchising from the severe damage of a judicial decision like that in Dunfee.

1) The bill would limit damages in cases involving a cause of action for breach of the implied covenant of good faith and fair dealing to the measure of contract damages, i.e., punitive damages could not be awarded. In the Dunfee case, the trial court awarded and the Supreme Court affirmed compensatory damages of $232,000 and punitive damages of $300,000.

2) Under the bill's provisions, an action for breach of an implied covenant of good faith and fair dealing arising from a contract may not be maintained against a party whose acts or omissions to act complained of are permitted by any provision of the contract or which constitute the exercise of a right granted by common law on statute. In the Dunfee case, the franchise was granted for a store in a specific location and the contract specified that Baskin-Robbins, the defendant company, had the right to approve or disapprove any proposal to relocate the franchise. Despite the specific contract provision allowing such disapproval, the court decided against the company because it refused to approve the franchisee's request to relocate the store.

3) The standard of conduct required under the implied covenant of good faith and fair dealing is drawn from the historical basis of the Uniform Commercial Code.

IFA strongly supports the enactment of this legislation in the belief that it will constitute a major step toward repairing the damage to Montana's economy which will ultimately result from the Dunfee decision.

IFA urges this committee to pass Substitute HB 592.

SENATE JUDICIARY
EXHIBIT NO. 9
DATE 3-18-87
BILL NO. H.B. 592

SENATE JUDICIARY
EXHIBIT NO. 10
DATE March 18, 1987
BILL NO. HB 592

SUBSTITUTE HB 592

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT, UNLESS OTHERWISE PROVIDED IN STATUTE, DAMAGES FOR BAD FAITH AND BREACH OR TORTIOUS VIOLATION OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING ARE LIMITED TO THE MEASURE OF CONTRACT DAMAGES; PROVIDING THAT A PARTY MAY NOT BE FOUND TO HAVE BREACHED THE COVENANT IF ITS ACTION WAS BASED UPON A STATUTORY OR CONTRACTUAL RIGHT; DEFINING GOOD FAITH CONDUCT; AND PROVIDING AN APPLICABILITY DATE AND AN EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA.

Section 1. Damages. Unless otherwise expressly provided by statute, damages for breach or tortious violation of an implied covenant of good faith and fair dealing shall be limited to the measure of damages for breach of contract.

Section 2. When covenant applicable. An action for breach or tortious violation of an implied covenant of good faith and fair dealing included within or arising out of a contract may not be maintained against a party whose act or failure to act is permitted by any provision of statute or of such contract.

Section 3. Definition. The conduct required by the implied covenant of good faith and fair dealing is honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

Section 4. Applicability. This act applies to causes of action arising after the effective date of this act.

Section 5. Effective date. This act is effective July 1, 1987.

Survey administered to Senior Bank Management Conference, Montana Banke Association, 2/12/87 - 38 Respondent

SENATE JUDICIARY
EXHIBIT NO. 11
DATE March 18, 1987
BILL NO. HB 592

BANK BAD FAITH SURVEY

A. Are you generally familiar with the area of bad faith claims against banks in Montana?

1. 38 yes

2. 0 no

If your answer to question A was yes, proceed to the following questions.

B. To what degree has your bank's exposure to bad faith claims affected the following lending activities:

1. The making of new commercial and agricultural loans?

a. 13 substantial effect

b. 23 some effect

c. 2 no effect

2. The increase or reduction in the credit line extended to a specific agricultural or commercial loan customer?

a. 10 substantial effect

b. 23 some effect

c. 5 no effect

3. The renewal or non-renewal of existing commercial and agricultural loans on maturity?

a. 13 substantial effect

b. 22 some effect

c. 3 no effect

4. Liquidation of and foreclosure on existing commercial and agricultural loans?

a. 20 substantial effect

b. 14 some effect

c. 4 no effect

C. It has been said that the "bad faith" doctrine has produced a virtual obligation on the part of Montana banks to accept a voluntary workout agreement in lieu of foreclosure.

What is your opinion of that statement?

1. 23 agree
2. 6 strongly agree
3. 4 don't know
4. 4 disagree
5. 1 strongly disagree

D. It has been said that the "bad faith" doctrine jeopardizes the quality of a Montana bank's loan portfolio.

What is your opinion of that statement?

1. 18 agree
2. 10 strongly agree
3. 7 don't know
4. 2 disagree
5. 1 strongly disagree

E. Many Montana bankers indicate that the "bad faith" doctrine has increased their costs for legal services, loan documentation and loan administration.

Is this statement true in your case?

1. 36 yes
2. 2 no

F. If your answer to question E was yes, characterize the nature of your cost increases caused by "bad faith."

1. 13 very substantial increase
2. 18 substantial increase
3. 3 moderate increase
4. 2 some increase

SENATE JUDICIARY
EXHIBIT NO. 11
DATE 3-18-87

Hello. My name is John Cronholm. I am the District Director of the Small Business Administration (SBA) in Helena, Montana. Our office guarantees loans submitted to us from banks all across the State of Montana. I am here to offer some observations about the effect of "bad faith" suits on the availability of commercial credit.

We rely heavily on our banking partners to provide basic loan servicing, but find that banks are becoming more and more reluctant to do anything more than accept payments and/or send out notices. When businesses come to the bank for "indepth" help, they are referred to an accountant or attorney as appropriate.

The Government cannot be sued in bad faith, nor can Government employees, acting within the scope of their employment, be held liable for tortious conduct. Nonetheless our office is under almost continuous subpoena to provide file information and testimony at bad faith hearings and trials.

During the month of January alone, my loan officers and I spent dozens of hours at depositions - all of which were attended by someone from my Legal Division - and provided file information for the case. The cost of reproducing the depositions and our file information for just this one lawsuit will exceed $1,000. The cost to the bank will vastly exceed ours.

One last point - during the twelve-month period ending 12/31/86 our office approved 426 loans. Three hundred sixty-three of these were to existing businesses and only sixty-four were to new businesses. Although this is the first year that we have tracked this data, I was surprised at how few loans were made to new businesses. I thought that historically that group comprised about 25% of our total activity. My people also tell me that about 60% of our loan funds are used for refinancing and the remainder for expansion and working capital. All of the above indicates to me that our lending partners - even with the added security of a Government guaranty - are directing their energy and resources to customers with whom they feel relatively secure and are not aggressively seeking new business.

It is my personal opinion that the possibility of litigative loss is a factor, not the only factor, but definitely a factor - in this conservatism.

That concludes my statment. If you have any questions I will try to answer them.

John R Cronholm

2-18-87

SENATE JUDICIARY
EXHIBIT NO. 12
DATE March 19 1987
BILL NO. HB 592

SENATE JUDICIARY
EXHIBIT NO. 13
DATE March 18, 1987
BILL NO. HB 592

TESTIMONY OF WILLIAM C. PARKER ON HOUSE BILL 592, MARCH 18, 1987

Good Morning! My name is Bill Parker and I am president and chief executive officer of First Interstate Bank of Great Falls and I appreciate the opportunity to speak before you this morning. Our Bank is a wholly owned subsidiary of First Interstate Bancorp, the 8th largest banking company in the country, with headquarters in Los Angeles, California. I have been with First Interstate Bank of Great Falls for 10 years and have served in my present capacity for almost two years.

Only two of seven banks in Great Falls operated at a profit last year and ours was not one of them. The two that were profitable could only be considered marginally so. Banking in these deregulated times and in an ecomony such as we are experiencing in Montana, is tough enough but operating under the constant threat of bad-faith, makes it formidable.

Bankers, by our very nature, are in the business of assessing risk. That is the very essence of what extending credit is all about. Yet what most people don't understand is that banker's never share in the profits of any business they may finance. At best, we will get paid interest on any funds we loan out and after paying out interest to the depositors who provided the money in the first place, and then paying salaries and all of our other operating expenses, we are hopefully left with a small margin we can call profit. Since we can never experience extra-ordinary profits, we are not in a position to take extra-ordinary risks.

Bad faith is a risk that we simply cannot assess. A jury looks at bad faith like most of us look at good art work - we know it when we see it, but we can't define it. In our bank we have determined that since we don't know what it is we can only avoid those instances where we know it will most likely occur. Those instances are primarily start-up operations or marginal operations.

A common measure of a bank's loan activity is its loan-to-deposit ratio. The loan-to-deposit ratio in our bank is about 75% which is heavy by anyone's standards. Of our total loans, about 75% are directly related to business and agriculture. In fact, agriculture alone represents 25% of our total loan portfolio. But we are changing the thrust of our bank. That is not to say that we won't make business or ag loans, but it is to say that those areas are not at the heart of our calling efforts. We are instead gearing ourselves toward increased activity in the consumer loan area for a variety of reasons, not the least of which is that consumer's don't sue for bad faith.

Would we change our direction if this bill is passed? I certainly cannot stand before you this morning and say that absolutely we would. But I can say without hesitation, that if some relief isn't provided, that we will absolutely continue to avoid those areas where the risk of a lawsuit is highest, and that is dealing with new business start-ups, or business or agricultural operators who appear to be marginal.

We spend tremendous time and tremendous dollars, trying to be fair to our customers. I urge you to be fair to the banking industry with your support of House Bill 592.

SENATE JUDICIARY
EXHIBIT NO. 14
DATE March 18, 1987
BILL NO. HB 592

WITNESS STATEMENT

NAME Tim H. Gill BILL NO. HB 592

ADDRESS Helena Montana DATE 3/18/87

WHOM DO YOU REPRESENT? Montana Livestock Ag. Credit Inc.

SUPPORT ✓ OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

As President of Montana Livestock, I represent over 200 former & Rancher share holder owners. Although we have a very clean record historicly for avoiding litigation, We see the very real potential for just one adverse Bad faith award stripping our Capital and subsequently closing the doors of this 54 year old ~~Ag~~ lending organization.
We do not relish the idea of legislating away our rights of recovery any more than ~~those~~ the trial lawyers do, but it would be little consolation if we are already put out of business at the expense of making some other party rich.

Good Faith and fair dealings is still a must to successful business, Just as a contract must be a believable and true negotiated business tool. We must daily re-evaluate the risk and rational for adding any new Ag. loans in this environment, and yet we are flooded with calls each week. The same concerns have restricted our borrowing ability as a corporation, which further restricts our current business.

I urge your support of H.B. 592

Tim H. Gill

SENATE JUDICIARY
EXHIBIT NO. Ex 15
DATE March 18, 1987
BILL NO. HB 592

March 18, 1987

TESTIMONY IN SUPPORT OF HB592

Mr. Chairman and Members of the Committee:

My name is Kay Foster. I appear in support of HB592 on behalf of the Governor's Council on Economic Development as well as the Billings Area Chamber of Commerce.

In its report published in January of 1987 the Governor's Council made six specific recommendations in the area of tort reform legislation. The first of these was a request that "the Legislature address the issue of bad faith as it pertains to insurance claims, wrongful discharge and the lending policies of financial institutions."

The Council found that in all of these areas the current practice allows Montana juries a great deal of flexibility in making "bad faith" determinations and our codes must be revised to ensure a fair and equitable civil justice system for all Montanans.

The overall goal of the Governor's Council was to present administrative and legislative action that would encourage economic growth for all doing business in Montana. The passage of HB592 is an important step toward that goal through the restoration of some certainty and predictability to employers, lenders and insurors in our state. We urge its approval.

Billings Chamber of Commerce • P.O. Box 2519 • Billings, Montana 59103 • 406-245-4111

Montana Retail Association

Executive Office
318 N. Last Chance Gulch
P.O. Box 440
Helena, MT 59624
Phone (406) 442-3388

SENATE JUDICIARY
EXHIBIT NO. Ex 16
DATE March 18, 1987
BILL NO. HB 592

March 17, 1987

Senator Joe Mazurek
Chairman, Judiciary Committee
Capitol Station
Helena, Montana 59620

Dear Senator Mazurek,

Due to a conflict of scheduling, I will be unable to attend your committee hearing that will deal with HB 592 (the bad faith bill). The Montana Retail Association, on behalf of the Montana Hardware & Implement Association, would like to go on record as OPPOSING HB 592. We are concerned for the small businessman and especially anyone who has a franchise agreement.

I understand there is to be some amendments presented. However, we feel they do not go far enough in giving the small businessman some protection.

Thank you for your consideration.

Respectfully,

George E Allen

George Allen
Executive Vice President
Montana Hardware & Implement Association

GA/ch

NAME Jo Brunner DATE 3/18/87

ADDRESS 2015½ BILL NO. HB592

REPRESENT Montana Grange

SUPPORT ______ AMEND ______ OPPOSE X

SENATE JUDICIARY
EXHIBIT NO. 17
DATE March 18, 1987
BILL NO. HB 592

MR. CHAIRMAN:

My name is Jo Brunner and I re present the Montana Grange at this hearing today.

The Montana Grange wishes to go on record as being opposed to HB592.

Despite all the whereases in this bill explaining just what problems apparently exist with the present way of entering into agreements on the premises of good faith, it is our position that we need all the help we can get, even though allegedly it would be reinforced ~~in~~ other laws and st andards, simply because of the trend in many of our dealings is to not act in good faith, often on both sides of a contract.

We are certainly not legal minds in each and every matter, but we find it difficult to believe that having a good faith clause brings on the great number of law suits indicated in this bill.

We ask that you do not pass HB592

Mr. Chairman, on a personal note, I have had more calls on this one bill than any other bill this session, and that is saying a great deal. From farmers and those involved in businesses alike, I have heard the concern that this will eliminate that which themajority of our people hold dear and necessary ~~--~~the belief that we all must act in good faith when we deal with others. Although they donot appreciate the fact that we must have laws to enforce that old fashioned position of dealing with your fellow-man, they do not want it eliminated from the laws, even if that is the only way it can come about in this day and age. And one thought I received frequently from the calls

I ask that you donot pass HB 592.

Mr Chairman - I wonder how many times your committee has heard the statement that certain portions ~~of~~ laws have to deleted, added to, or amended - or the banks - and other businesses will no longer be able to work with those who borrow - specifically with agriculture - yet no guarantees are given - not even promises - ~~that~~ not even

111 Situations That Should All These Various
Concessions be given - That our Borrowing
Ability - our Insurance ability will improve -

H.B.592

Loaning Worthless Money

Loaning officers, looked at ~~Banks~~ only high-profitable exhorbinate interest rate when making loans which were very profitable. ~~they~~ encourged all borrowers to borrow without looking at ~~the~~ cash flow of loan.

The bottom line of all this is, Bankers & loan co. loaned worthless money, under conditions of ~~other loans~~ with high int. rates the borrower faces forclosure and the banks end up with an asset.

Robert Boucher
Box 97
Conrad MT

SENATE JUDICIARY
EXHIBIT NO. 18
DATE 3-18-87
BILL NO. H.B.592

SENATE JUDICIARY
EXHIBIT NO. 18 A
DATE March 18, 1987
BILL NO. HB 592

A POSITION PAPER IN OPPOSITION TO
HOUSE BILL #592
by Tom L. Lewis

House Bill #592 violates the public interest by promoting rather than curbing abusive and unethical business practices. The Bill mistates the law relating to common law causes of action for breach of the implied convenant of good faith and fair dealing in that it suggests that all contract breaches are actionable in tort for bad faith. The Montana Supreme Court has specifically declined "to extend the breach of implied convenant to all contract breaches." Nicholas v. United Pacific Insurance Co., 42 St.Rptr. 1822. If the legislature were to enact HB592 the citizens of this state would be badly served by their elected representatives, because the act specifically encourages unethical and unreasonable business conduct.

The Montana Supreme Court has held that the bad faith breach of contract is actionable only when there is a "special relationship" that exists between the parties to a contract or when there is a knowing and unreasonable breach of the contract that exceeds the justifiable expectations of the injured party. The Court has properly reserved the application of tort damages into those cases where the conduct of the breaching party is especially harsh, unjustifiable, capricious and beyond all reasonable expectations of the injured party. The Court has primarily limited the application and availability of this common law cause of action to those cases where there is a special relationship between the parties arising out of an inherently unequal bargaining position at the time of both formation of the contract and enforcement of contract provisions.

The Court has found an implied convenant of good faith in adhesion contracts where one party to the contract is in a vastly inferior bargaining position at the time of formation of the contract. In those cases where powerful financial institutions are in a position to dictate to parties with whom such institutions contract (e.g. contracts between bank/customer, security broker/client, surety/principle, insurer/insured), the inferior party has no real say in the language of the written contract and often does not even see the contract until after the commercial relationship has come into existence. The public interest is therefore well served by a requirement of good faith and fair dealing actionable in tort, when the party in a superior position acts with particular harshness and unreasonableness concerning of the other party's rights arising from the commercial transaction, the insurance policy, or other contractual relationship existing between the parties.

In these kinds of legal relationships, common law actions for bad faith well serve the public, because that is the only way to take the profitability out of intentional and unreasonable contract breaches by parties in a superior financial or bargaining position. For example, if an insurer intentionally, arbitrarily and unreasonably withheld health insurance benefits from its insured and forced that insured into bankruptcy or other form of economic distress due to refusal to pay for extraordinary medical expense, HB592 would prevent the insured from ever being made whole. All the insurance company would be required to pay at the conclusion of a long court fight would be what the insurer should have paid to begin with. What incentive would there by for any insurer to deal fairly and in good faith with the insured, when all the insurer would ever have to pay would be what the insurer should have paid before the insured sought counsel and incurred substantial legal fees. What if the insured lost home, property and life savings, because he or she were unreasonably denied coverage by the carrier? Would the public policy and public interest of the citizens of this state be served by this bill which would allow the insurer to escape any liability for consequential damages resulting to the insured and his or loved ones?

The Montana Supreme Court has correctly ruled that in contracts involving inherently unequal bargaining positions and in cases of special relationship between the parties to a commercial transaction, there is an implied-in-law duty of good faith and fair dealing actionable in our civil courts. Every member of the legislature should read the well reasoned decisions of the Supreme Court, which clearly justify this legal principle. The legal relationships where this duty has been found include: Insurer/insured (First Security Bank v. Goddard, 181 Mont. 407, 593 P.2d 1040 (1979); Gibson v. Western First Ins., 682 P.2d 725, 41 St.Rptr. 1048 (1984); Lipinski v. Title Ins. Co., 655 P.2d 970 (1982). Bank/customer (First National Bank of Libby v. Twombly 689 P.2d 1226 (Mont. 1984); Tribby v. Northwestern Bank of Great Falls, 704 P.2d 409 (Mont. 1985). Attorney/client (Morse v. Espeland, 696 P.2d 428 (Mont. 1985).

House Bill 592 would be a giant and unfortunate step backward by the law makers of this State. The Supreme Court has proceeded cautiously and has only approved or upheld verdicts based upon bad faith when such verdicts or judgments are well founded by the evidence. If justice is to be sacrificed for certainty and predictability, then the

SENATE JUDICIARY
EXHIBIT NO. 18A
DATE 3-18-87
BILL NO. H.B. 592

citizens of this State will suffer. Powerful contracting parties and powerful litigants will therefore be permitted to intentionally violate their contractual obligations regardless of the harshness of the result on the weaker party to the contract. There will be no incentive for the out-of-state holding companies and financial giants to deal fairly with smaller Montana business interests, because the stronger party will only have to pay when it is caught and it will only have to pay what it should have paid according to the limitations the stronger party has written into the contract. The true damages of the victim of bad faith will not even be presented to a court and will go forever uncompensated. There will therefore be a strong and potentially irresistable incentive for powerful institutions to disregard their contractual/commercial obligations, because it will be less expensive and more profitable to violate the terms of the commercial relationship regardless of how disasterous the consequences are for the disadvantaged party.

HB592 does not promote the legitmate business interests of the State of Montana; it promotes and protects improper and unethical business practices in violation of the interests of all citizens of this State.

SENATE JUDICIARY
EXHIBIT NO. 18A
DATE 3-18-87
BILL NO. H.B. 592