MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

March 25, 1987

The fifty-second meeting of the Senate Judiciary Committee was called to order at 10:00 a.m. on March 25, 1987, by Chairman Joe Mazurek in Room 325 of the state Capitol.

ROLL CALL: All members were present.

CONSIDERATION OF HOUSE BILL 720: Representative Gary Spaeth, House District 84, opened the hearing on HB 720 which adopts the Model Statutory Close Corporation Supplement (approved by the ABA) to the Model Business Corporation Act (which Montana has). He informed the committee the proponents would explain the bill in more detail.

PROPONENTS: Steve Bahls, Assistant Professor of the University of Montana Law School, supported the bill and gave a brief outline of what the bill does. (Exhibit 1)

Amy Guth, a University of Montana law student and Marcella C. Quist, also a University of Montana law student, stated to the committee the detailed outline of what the bill will do when passed into law. The women were the law students who worked on the bill.

Don Ingels, Montana Chamber of Commerce, testified in support of the bill.

Bob Murdo, State Bar Business Law, felt it will simplify the process for incorporations.

OPPONENTS: There were no opponents.

DISCUSSION ON HOUSE BILL 720: Senator Pinsoneault asked Mr. Bahls if a business is currently incorporated, does the business amend their articles to convert to this law. Mr. Bahls answered it is available to existing corporations.

Senator Halligan asked if a business would lose its limited liability if they don't meet annually. Mr. Bahls replied that section 17 of the act provides that the

"corporate veil" will not be pierced for not meeting annually. He said this bill will stop that from happening.

Representative Spaeth closed by thanking the law students for their work.

CONSIDERATION OF HOUSE BILL 748: Rep. Jack Ramirez, Billings, opened the hearing on HB 748, which allows a corporation to amend its articles of incorporation to eliminate or limit a director's personal liability to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director. He said different associations can't get directors to serve on corporation boards because of the liability problem. He said page 3 has the exceptions for the limited liability. He stated the bill will not affect director's liability outside the corporation.

PROPONENTS: Elwood English, representing the Secretary of State, supported the bill. (Exhibit 2)

Jim Robischon, Montana Liability Coalition, stated the bill doesn't diminish the shareholder's right against the officers of the corporation. He felt it will eliminate some pressure on directors, which may be a factor in these kinds of lawsuits.

George Bennett, Montana Bankers Association, said the bill will only affect state chartered banks. He stated the bill just affects the relationship between the banking corporation and the shareholders and the directors. (See witness sheet)

John Allen, Great Falls Gas Company, testified in support of the bill. (Exhibit 3)

John Hoyt, representing himself, supported the bill.

Joe Brunner, Montana Water Development Association, supported House Bill 748.

OPPONENTS: There were no opponents.

DISCUSSION OF HOUSE BILL 748: Senator Bishop inquired if there is a case example of this kind of lawsuit in Montana. Mr. English replied there has been none in Montana, but there have been several in Delaware. He said the nonprofit groups are the ones that really need this protection. He said if investors put money into stock and the market goes down, the shareholders might sue the broker or the business they invested into.

Rep. Ramirez distributed amendments for the bill. (Exhibit 4)

Senator Mazurek asked if the amendments go through other corporation sections and reference the changes made here. Rep. Ramirez said Rep. Bardanouve asked for these amendments because he was worried about private corporations being sued.

Senator Beck questioned why federal banks could not be in this bill. Mr. Bennett responded that the bill will affect the corporate charter, which is filed with the Secretary of State, for a state bank. He said we cannot mess with federal law.

Representative Ramirez closed the hearing on HB 748.

CONSIDERATION OF HOUSE BILL 567: Rep. Ramirez of Billings introduced the bill. He said HB 567 will amend the law relating to civil lawsuits as to the treatment of collateral source payments in such suits. He gave the committee two examples of cases in front of the jury. He stated a man in case #1 is injured by a power line and loses his arm. He stated he has no medical expenses paid for and no workmen's compensation or benefits which will help him. He explained in case #2, the man has the same accident but has everything paid for. He said case #2 is tried with the jury and the jury doesn't know all of the medical expenses are paid for. Rep. Ramirez said that is the "collateral source rule". He felt the rule was not fair that the jury can't obtain collateral information on a claimant. He said his bill would abolish this rule. He said society can't afford people to get "double recovery" from a suit because of this rule. He explained if the insurance company pays the expenses the second time around because of a law suit, the claimant's expenses for an injury were already paid for, the people end up paying higher premiums. He said the bill will allow a judge to see the claimant's financial record on the injury when making his decision. He pointed out the House amended into the bill that the judge has the right to know if the claimant has insurance. He felt the part of HB 567 which deals with plaintiff's and claimant's current and expected future litigation costs and attorney fees had nothing to do with this bill and would like it stricken.

PROPONENTS: Gary Neely, Montana Medical Association, supported the bill. (Exhibit 5) Mr. Neely also distributed amendments to the bill. (Exhibit 6)

Jim Robischon, Montana Liability Coalition, supported the bill and the Neely amendments. He said the Neely amendments eliminate the disclosure of liability insurance information. He commented that the Montana Supreme Court stated these disclosures are prejudicial. He commented the Neely amendments also eliminate the plaintiff's collateral source payment. He felt the plaintiff's collateral source payments are not relevant to any issue relating to the defendant's liability. He said there is no statute in Montana that prohibits the disclosure of these payments.

Randy Gray, State Farm Insurance, stated his organization did not like the disclosure of insurance information to the jury. He said his organization supported the Neely amendments.

Kay Foster, Governor's Council on Economic Development, testified in support of the amended HB 567.

Jacquline Terrell, American Insurance Association, testified that the American Insurance Association stands in support of the bill because of the Neely amendments presented; however, her organization did not agree with subsection 5 (a) and 5 (b) which is the disclosure of insurance in the bill's present form. She said the state would be the only state that would allow disclosure of insurance information.

OPPONENTS: Karl Englund, Montana Trial Lawyers Association, gave the committee an evaluation of proposals to eliminate the collateral source rule. (Exhibit 7) He stated the rule is based on a policy decision and not on the basis of punishment. Mr. Englund pointed out people should not be left "off the hook" from a lawsuit just because the person that was injured can pay for expenses because he carries insurance. Mr. Englund presented charts to the committee explaining a case.

	Current Law	Proposed Bill
Verdict	$100,000	$100,000
Litigation Costs	-40,000	-40,000
Collateral Source	+20,000	-0-
Other	-0-	-0-
Net Recovery	$ 80,000	$ 60,000

He showed the committee what the monetary difference would be in using the proposed bill now. He said it will cause the victim's recovery to reduce 20 percent; the insurance company will get $20,000 windfall, and a fair trial concept is jeopardized. He felt the proposed bill takes the jury's attention away from the real case. Mr. Englund stated SB 252 would cause the "double payment" to go back to the insurance compane that insured the claimant. He didn't want to see the trial weighed down with too many issues, so Mr. Englund liked Mr. Neely's proposal but wanted to make sure the bill would only go into action on a true "double recovery" case. Mr. Englund thought an amendment to Mr. Neely's new section 2; the court must reduce to the extent that the payments from the collateral source exceed the litigation cost; would allow the court to decide if there truly was a double recovery.

John Hoyt, representing himself, stated the bill will cause the court system to increase its judges in all levels and increase the lawyer population. He felt "double recoveries" are not existent. He felt there will be people having double reductions with HB 567. He asked if the intent of this bill means a person can't buy insurance for his own protection. He believed self insurers will be affected by the bill and so will the injured person.

Tom Keegan, representing injured people, stated a person who is injured might end up, after a lawsuit, with just his insurance premium. He felt this bill was very unfair. He expressed that if the bill discloses insurance information for health, it should then disclose life insurance too. He said this bill is just a myth because no one gets rich because he was hit by a car. He hoped the committee would kill the bill.

Sue Weingartner, Montana Association of Defense Counsel, opposed the bill because of the new House language on page 4, about the disclosure of insurance and the attorney fees section.

Glen Drake, American Insurance Association, opposed the bill. (Exhibit 8)

DISCUSSION ON HOUSE BILL 567: Senator Mazurek asked why the bill is no longer a big problem for the Montana Trial Lawyers Association like it was at the special session.

Karl Englund said there was a concern, that was all. Senator Mazurek asked Mr. Englund if he supports the bill the way the evaluation bill from Exhibit 7 states. Mr. Englund answered yes, or the Neely bill would be fine. Senator Mazurek asked why the House made the bill discretionary on page 3, line 19. Mr. Englund replied if the jury follows this bill, they should not be mandated to reduce the verdict.

Representative Jack Ramirez closed by saying the lawsuits are to compensate the injured so it will get complicated, but the courts know all about these kinds of suits, so it will not weigh the court system down. He expressed the bill should not cover a double recovery or trick the jury into trying to award the plaintiff enough to cover litigation costs. He commented if the committee wants to have subrogation rights, put it in the bill, but say everyone can have subrogation rights because the jury doesn't know if the claimant can work again or not. He didn't believe in keeping information from the jury because it is not fair to the defendant.

CONSIDERATION OF HOUSE BILL 474: Representative Janet Moore, Condon, Montana, introduced HB 474, which provides that the officers and directors are jointly and severally liable for the unpaid wages of an employee of the corporation in the following circumstances:

1) the corporation becomes insolvent and continues to operate for a period of 30 days after insolvency (but not more than 30 days?);

2) the corporation disposes of its assets and dissolves before paying the unpaid wages of any of its employees;

3) a director or officer commingles substantial assets of the corporation with his personal assets;

4) an officer holds the corporation out to be a sole proprietorship, a partnership, or an unincorporated association or organization (holds out to whom? the employee? others?).

Rep. Moore stated a constituent asked her to carry this bill. She felt the bill will only affect the "fly-by-night" corporations. She stated Rep. John Mercer would assist in the legal aspects of the bill.

PROPONENTS: Don Judge, Montana AFL/CIO, said this problem of unpaid wages is growing. He said the bill turns the unpaid wages into a lien. He explained a story about contractors that just left Helena and did not pay their workers for their labor on hail damaged houses.

OPPONENTS: Jacquline Terrell, American Insurance Association, testified because the bill contravenes the theory of a corporation protecting its' officers and directors from personal liability. She said subsection (1) will force joint and several liability on corporations that continue their operation beyond the solvency point of 30 days.

Bryan Enderle, Missoula Chamber of Commerce, stated the bill is unfair because it makes officers and directors liable, so it defeats the purpose of incorporating.

DISCUSSION ON HOUSE BILL 474: Senator Pinsoneault asked if the bill just affects profit organizations. Rep. Moore answered it only affects the people making a profit.

Representative Moore closed the hearing on House Bill 474.

ACTION ON HOUSE BILL 720: Senator Pinsoneault moved House Bill 720 BE CONCURRED IN. The motion CARRIED UNANIMOUSLY.

ADJOURNMENT: There being no further business before the committee, the meeting adjourned.

SENATOR JOE MAZUREK, Chairman

mh

COMMITTEE ON Judiciary DATE March 25th

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Bryan Enderle	Missoula Chamber of Commerce	474		X
Elwood English	Secretary of State	437 748	X	
Tom Keegan		567		X
Bob Murdo	State Bar Business Law Section	HB720	X	
Bob Correa	Bzn. Chamber	567-720	X	
Kay Foster	Bzn Chamber Gov. Council on Ec. Develop.	567	X	
John C Hoyt	Hoyt & Bleamett	567		X
Bryan Enderle	Missoula Chamber of Commerce	567/720/748	X	
Don Angela	Mt Chamber of Commerce	720	X	
John Allen	Great Falls Gas Co	748	X	
[illegible]	MT. Retail Assn	748	✓	
[illegible]	Self -			
[illegible]	MUPA	748	✓	
Jacqueline Terrell	AIA	567	amdts	X
"	"	474		X
Roger McGlenn	Independent Ins. Agents Assoc. of MT	567	Amend	
Ted J. Dorey	Montana Dairymens Association	720		
	Applied Management Corp.	748	X	
Brian Ems	MT. Medical Assn	H567	X	
Brian Ems	MT. Medical Assn	H748	X	
Gerald J. Neely	" "	HB567	X	
Randy Gray	State Farm + NAII	567	X amend	
Marcelle C. Quist	Mt Law School - Weedbusters	HB 720		
Amy Gilth	" "	720	X	
Steven C Bahls	U of M Law School	720	X	

(Please leave prepared statement with Secretary)

ROLL CALL

Judiciary COMMITTEE

50th LEGISLATIVE SESSION -- 1987 Date March -

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		
	X		

Each day attach to minutes.

SENATE JUDICIARY
EXHIBIT NO. 1
DATE March 25, 1987
BILL NO. HB 720

TESTIMONY OF STEVEN C. BAHLS,

Assistant Professor of the
University of Montana School of Law

in Support of House Bill 720

The Montana Business Corporations Act, enacted in 1967, is the law that governs how corporations are formed, how they are operated, and how they are dissolved. This statute is based upon the Model Business Corporations Act. The Model Business Corporations Act was drafted in 1950, primarily by a group of Chicago lawyers.[1] Experience has shown that, while these lawyers adequately provided for the needs of large corporations, they failed to provide for the needs of small business. In Montana, small business, including farmers and ranchers, have frequently gotten into expensive litigation, in part, because of the failure of the Montana Business Corporations Act to address their needs.

Consider these hypothetical cases which are indicative of the problems a small business may have.

1. A mainstreet business with one owner incorporates. The owner of the business thinks that he will not be personally responsible for the corporation's debts because corporations are separate legal entities. If that owner fails to elect himself to his own board of directors, have meetings (presumably with himself) and

keep "minutes" of those meetings, he may be personally liable for the corporation's debts because he did not follow the Montana statute.[2]

2. After Dad dies, three brothers inherited a ranch. The two oldest brothers moved out of state and the youngest brother operated the ranch. The two out-of-state brothers, wanting to sell their stock in the ranch, sold it to an out-of-state corporation, which removed the youngest brother from operation of the ranch.[3]

House Bill 720, if adopted, would save small businesses such as these from the problems I just described:

1. Any lawyer knows that small businesses usually are operated by their primary owner, who ignores the corporate formalities (election of board of directors, annual meetings, minutes, etc.). In a small business these are needless and House Bill 720 allows a corporation to operate more informally without losing its corporate protection.

2. Small businesses want to keep ownership of the business in the family. This may be done under existing law, but only if complex and expensive legal documents are drafted. Under House Bill 720, the law will allow

businesses to stay in the family by allowing the corporation the option to buy stock proposed to be transferred to outsiders.

Are we sailing into uncharted waters if we adopt House Bill 720? The bill is virtually identical to the Close Corporation Supplement to the American Bar Association Model Business Corporation Act. The Supplement was approved in 1984 by the American Bar Association Committee on Corporate Laws. As of last year 23 states have some sort of provisions in their business laws addressing the special needs of small corporations.[4] The legislature of Montana has periodically updated its Business Corporation Act in accordance with American Bar Association Model Act revisions.

What if a small business doesn't like the provisions of House Bill 720? The provisions of House Bill 720 apply to small business only if the small business so elects. If the small business doesn't like the provisions of House Bill 720, then it does nothing and the existing law applies.

Why would a small business want to operate under House Bill 720? There are three reasons, in addition to solving the problems described previously.

1. It allows small business flexibility to vary normal

corporate rules to meet their business needs.

2. It protects shareholders who own less than 50% of the stock from unfair conduct by large shareholders.

3. It codifies the current practices of how business operates.[5]

I've recently seen publications[6] which state that there are more benefits associated with incorporating in the State of Delaware than any other state. Most of those advantages are available in Montana--with a few exceptions. One of those exceptions is the availability of a special corporate law for small business. We too ought to have that advantage.

Prior to coming to Montana, I practiced law for six years in the State of Wisconsin, which has adopted an act nearly identical to that of House Bill 720. Small business has had a good experience with it.

Montana is a state where there are few big businesses and many small businesses--including farms and ranches. A statute to meet their needs is important.

1. 6 Business Lawyer 1 (1950).

2. See Brewster, "Piercing the Corporate Veil", 44 Mont. L. Rev. 91, 96 (1983). See also E.C.A. Environ. Management Serv., Inc., ___ Mont. ___, 679 P.2d 213 (Mont. 1984); Scott v. Prescott, 69 Mont. 540, 552-53, 223 P. 490, 494 (1924); and Hansen Sheep Co. v. Farmers' & Traders' State Bank, 53 Mont. 324, 331, 163 P. 1151, 1153 (1917).

3. The Montana Supreme Court has been forced to deal with several cases where family members who each own stock in a corporation are deadlocked in bitter disputes. See Fox v. 7L Bar Ranch Company, ___ Mont. ___, 645 P.2d 929 (1982); Maddox v. Norman, ___ Mont. ___, 669 P.2d 230 (1983).

4. O'Neal, Close Corporations § 1.15 (1986). Twelve of these states have a separate integrated statute, most of them being patterned after Delaware's law. Model Business Corporation Act Annotated, 1 P. 1818 (1986).

5. Committee on Corporate Laws, "Proposed Statutory Case Corporation Supplement to the Model Business Corporation Act," 37 Bus. Law. 269 (1982).

6. See, e.g., The Red Book Digest of Delaware Corp. Procedures (1976).

SENATE JUDICIARY
EXHIBIT NO. 1
DATE 3-25-87
BILL NO. H.B. 720

SENATE JUDICIARY
EXHIBIT NO. 2
DATE March 25, 1987
BILL NO. HB 748

TESTIMONY FROM
THE OFFICE OF
THE SECRETARY OF STATE

HB748

EFFORT MADE TO PROTECT DIRECTORS
FROM CORPORATE LIABILITY

In recent years corporations have been facing more and more difficulty in recruiting outside directors because of the exposure to liability in lawsuits. Small business corporations (which predominate in Montana) and nonprofit corporations have been particularly hit hard by the proliferation of lawsuits and the increasing difficulty in obtaining directors' liability insurance.

Many small business corporations and almost all nonprofits depend on outside advice and judgment for policy decisions. Directors who voluntarily, or for only small compensation, offer their expertise are faced with lawsuits by disgruntled shareholders or members if decisions go bad.

Some courts around the country have developed standards like "sound business judgment" which make sense, but are often misapplied with the advantages of hindsight. For instance, a director may vote for a particular action expecting interest rates to continue to rise. As economic conditions change, the decision may turn out to lose money even though no one could foresee that result at the time it was made.

A jury, with the assistance of hindsight, may decide that the decision made by the director was not "sound business judgment." Rather than subject themselves to such second-guessing, most experts stick to their own ventures, depriving new companies of the benefit of their experience which they might otherwise be willing to share.

As part of an effort to encourage small business to flourish in Montana, Representative Jack Ramirez sponsored House Bill 748 at the request of the Secretary of State. House Bill 748 allows shareholders to adopt articles of incorporation or amend existing articles to grant immunity from suit by the shareholders or corporation to directors under all but a few excepted circumstances. The grant of immunity is not effective by operation of law, but must be affirmatively adopted by the shareholders or members.

It should be noted that directors are <u>not</u> offered <u>absolute</u> protection. First the protection offered is left to the stockholders to adopt (if they are suffering from the inability to attract needed directors) or not (if they are not). Second, the protection is only against lawsuits <u>by the corporation or its shareholders</u>, not other members of the public who did not voluntarily surrender their rights and who may have valid claims

against a director.

Third, directors are not immune if they (1) breach a duty of loyalty, (2) engage in willful misconduct, recklessness, or knowing violation of law, (3) violate 35-1-409, MCA, (allow a distribution contrary to law or articles of incorporation), or (4) derive an improper personal benefit. The important point is that directors would be immune from suit, if the corporation adopts the provision, for simply making an honest mistake in business judgment.

Please note in 35-1-207, articles of incorporation may be amended only by a vote of the shareholders unless (1) no shares have been issued, or (2) an amendment is solely to change the number of authorized shares.

Consequently the HB 748 provision could not take effect without shareholder approval. If it were adopted before shares were issued, a potential shareholder could decline to purchase because of the objectionable provision in the articles.

A minority shareholder who loses the vote on whether to adopt the provision would presumably have time to get out of the corporation before an event arose which would limit that shareholder's rights.

In essence, the general corporate law of Montana prevents the HB 748 provision from being adopted against the will of the shareholders.

Delaware has long been in the forefront of those states attempting to establish a reputation for hospitality to business. Consequently Delaware has become the state of incorporation for thousands of American corporations, large and small, and has reaped benefits, both direct and indirect, from the process.

A comparison made by the University of Montana Law School shows very little difference between the advantages offered by Delaware and those we offer in Montana. Recently Delaware has responded to the directors' liability problem with legislation from which HB 748 is taken.

House Bill 748 would accomplish its purpose by adding the proposed provision to the list of acceptable contents in business corporation articles at 35-1-202, MCA.

Although the proposal is placed in a section applying to business ("profit") corporations, an amendment has been proposed to specifically include the liability immunity provision among those subjects which may be covered in articles of incorporation of nonprofit corporations and various types of associations as well.

It is the purpose of HB 748 to encourage new business formation and growth in Montana.

SENATE JUDICIARY
EXHIBIT NO. 2
DATE 3-25-87
BILL NO. H.B. 748

SENATE JUDICIARY
EXHIBIT NO. 3
DATE March 25 1987
BILL NO. HB 748

TESTIMONY OF JOHN C. ALLEN
ON BEHALF OF GREAT FALLS GAS COMPANY
HOUSE BILL 748
SENATE JUDICIARY COMMITTEE, ROOM 325
MARCH 24, 1987

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, TO GREAT FALLS GAS COMPANY, HOUSE BILL 748, IS ONE OF THE MOST IMPORTANT PIECES OF LEGISLATION BEING CONSIDERED BY THIS LEGISLATIVE SESSION.

THE BOARD OF DIRECTORS FOR GREAT FALLS GAS COMPANY CONTAINS SEVEN OUTSIDE DIRECTORS. THE EXPERTISE AND BUSINESS EXPERIENCE REPRESENTED BY THAT BOARD ARE INVALUABLE TO THE OPERATION OF OUR COMPANY. A CONDITION OF SERVICE BY THOSE DIRECTORS HAS ALWAYS BEEN THAT THEY HAVE ADEQUATE PROTECTION FROM PERSONAL LIABILITY ARISING OUT OF THEIR SERVICE ON THE BOARD. THIS PROTECTION WAS TRADITIONALLY PROVIDED BY CARRYING LIABILITY INSURANCE AT AN ANNUAL COST OF APPROXIMATELY $1,700.00. IN AUGUST OF 1986 THE COMPANY WAS NOTIFIED THAT THE EXISTING CARRIER WOULD NOT RENEW OUR POLICY IRRESPECTIVE OF THE FACT THAT OUR CLAIMS HISTORY WAS UNBLEMISHED. THE COMPANY SOLICITED BIDS TO REPLACE THIS COVERAGE AND RECEIVED ONLY ONE BID AT A PREMIUM COST OF OVER $36,000 PER YEAR. THE COVERAGE PROVIDED BY THIS BIDDER WAS NOT AS COMPREHENSIVE AS THE PREVIOUS PROVIDER. THE BOARD DETERMINED THAT IT SHOULD SEEK ANOTHER AVENUE TO INDEMNIFICATION FOR THIS EXPOSURE RATHER THAN PAYING THIS UNREASONABLY HIGH PREMIUM FOR THE REDUCED COVERAGE BEING OFFERED. AFTER CONSIDERABLE RESEARCH AND INVESTIGATION THE ONLY CERTAIN WAY OF PROVIDING THE NECESSARY PROTECTION TO DIRECTORS APPEARED TO BE A CHANGE IN MONTANA LAW WHICH WOULD ALLOW A CORPORATION TO LIMIT THIS EXPOSURE THROUGH ADOPTION OF A NEW ARTICLE OF INCORPORATION OR SOME SIMILAR DEVISE.

DURING THIS INVESTIGATION IT BECAME APPARENT THAT THIS PROBLEM WAS NOT UNIQUE TO GREAT FALLS GAS COMPANY. INDEED, NATIONWIDE INSURANCE FOR THIS INDEMNIFICATION HAS INCREASED AN ESTIMATED 506% SINCE 1985 THE CONSULTING FIRM OF HENDRICK & STRUGGLES INC. CONDUCTED A SURVEY OF CORPORATE DIRECTORS WHICH FOUND THAT 75% OF THOSE SURVEYED WOULD NOT SERVE ON A BOARD WITHOUT INSURANCE PROVIDING INDEMNIFICATION FROM PERSONAL LIABILITY. A SIMILAR SURVEY BY TOUCH ROSS FOUND THAT ONE THIRD OF THE DIRECTORS SURVEYED SAY THEY HAVE CONSIDERED RETIRING FROM THEIR BOARDS BECAUSE OF THE INCREASED LIABILITY TO WHICH THEY ARE EXPOSED. NINETY-THREE PERCENT OF THE DIRECTORS POLLED BELIEVE INCREASED LIABILITY EXPOSURE WILL MAKE IT MORE DIFFICULT TO RECRUIT TALENTED, EXPERIENCED PEOPLE TO SERVE ON BOARDS IN THE FUTURE.

IN RESPONSE TO THIS PROBLEM CERTAIN STATE LEGISLATURES ADOPTED STATUTES

SIMILAR TO HB 748 WHICH ALLOWED CORPORATIONS ALTERNATIVES TO INSURANCE. THESE OTHER STATES INCLUDE DELAWARE, SOUTH DAKOTA, INDIANA, KANSAS, LOUISIANA, MISSOURI, NEW YORK, VIRGINIA AND PENNSYLVANIA. HB 748 IS PATTERNED IN LARGE MEASURE AFTER THE LEGISLATION IN PENNSYLVANIA.

THE PROBLEM ADDRESSED BY HB 748 IS REAL. IN THE LAST QUARTERLY BOARD MEETING FOR OUR COMPANY A RESOLUTION WAS ADOPTED BY THE BOARD WHICH REQUIRES OUR COMPANY TO EXPEND THE $36,000 FOR DIRECTOR'S LIABILITY INSURANCE IF HB 748 DOES NOT PASS. PASSAGE OF HB 748 WILL SAVE GREAT FALLS GAS AND THE CUSTOMERS WHO ULTIMATELY BEAR THE COSTS FOR SUCH EXPENDITURES SIGNIFICANT AMOUNTS OF MONEY. PASSAGE WOULD UNDOUBTEDLY SAVE OTHER COMPANIES MONEY WHO ARE SIMILARLY SITUATED TO GREAT FALLS GAS COMPANY. PASSAGE WOULD ALSO SEND THE PROPER SIGNAL TO THE REST OF THE COUNTRY REGARDING THE BUSINESS CLIMATE IN MONTANA.

FINALLY, AN EXAMINATION OF THE CONTENTS OF HB 748 INDICATES THAT THE BILL IS CAREFUL TO PROTECT SHAREHOLDERS FROM INTENTIONAL OR IMPROPER CONDUCT BY THE DIRECTOR. THE ONLY LIMITATION ON LIABILITY PROVIDED FOR IN THIS BILL IS FAILURE BY THE DIRECTOR TO EXERCISE PRUDENT BUSINESS JUDGMENT. WITH RESPECT TO THAT MATTER SHAREHOLDERS HAVE THE RIGHT TO VOTE FOR BOTH THE CHANGE IN CORPORATE BYLAW AS WELL AS FOR THE DIRECTOR HIMSELF BEFORE THE INITIATION OF HIS TERM.

IN SUMMARY HB 748 WOULD SOLVE A SIGNIFICANT BUSINESS PROBLEM FOR GREAT FALLS GAS COMPANY; IT WOULD SAVE THE COMPANY AS WELL AS ITS CUSTOMERS SIGNIFICANT AMOUNTS OF MONEY; IT WOULD MAKE DOING BUSINESS IN MONTANA MORE ATTRACTIVE; IT WOULD RETAIN THE PROTECTION FOR SHAREHOLDERS AGAINST IMPROPER OR INTENTIONALLY WRONGFUL ACTION BY THE DIRECTOR.

FOR THE ABOVE STATED REASONS, GREAT FALLS GAS COMPANY STRONGLY URGES THE PASSAGE OF HB 748.

SENATE JUDICIARY
EXHIBIT NO. 3
DATE 3-25-87
BILL NO. H.B. 748

SENATE JUDICIARY
EXHIBIT NO. 4
DATE March 25, 1987
BILL NO. HB 748

SPONSOR'S AMENDMENTS

TO HB748

1. Title, line 5.
Following: "CORPORATION"
Insert: "OR ASSOCIATION"

2. Title, line 7.
Following: "CORPORATION"
Insert: ", ASSOCIATION"

3. Title, line 9.
Strike: "SECTION"
Insert: "SECTIONS"
Following: "35-1-202,"
Insert: "35-2-202, 35-15-201, 35-16-202, 35-17-202, 35-18-203, and 35-20-103,"

4. Page 4, line 8.
Following: Section 1
Insert:

Section 2. Section 35-2-202, MCA, is amended to read:

35-2-202. Articles of incorporation — control over bylaws. (1) The articles of incorporation shall set forth:

(a) the name of the corporation;

(b) the period of duration, which may be perpetual;

(c) the purpose or purposes for which the corporation is organized;

(d) any provisions, not inconsistent with law, which the incorporators elect to set forth in the articles of incorporation for the regulation of the internal affairs of the corporation, including any provision for distribution of assets on dissolution or final liquidation;

(e) the address, including street and number, if any, of its initial registered office and the name of its initial registered agent at such address;

(f) the number of directors constituting the initial board of directors and the names and addresses of the persons who are to serve as the initial directors;

(g) the name and address of each incorporator.

(2) In addition to provisions required therein, the articles of incorporation may also contain provisions not inconsistent with law regarding liability of directors as set forth in 35-1-202(2)(e).

(3) ~~(2)~~ It shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated in this chapter.

(4) ~~(3)~~ Unless the articles of incorporation provide that a change in the number of directors shall be made only by amendment to the articles of incorporation, a change in the number of directors made by amendment to the bylaws shall be controlling. In all other cases, whenever a provision of the articles of incorporation is inconsistent with a bylaw, the provision of the articles of incorporation shall be controlling.

Section 3. Section 35-15-201, MCA, is amended to read:

35-15-201. Incorporation. (1) Whenever any number of persons, not less than three or more than seven, may desire to become incorporated as a cooperative association for the purpose of trade or of prosecuting any branch of industry or the purchase and distribution of commodities for consumption or in the borrowing or lending of money among members for industrial purposes, they shall make a statement to that effect under their hands setting forth:

(a) the name of the proposed corporation;
(b) its capital stock;
(c) its location;
(d) the duration of the association; and
(e) the particular branch or branches of industry which they intend to prosecute.

(2) In addition to provisions required therein, the statement of incorporation may also contain provisions not inconsistent with law regarding liability of directors as set forth in 35-1-202(2)(e).

(3) ~~(2)~~ The statement shall be filed in the office of the secretary of state as the articles of incorporation of the association. The secretary of state shall thereupon issue to such persons a license as commissioners to open books for subscription to the capital stock of such corporation, at such time and place as they may determine, for which he shall receive the fee of $20.

Section 4. Section 35-16-202, MCA, is amended to read:

35-16-202. Petition for incorporation — contents and filing — bond. (1) Such persons must prepare, sign, acknowledge, and file a petition with the clerk of the district court of the county in which the lands or the greater portion of the lands included in the petition are situate, such petition to state:

(a) the name of the corporation or district proposed to be formed;
(b) the purpose for which it is formed;
(c) the place where its principal business is to be transacted;
(d) the number of its directors or trustees, which shall not be less than three, and the names and residences of those who are selected for the first 3 months and until their successors are elected and qualified. Such directors or trustees shall at all times be resident freeholders in the state of Montana.

(e) the names and addresses of the petitioners applying for such incorporation or district, with a description of the lands which each owns and proposed to be submitted to said corporation or district and the character of the same and their production, also a consent of the owners to submit the lands to the provisions hereof;

(f) the assessed valuation of the land;

(g) the term for which it is to exist, not exceeding 40 years;

(h) if shares, acres, production, or other evidences of membership are to be used, the basis for issuing the same in either value, acreage, or production.

(2) In addition to provisions required therein, the petition for incorporation may also contain provisions not inconsistent with law regarding liability of directors as set forth in 35-1-202(2)(e).

(3) ~~(2)~~ Such petition shall be accompanied by a map giving location of the lands sought to be included in such corporation or district, nothing herein to be construed as requiring such lands to be contiguous.

(4) ~~(3)~~ A bond in the sum of $1,000 to be approved by the clerk, conditioned for the payment of all costs incurred in the creation of such corporation or district, shall be filed with the petition.

Section 5. Section 35-17-202, MCA, is amended to read:

35-17-202. Articles of incorporation — contents — filing — articles or copies as prima facie evidence. (1) Each association formed under this chapter must prepare and file articles of incorporation setting forth:

(a) the name of the association;

(b) the purposes for which it is formed;

(c) the place where its principal business will be transacted;

(d) the term for which it is to exist, which may be perpetual;

(e) the number of its directors or trustees, which shall not be less than 5 or more than 13, and the names and residences of those who are appointed for the first 3 months and until their successors are elected and qualified;

(f) if organized without capital stock, whether the property rights and interest of each member shall be equal or unequal, and if unequal, the articles shall set forth the general rule or rules applicable to all members by which the property rights and interests, respectively, of each member may and shall be determined and fixed. The association shall have the power to admit new members who shall be entitled to share in the property of the association with the old members, in accordance with such general rule or rules.

(2) In addition to provisions required therein, the petition for incorporation may also contain provisions not inconsistent with law regarding liability of directors as set forth in 35-1-202(2)(e).

(3) ~~(2)~~ The articles must be subscribed by the incorporators and shall be filed in accordance with the provisions of the general corporation law of this state, and when so filed the articles of incorporation or certified copies thereof shall

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be received in all the courts of this state and other places as prima facie evidence of the facts contained therein and of the due incorporation of such association.

Section 6. Section 35-18-203, MCA, is amended to read:

35-18-203. Articles of incorporation. (1) The articles of incorporation of a cooperative shall recite in the caption that they are executed pursuant to this chapter, shall be signed by each of the incorporators, and shall state:

(a) the name of the cooperative;

(b) the address of its principal office;

(c) the names and addresses of the incorporators;

(d) the names and addresses of the persons who shall constitute its first board of trustees; and

(e) any provisions not inconsistent with this chapter deemed necessary or advisable for the conduct of its business and affairs.

(2) In addition to provisions required therein, the petition for incorporation may also contain provisions not inconsistent with law regarding liability of directors as set forth in 35-1-202(2)(e).

~~(2)~~ (3) Such articles of incorporation shall be submitted to the secretary of state for filing as provided in this chapter.

~~(3)~~ (4) It shall not be necessary to set forth in the articles of incorporation of a cooperative the purpose for which it is organized or any of the corporate powers vested in a cooperative under this chapter.

Section 7. Section 35-20-103, MCA, is amended to read:

35-20-103. Document of incorporation — contents — filing. (1) The chairman and secretary of such meeting shall within 5 days after the holding of the same make a written certificate, which shall state:

(a) the names of the associates who attended such meeting;

(b) the corporate name of the association determined upon by a majority of the persons who met;

(c) the number of persons fixed upon to manage the concerns of the association;

(d) the names of the trustees chosen at the meeting and their classification;

(e) the day of the year fixed upon for the annual election of trustees and the manner of their election.

(2) In addition to provisions required therein, the document of incorporation may also contain provisions not inconsistent with law regarding liability of directors as set forth in 35-1-202(2)(e).

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(3) ~~(2)~~ Such certificate shall be signed by the chairman and secretary and acknowledged by them before some person authorized to take acknowledgments within the state of Montana. They shall cause such certificate so acknowledged to be recorded in the office of the county clerk and recorder of the county in which said meeting was held, and a certified copy of such certificate so recorded shall be filed with the secretary of state of the state of Montana, who shall thereupon issue his certificate therefor without charge.

Renumber: Subsequent section.

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EXHIBIT NO. 4
DATE 3-25-87
BILL NO. H.B. 748

LEGISLATIVE PROPOSALS OF THE MONTANA MEDICAL ASSOCIATION

DUPLICATE PAYMENTS TO INJURED PARTIES

A. SUMMARY OF POSITION ON HB 567

The Montana Medical Association supports the mandatory reduction of awards by certain duplicate payments or collateral sources, regardless of whether that offset is done by the judge or - in jury cases - by the jury.

This type of legislation is one of the few types of "tort reform" which can be shown to have a demonstrable effect on premium rates and the availability of insurance.

Opponents of this legislation have acknowledged the fact that duplicate payments occur. In their support of SB 252 - which would provide a right of subrogation to disability carriers - they have acknowledged that the question is one of policy: will disability carriers or casualty carriers receive the return of the duplicate payment?

If the disability carriers receive it, the injured party does not benefit unless there is a subsequent reduction in the premiums already charged for disability insurance taking account of the payments without a current right of subrogation. If the casualty carrier receives it, the injured party - by virtue of the terms of HB 567 - provides for a guaranteed return of the premiums paid for such insurance by the patient.

B. POLICY REASONS FOR LEGISLATIVE PROPOSAL

The general objectives of the legislation are to:

- to reduce some of the amounts of duplicate payments which plaintiffs receive from third parties in addition to that which they receive in awards, after giving credit for certain contributions made by the plaintiffs or their employers

- thus assuring that plaintiffs receive full compensation, but not more than full compensation in major cases

- thus to some degree shifting a portion of the economic losses in casualty cases to the more efficient, high-volume accident and health insurers and away from the casualty insurers

- thus further assuring the affordability and availability of medical malpractice insurance

C. SCIENTIFIC EVIDENCE OF LINK WITH DOWNWARD IMPACT ON PREMIUMS

The legislation has been shown to have a "downward impact" on premiums, i.e. the savings could be realized in the form of increases which

are not as large as previously, and would not necessarily result in lower premiums, which no form of legislation can assure.

An actuarial survey undertaken by an independent actuarial firm at the request of the American Medical Association indicated a total savings in premiums of 8% of the premium dollar from legislation implementing legislation eliminating major duplicate payments. [1]

The RAND STUDY concluded that states that enacted a mandatory collateral offset, the severity of awards drops by 50%, on average, within two years time. [2] The Danzon study found that reductions of amounts received from collateral sources reduce malpractice awards severity by an estimated 30 to 40 percent. [3]

The Report of a special committee of the American Bar Association found as follows: [4]

> "One tort change which is likely to have a measurable impact on premium costs is the repeal of the collateral source rule, so that costs now reflected in medical malpractice premiums would be shifted to first-party health and accident insurance and government health insurance programs. There would also be some overall savings due to the elimination of overlapping payments and the greater administrative efficiency of the collateral payers."
>
> "With the help of an experienced consultant, the Commission attempted to estimate the potential savings in malpractice awards in a 'typical' state which had broadly repealed the collateral source rule. While the conclusions necessarily reflect certain arbitrarily chosen assumptions, the Commission is reasonably confident that malpractice awards would be reduced by about 10 to 20 percent depending on the tendency

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1 November 22/29, 1985. American Medical News, p. 19. AMA General Counsel's Office commission of actuarial survey by Milliman & Robertson, Inc, New York. Survey: Actuarial Analysis of American Medical Association Tort Reform Proposals, September, 1985.

2 Danzon, P.M.: The Frequency and Severity of Medical Malpractice Claims Santa Monica, Rand Institute for Civil Justice, 1983.

3 Danzon, Medical Malpractice: Theory, Evidence and Public Policy, Harvard Univ. Press (1985), p. 170.

4 1977 Report Of the Commission On Medical Professional Liability. 1977, American Bar Association, pp. 55 - 58. The Report recommended that recovery of damages should be reduced by collateral source payments, and that subrogation should not be allowed to any collateral sources for medical benefits thus set off. The Report concluded that the set-off of collateral source payments should be mandated as a matter of law rather than left the jury's discretion and that legislation should require that the trial judge deduct all collateral source payments from the jury's award before entering judgment. The jury would be instructed to resolve any dispute as to the amount of a collateral source payment under the ABA Committee proposal.

of the fact-finder to ignore evidence of collateral sources."

An article on elective no-fault insurance in the Minnesota Law Review reviewed studies available in the late 1970's, which concluded that other available sources of compensation such as Blue Cross, Blue Shield, accident and health coverage, and the like amount to at least 11% of the total tort recoveries, which amounted to 6% of the premium dollar.

The writer of the article cited another study updating that of the first and including the overlapping of compensation that results from the fact that a claimant is excused from paying income tax on the compensation he receives for the amount of wages lost, on which he would have had to pay a tax if he had received that amount in wages. The writer concluded that a figure of 8 cents on the premium dollar constituted a very conservative estimate of overlapping compensation. [5]

E. CONSTITUTIONALITY OF LEGISLATION

Many states - some 27 - have statutorily reversed the collateral source rule. The changes have been upheld in five states, struck down in four states, and allowed to expire under Sunset legislation in another. [6]

But no state or federal court has ever held the concept of collateral source abolition unconstitutional.

In each instance where a statute has been struck down, it has been on circumstances which could not occur with the proposed legislation.

- A Kansas federal court declared unconstitutional on grounds of equal protection a collateral source law which applied only to medical malpractice cases and which allowed the admissibility of evidence as to duplicate payments from non-insurance sources and excluded collateral sources which were received from insurance sources. Doran v Priddy, 534 F. Supp. 30 (1981)

- A North Dakota Supreme Court decision declared a medical malpractice act - which included a collateral source rule section - unconstitutional because there was no factually-demonstrated crisis of availability or cost of medical malpractice insurance in the state. Arneson v Olson, 270 N.W. 2d 125 (N.D. 1978). With the passage of Initiative 30, such a finding would not be required, nor is the legislation under consideration so limited in scope.

- The New Hampshire Supreme Court has declared unconstitutional, as denying equal protection of the laws, legislation pertaining medical malpractice cases only which, among other things, abolished the collateral source rule, using a standard greater than the "rational basis" standard which would be applicable in Montana, on the grounds that the act

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5 Minnesota Law Review, "Elective No-Fault", 1976, Vol. 60:501,504-505, at n. 11.

6 Allow to expire in Idaho; overturned in Kansas, New Hampshire, North Dakota, and Pennsylvania.

arbitrarily and unreasonably discriminated in favor of the class of health care providers. Carson v Maurer, 424 A.2d 825 (NH 1980).

Prepared by the Montana Medical Association, 2021-11th Ave., Helena, Montana 59601, G. Brian Zins, Executive Director, 406-443-4000. 3/87	LEGISLATIVE PROPOSALS - DUPLICATE BENEFITS

SENATE JUDICIARY
EXHIBIT NO. 6
DATE March 25, 1987
BILL NO. HB 567

ALTERNATIVE PROPOSAL: House Bill 567

1. Bill Title Of Current HB 567. The following new bill title:

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR THE REDUCTION OF VERDICTS BY THE TRIAL COURT FOR AMOUNTS PAID OR PAYABLE FROM COLLATERAL SOURCES"

2. Section 1 Of Current HB 567. Keep Section 1 the same.

3. Section 2 Of Current HB 567. Replace Section 2 with the following:

"Section 2. Collateral source reductions in actions arising from bodily injury or death -- subrogation rights.

(1) In an action arising from bodily injury or death where the total verdict against all defendants is in excess of $ 50,000, a plaintiff's recovery must be reduced by any amount paid or payable from a collateral source that does not have a subrogation right under state or federal law.

(2) Before an insurance policy payment is used to reduce an award under subsection (1), the amount plaintiff paid or is obligated to pay to keep the policy in force for the policy period during which the insurance policy payment was made must be deducted from the amount of the insurance policy payment.

(3) The jury shall determine its verdict without consideration of any collateral sources. Reduction of the jury's verdict must be made by the trial judge after the jury determines its verdict, at hearing and upon a separate submission of evidence relevant to the existence and amount of collateral sources. Evidence is admissible at such hearing to show that plaintiff has been or may be reimbursed from a collateral source that does not have a subrogation right under state or federal law. If the trial judge finds that it is not, at the time of hearing, reasonably determinable whether or in what amount a benefit from such a collateral source will be payable, the trial judge shall: (a) order a deposit into court, at interest, of the disputed amount, by ~~the legal representative of~~ any person against whom a verdict was rendered who claims a deduction under this section; (b) reduce the verdict by the amount deposited. The amount deposited, and any interest thereon, shall be subject to the further order of the court, pursuant to the requirements of this section.

(4) Except for subrogation rights specifically granted by state or federal law, there is no right to subrogation for any amount paid or payable to a plaintiff from a collateral source if an award is reduced by that amount under subsection (1)."

3. Section 3 Of Current HB 567. Delete Section 3 in its entirety.

* *

AN EVALUATION OF PROPOSALS TO ELIMINATE THE COLLATERAL SOURCE RULE

* *

Prepared by the Montana Trial Lawyers Association

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I. INTRODUCTION

In Montana, the collateral source rule provides "that a payment to [an injured victim] from a source wholly independent of and not in behalf of the wrongdoer cannot inure to the benefit of the wrongdoer to lessen the damages recoverable from him, and the evidence of such payment is inadmissible". Goggans v. Winkley, 159 Mont. 85, 92, 495 P.2d 594, 598 (1972). Thus, the rule is predicated upon the general notion that the wrongdoer should not benefit because a victim has been prudent enough to buy her own insurance or because he or she is fortunate enough to have friends or relatives who are willing to provide valuable services without pay during a time of need.

This rule is now under attack. The general argument advanced is that the rule allows the victim to be paid twice for damages such as medical expenses covered by insurance and thus, provides the injured party with a "windfall". The proponents of change also maintain that evidence regarding collateral sources should be presented to juries to reduce awards. Close analysis of the situation, however, shows the following:

> (1) Even with the collateral source rule, the victim rarely, if ever, receives a "windfall", and indeed, is not fully compensated for losses;
>
> (2) In fact, elimination of the collateral source rule will only further deprive an injured victim of full compensation; and
>
> (3) Elimination of the rule will have adverse social consequences. It will create a "windfall" for the insurance industry at the expense of the victim.

(4) Moreover presenting collateral source evidence to juries will distract from the major issues and will create confusion for the juries. Thus, it will waste court resources and will jeopardize the victim's opportunity to obtain a fair trial.

Each of these points are discussed in detail below.

II. DISCUSSION

A. THE VICTIM IS NOT FULLY COMPENSATED UNDER THE CURRENT SYSTEM.

First, the victim rarely receives "double recovery" for his losses because the expenses of modern litigation far exceed anything he can recover through the collateral source rule. Expert medical testimony, for instance, often costs thousands of dollars. Indeed, physicians who charge only $25 to their patients for an office visit, often charges the same patient $250 or even $500 per hour if they have to assist them in litigation. Some physicians have, in fact,charged their patients over $700 per hour for testimony related to their injuries. Nonmedical expert testimony is just as expensive. Other litigation costs and attorney fees leave the victim with a net recovery of approximately 60% or less of his overall damages, since none of these expenses are recoverable under current laws. The value of the victim's compensation is further diminished because the wrongdoer or his insurance company is not required to pay any interest on the amount owed between the time of the injury and the date of entry of judgment, a period which usually exceeds two years and sometimes exceeds a half a decade.

The amount the victim recovers through the application of the collateral source rule is far less than his overall litigation expenses in virtually every case. This, as a practi-

cal matter, eliminates any opportunity for the victim to be compensated twice and thus, to obtain a "windfall" or "double recovery" as you are now being told.

On the other hand, the collateral source rule serves as a practical device for the injured party to recoup, at least, part of his non-compensable litigation costs and interest. This, of course, furthers the public policy that all injured persons should be fully compensated under the law.

B. ELIMINATION OF THE COLLATERAL SOURCE RULE WILL ONLY FURTHER VICTIMIZE THE INJURED PARTY.

As shown above, in virtually every instance, litigation costs exceed any benefit derived from the collateral source rule. If the rule were eliminated, the victim would receive an even smaller percentage of his overall lawful damages than he is receiving at the current time. Thus, elimination of the rule does more harm than it does good.

C. ELIMINATION OF THE COLLATERAL SOURCE RULE WILL CREATE A "WINDFALL" FOR THE INSURANCE INDUSTRY.

As stated above, the collateral source rule benefits those that are prudent enough to purchase their own insurance. This insurance, of course, does not come free. The insured person pays a premium for it. The insurance company takes money from this person to undertake the risk that there is going to be an injury. When the injury occurs, all the insurance company is doing is paying for the risk it has underwritten. In other words, it is simply fulfilling its contract. The collateral source rule allows the victim to, in effect, recover some of the

premium he or she has paid over the years to be covered for these risks. In that sense, the victim does not receive any "windfall" at all. He is simply getting what he paid and bargained for.

The party that receives the windfall is the insurance company that has received premiums from the negligent party. It gets to keep the premiums the negligent party has paid to it, but does not have to pay for the risk caused by the negligent party's actions. Certainly, this is unfair to both the victim and to the negligent party, who have paid premiums to be covered for these risks.

D. PRESENTING COLLATERAL SOURCE EVIDENCE TO THE JURY.

There are still other problems. Those that advocate eliminating the collateral source rule also want the jury to be presented with evidence concerning who made collateral payments, how much was paid, when they were paid, whether or not they will continue to be paid in the future, and so on. The purported objective of such evidence is to allow the jury to offset the total amount of damages by the amounts expected to be paid by collateral sources.

If the jury is going to be allowed to hear this evidence, however, should not it also be allowed to hear evidence concerning how much the victim has previously paid out in premiums in order to be compensated with collateral insurance benefits? Should not it also be allowed to know that between the time of the injury and the time of judgment, the victim receives no interest on the amounts due to him in compensation? Moreover, shouldn't the jury be allowed to know that litigation costs,

including expert witness fees, many deposition and investigative costs, and attorney fees will not be paid by the wrongdoer, but will have to be paid out of the verdict? In other words, if we are going to allow a jury to reduce the verdict by considering collateral benefits, shouldn't we also allow it to increase the verdict by considering all of the expenses that reduce the net recovery?

The current collateral source rule, which prohibits a jury from considering evidence of collateral sources of payment is predicated partially on the notion that "collateral matters involving transactions between others" only confuse the issues, wastes the jury's and court's time, and leads to consideration of matters which are no business to the wrongdoer or his insurance company. See Goggans, supra. This underpinning of the rule is probably more applicable now than it was in the past. If our aim is to streamline our judicial system in terms of both time and money and also to further the public policy of just compensation for injuries, then we should resist any attempts to make drastic changes in the current rule.

III. SUMMARY AND SUGGESTED SOLUTION

In summary, the collateral source rule, at least, provides the victim with a partial set off for his or her litigation costs. In the vast majority of the cases, however, collateral benefits do not even approach overall costs, and thus, their elimination would only compound the problem of incomplete compensation. Moreover, abolishing the rule would only create a "windfall" for insurance companies that have received premiums,

50th Legislature

SENATE JUDICIARY
EXHIBIT NO. 7
DATE 3-25-87
BILL NO. H.B. 567

_____ BILL NO. _____

INTRODUCED BY _____

BY REQUEST OF THE

A BILL FOR AN ACT ENTITLED: "PREVENTION OF DOUBLE RECOVERY".

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

Section 1. A new section should be enacted to read:

Declaration of policy. It is the policy of this state that all persons injured through the fault of another should receive full compensation for all injuries defined under the law and that the wrongdoer should not benefit at the victim's expense. It is also the public policy of this state that a person should not receive more than his just and lawful compensation, after consideration of costs and expenses incurred to recover lawful damages. This Act is designed to promote these policies.

Section 2. A new section should be enacted to read:

Definitions. The following words, as used in this Act, shall have the meaning set forth below, unless the context clearly requires otherwise:

(a) "Claimant" means any person who brings a

personal injury action. When the action is brought on another's behalf, the term "claimant" includes a guardian, parent, personal representative, or whoever is acting in the representative capacity of the injured party.

(b) "Collateral sources" are sources of compensation paid or given to the claimant for damages by someone other than the wrongdoer.

(c) "Litigation costs" mean all reasonable and necessary costs and expenses incurred by a claimant to recover lawful damages including but not limited to, witness fees, investigation costs, expert fees, attorney fees and similar litigation expenses. Litigation costs include such expenses regardless of whether or not the claimant is compensated by settlement or judgment or before suit is filed in a court of law.

(d) "Payments" refer to economic losses paid or payable by collateral sources for wage loss, medical costs, rehabilitation costs, services, and other out-of-pocket costs incurred by or on behalf of a claimant for which that party is claiming recovery through a tort suit.

(e) "Wrongdoer" means a person or party legally responsible for damages sustained by a claimant.

Section 3. A new section should be enacted to read:

Collateral Source Rule. (1) Payments to the

claimant from a collateral source cannot inure to the benefit of a wrongdoer to lessen the damages recoverable from him. This collateral source rule shall be applied in all cases where litigation expenses exceed such payments, and thus, net recovery by the claimant is less than his overall lawful damages.

(2) The collateral source rule is inapplicable only to the extent that payments exceed litigation expenses, and thus, to apply it would create a net recovery for the claimant beyond his lawful damages.

(3) When a wrongdoer alleges that the collateral source rule should not be applied because payments exceed litigation costs, he may petition the district court having proper venue and jurisdiction over the controversy to convene an evidentiary hearing to determine the reasonable value of litigation costs and collateral payments. If the district court determines that collateral payments exceed litigation costs, it shall order that any excess collateral payments be deducted from the lawful damages recovered by the claimant through settlement or judgment.

(f) Any motion or petition by the wrongdoer under subparagraph (3) above, shall be made within 30 days in cases of settlement between the parties or within the time provided for requesting a new trail under Montana Rule of Civil Procedure 59(b) in the cases of a judgment.

SENATE JUDICIARY
EXHIBIT NO. 7
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Section 4. A new section to read:

Collateral payments shall not be introduced as evidence. The payment to the victim from collateral sources shall not be admissible as evidence at a trial to determine lawful damages, but shall be determined and applied under the rules set forth in this Act.

-End-

but will be able to escape risks they have insured for. Furthermore, presentation of collateral source evidence to a jury without consideration of expenses that reduce the net amount the victim will recover would be unfair. It would also confuse the major issues the jury must decide and cause unnecessary drains on the court's resources.

Thus, at best the collateral source rule should be modified and not eliminated. If it is to be changed, it should accomplish only the following:

> (1) Apply only in those rare situations where the victim really does receive a "double recovery (i.e. where collateral sources exceed litigation expenses).
>
> (2) Require the negligent party's attorney to petition the court for a reduction in the verdict or settlement if a "double recovery" is expected. In this way, judicial resources and moneys are not wasted in the vast majority of cases where "double recovery" does not occur.
>
> (3) Let the Court--not a jury--decide what the appropriate setoff should be. To do otherwise is, again, a tremendous waste of time and money. The confusion and complexity it will generate will also jeopardize the ability to get a fair trial.

A proposed amendment, tailored to achieve these fair objectives, is attached.

TESTIMONY OF GLEN L. DRAKE
ON BEHALF OF THE
AMERICAN INSURANCE ASSOCIATION
IN RE HB567
BEFORE THE SENATE JUDICIARY COMMITTEE

House Bill 567 is one of several bills designated and designed as "tort reform" bills. In its initial form, HB567 was a very important bill as it would have eliminated double recovery for many plaintiffs and, thus, would have reduced the overall cost of the tort system.

House Bill 567, as now written, has become a anti-tort reform bill designed by the plaintiffs' bar to further increase the costs of doing business and the cost of insurance in the state of Montana.

The problem with HB567 is the amendment that has been placed in Section 2 (5) of the bill. That amendment requires the admissibility in evidence of (a) insurance, including liability dollar limits, that is available to defendant to pay for judgments against defendant, and (b) plaintiffs' and defendants' current and expected future litigation costs and attorneys fees.

The effect of Section 2(5) is a double-whammy against the defendant. As to the admissibility of insurance liability dollar limits under Section 2(5)(a), our Supreme Court long has held that the evidence is inadmissible and prejudicial in any case. The net effect of that provision is to do away with all of our long-held principles of honesty and fair play in the legal system. In no other cases but those involving punitive damages is the wealth or lack of wealth of the defendant an issue. Yet this bill would make the availability of insurance admissible in all cases.

Section 2(5)(b) is likewise equally abhorrent. This section would allow double recovery by a plaintiff of his costs. Section 25-10-201, MCA, provides what costs are recoverable by the successful party. Section 25-10-501, MCA, provides that the successful party shall deliver to the clerk and the adverse party his bill of costs within five days of the verdict. Section 25-10-504, MCA, provides that the clerk must include in the judgment entered up by him the costs. Thus, under HB567 as now proposed, the evidence as to costs is presented to the jury so that a jury award will include the same for the plaintiff and the aforementioned sections will then provide for an additional taxing of the same costs again - a double recovery for the plaintiff.

Additionally, Section 2(5)(b) permits evidence of expected future litigation costs and attorney fees. This evidence necessarily would be speculative, again an element of damages consistently disapproved by the Montana Supreme Court.

Should full disclosure of all insurance evidence truly be the intent of this legislature, then clearly the bill should be amended to also require evidence and jury instructions regarding the nontaxibility of tort damages.

It is respectfully submitted that if the legislature desires to give any relief to the consuming public in the state of Montana from the ravages of a tort system out of control Section 2(5) of HB567 should be stricken from the bill, or in the alternative, HB567 should be killed.

SENATE JUDICIARY
EXHIBIT NO. 8
DATE 3-25-87
BILL NO. H.B. 567

TESTIMONY OF GLEN L. DRAKE
ON BEHALF OF THE
AMERICAN INSURANCE ASSOCIATION
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BEFORE THE SENATE JUDICIARY COMMITTEE

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Section 2(5)(b) is likewise equally abhorrent. This section would allow double recovery by a plaintiff of his costs. Section 25-10-201, MCA, provides what costs are recoverable by the successful party. Section 25-10-501, MCA, provides that the successful party shall deliver to the clerk and the adverse party his bill of costs within five days of the verdict. Section 25-10-504, MCA, provides that the clerk must include in the judgment entered up by him the costs. Thus, under HB567 as now proposed, the evidence as to costs is presented to the jury so that a jury award will include the same for the plaintiff and the aforementioned sections will then provide for an additional taxing of the same costs again - a double recovery for the plaintiff.

Additionally, Section 2(5)(b) permits evidence of expected future litigation costs and attorney fees. This evidence necessarily would be speculative, again an element of damages consistently disapproved by the Montana Supreme Court.

Should full disclosure of all insurance evidence truly be the intent of this legislature, then clearly the bill should be amended to also require evidence and jury instructions regarding the nontaxibility of tort damages.

It is respectfully submitted that if the legislature desires to give any relief to the consuming public in the state of Montana from the ravages of a tort system out of control Section 2(5) of HB567 should be stricken from the bill, or in the alternative, HB567 should be killed.

SENATE JUDICIARY
EXHIBIT NO. 8
DATE 3-25-87
BILL NO. H.B. 567

NAME: John C Allen DATE: 3-25

ADDRESS: P.O. Box 2229

PHONE: 761- [redacted] 7100

REPRESENTING WHOM? Great Falls Gas Co.

APPEARING ON WHICH PROPOSAL: HB 748

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

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

WITNESS STATEMENT

NAME GEORGE T. BENNETT BILL NO. HB-748

ADDRESS 111 N. Main, P.O. Box 1705, Helena, MT 59624 DATE 3/25/87

WHOM DO YOU REPRESENT? Montana Bankers Association

SUPPORT X OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

The Montana Bankers Association supports HB-748 which will allow banking corporations organized in Montana to limit the liability of directors to the corporation and stockholders, in narrow circumstances, as described in the bill. The banking industry in Montana has been faced with a situation where a number of the major insurance carriers are refusing to offer directors and officers insurance, and this bill should help with this problem.

WITNESS STATEMENT

NAME Gerald J. [illegible] BILL NO. HB 567

ADDRESS Billings, Montana DATE 3/25

WHOM DO YOU REPRESENT? Montana Medical Association

SUPPORT ✓ OPPOSE _____ AMEND ✓

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

STANDING COMMITTEE REPORT

March 25 87
..... 19.....

MR. PRESIDENT

We, your committee on SENATE JUDICIARY .....

having had under consideration..... HOUSE BILL 720 No.....

Third reading copy (blue color)

Adopt model close corporations act.
Spaeth (Mazurek)

Respectfully report as follows: That..... HOUSE BILL 720 No.....

~~DO PASS~~ BE CONCURRED IN

~~DO NOT PASS~~

Senator ~~XXXXXX~~ Mazurek
Chairman.