

MINUTES

MONTANA SENATE
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By, Chairman Bruce D. Crippen on February 7, 1989, at 10:00 a.m. in Room 325.

ROLL CALL

Members Present: Chairman Bruce Crippen, V. Chairman Al Bishop, Senators Tom Beck, Bob Brown, John Harp, Mike Halligan, Loren Jenkins, Joe Mazurek, R. J. Pinsoneault and Bill Yellowtail.

Members Excused: None

Members Absent: None

Staff Present: Staff Attorney Valencia Lane and Committee Secretary Rosemary Jacoby

Announcements/Discussion: None

HEARING ON SENATE BILL 314

Presentation and Opening Statement by Sponsor: Senator Pat Regan of Billings, District 47, opened the hearing saying the bill addressed a problem which she was appalled to bring before the committee. She said that, 25 years after laws had been enacted for equal rights for women, there were still groups which denied access to women. Montana's equal dignity act contains a provision stating that both men and women have the same rights in business and clubs. She said it is inappropriate that some clubs have private liquor licenses, yet don't allow access to women. This bill would deny those clubs liquor licenses. She stated that it was copied after a New York law. She said there might be challenges to the law, and she felt there could be clubs with a valid claim to having men only. However, there were instances when professional and business women needed to have access to private clubs and should be on an equal status with men. She announced that Valencia Lane had drafted the bill and could answer any questions for the committee.

List of Testifying Proponents and What Group they Represent:

Brenda Nordlund, Montana Womens' Lobby

List of Testifying Opponents and What Group They Represent:

None

Testimony:

Brenda Nordlund testified that women should be treated without discrimination. She is a lawyer and her practice does not require her to belong to clubs of this nature; but, she said there are women who do and who are virtually excluded from these clubs. The Montana Club in Helena has not excluded women since 1979. Before that, they were allowed to belong as wives of members, but now they are allowed to have full memberships. She said the bill was not directed to Eagles, Elks or other fraternal organizations, but to country clubs and to other private clubs. She urged passage of the bill.

Questions From Committee Members: Senator Mazurek asked why the bill didn't include fraternal organizations. Senator Regan said those were usually smaller in nature. She said this bill is addressing country clubs where professionals can take a client as part of the business activity. The bill seeks equal access.

Senator Mazurek asked why the bill asked for an immediate effective date. Senator Regan said that, after 25 years, why wait any longer.

Senator Beck asked how big was the problem. Senator Regan said that in Yellowstone County there were 5 country clubs of which 3 were open to women having full memberships. Two were closed to women. In fact, she said, one club refused to come into the city for fear the city would enact an ordinance against discrimination.

Senator Mazurek said that the Green Meadow Country Club in Helena has restrictions against junior members. He asked if the bill would allow that.

Ann McIntyre of the Human Rights Division said there are reasonable exemptions. The statute (49-2-402) says that the term "reasonable" is to be narrowly construed. She thought golf clubs might not use age for restriction, but could use handicap instead.

Senator Crippen said that, in a recent case that the commission had with the Yellowstone Country Club, the commission found that they were in violation of the Human Rights act pertaining to women. Where would you find a situation where there were "reasonable" exclusion of women, he asked.

Ann McIntyre said there have been cases that have been defined "reasonable" based on "privacy" i.e. if there was only one locker room.

Senator Crippen asked if the main remedy was the removal of the all-purpose liquor license. Ms. McIntyre said there were 2 primary remedial provisions. In the Human Rights Act, there is a remedies provision act (49-2-506) which allows an injunction asking that the discrimination cease. The other remedy was to take away the liquor license, she said.

Senator Crippen asked if the club could become a "bottle" club if their license was removed. Ms. McIntyre didn't know.

Senator Crippen said that some clubs have provisions where 2 or more members could "blackball" a person to prevent them from coming into the club. He asked if this bill would make that club in violation of law. Ms. McIntyre didn't believe it would. However, if it could be demonstrated that there was a pattern to exclude people on the basis of sex, race, religion etc., it could constitute a violation.

Closing by Sponsor: Senator Regan closed the hearing.

HEARING ON SENATE BILL 312

Presentation and Opening Statement by Sponsor: Senator R. J. "Dick" Pinsonneault of St. Ignatius, District 27, opened

the hearing. Senate Bill 312 was an act to submit to the qualified electors of Montana an amendment to Article II, section 16 of the Montana Constitution to generally revise the constitutional right of access to the courts of this state for redress of wrongs. He distributed an amendment to the bill (Exhibit 1), which when inserted in the bill, would make SB 312 read precisely as CI 30 when it was placed on the ballot on November, 1986. He also gave committee members a copy of a publication which came out of the Secretary of State's office on CI 30 in 1986. He also distributed the election results of CI 30.

The efforts of the legislature to gain some reasonable measure of control over limits on liability go back to 1974, said the Senator, when a voter-approved amendment placed a 2/3 vote of the legislature on Sec. II, Art. 18 of the Constitution on public liability. Many committee members are familiar with tort reform, he commented, and the legislature's inability to come to an agreement on the issue. The most significant occurrence was subsequent to the special session in 1986 was the Liability Coalition's success in placing CI 30 on the ballot in November, 1986. One hundred seventy-two five hundred two (172,502) voters (55%) in Montana approved of CI 30. In 1987, this committee passed roughly 2 dozen tort reform measures to be combined into the constitution. When CI 30 was declared null and void due to errors in printing, it was a blow to the voters, he said. He sponsored the bill to once again bring the issue to the voters of the state.

List of Testifying Proponents and What Group they Represent:

- Jim Robischon, Montana Liability Coalition
- Marie Durkee, Montana Tavern Association
- Kay Foster, Billings Chamber of Commerce
- Rick Bartos, Chief Counsel, Governor's Office
- Lynn Hoodyshall, Helena
- Tom Rolf, himself
- Laurie Shadoan, Bozeman Chamber of Commerce
- Dr. Scott Erler, Montana Dental Association, Political Action Committee

List of Testifying Opponents and What Group They Represent:

- Zander Blewett, Great Falls Attorney, self
- Mike Sherwood, Montana Trial Lawyers Association
- Jim Jensen, Montana Environmental Information Center
- John White,

Testimony:

Jim Robischon presented testimony to the committee. A copy of his notes are included in the record (Exhibit 2).

Marie Durkee said she wished to be on record in behalf of the association as being fully in support of Senate Bill 312. She believed the court voted against the will of the people of Montana. She felt the issue should be placed on the ballot again. She presented a letter to the committee from Donald Larson Legislative Committee Chairman of the MTA to be entered into the record (Exhibit 3).

Kay Foster felt the passage of SB 312 was important to retain the validity of the laws passed during the last session. She said she had heard an excellent report given by Staff Attorney Valencia Lane on the affect of CI 30 and the possible constitutionality of the various tort reform bills passed last session. She recommended it to the committee. She also urged passage of this bill.

Rick Bartos said the governor strongly recommended SB 312. The governor believes that tort reform is in the best interest of Montana.

Lynn Hoodysshall, a member of the business community of the state, is concerned about the rise in the cost of insurance. He felt it was going up largely due to the amounts in recovery of damages that had been awarded. Consistency is needed, he said.

Tom Rolf said he and his wife bought an automobile dealership several years ago. He said that his insurance rates, namely the liability policies, doubled, tripled and doubled again. He said they paid more in insurance than they made. The company had high customer satisfaction, yet were forced out of business. He urged passage of the bill to help thousands of struggling small businessmen in Montana who are trying to make a living.

Laurie Shadoan said this is a critical issue and urged its passage.

Dr. Scott Erler presented written testimony to the committee (Exhibit 4) in favor of the bill.

Zander Blewett (Exhibit 5) appeared in opposition to the bill. He claimed that the insurance industry was behind the liability problem. He said the legislature had done a very good job on tort reform. He felt the bill would remove juries from civil cases. The insurance companies are not having the problems they claim, he stated, and that their executives are earning extravagant salaries. He said the bill would remove the system of checks and balances that presently exist.

Mike Sherwood presented written testimony to the committee (Exhibit 6).

Jim Jensen opposed the bill. He said the train explosion which occurred near Carroll College the week before was a dramatic example of why the bill should not pass. If the legislature sanctioned limiting the liability, many people who were injured would not have adequate redress. Environmental damage also occurs, he said. He felt the Montana Senate should not pass a bill limiting liability as it could result in less safety regarding railroads and other industrial operations.

John White asked what had happened the last two years to trigger the introduction of this bill. He said that no liability crisis presently exists. He said his health insurance went up over 50% this year, but that had nothing to do with liability, just the cost of medical care. He felt the state needed to work in harmony, not on divisive issues. He thought other issues were more important, such as education. He urged that this issue be put to rest and spend time and money on more worthwhile matters.

Jim Murry, AFL-CIO, was not able to testify because of a conflict, but sent testimony to the committee opposing the bill. (Exhibit 7)

Questions From Committee Members: Senator Yellowtail asked if there was any assurance that insurance rates would go down if this bill was passed. Mr. Robischon said not to his knowledge.

Senator Yellowtail said he was in sympathy with the people who pay high insurance rates. He wondered why there were no people at the hearing from the insurance industry. Mr. Robischon said they had been asked. However, he felt the bills must stand on their own.

Senator Brown said that the so-called tort reform legislation enacted in 1987 was passed before CI 30. He felt the reason the bill was before the committee was to assure the constitutionality of what was done in 1987.

Zander Blewett said the constitutionality issue concerned the committee in 1987. He thought the tort reform bills were constitutional at the time that they were passed.

Senator Brown told Mr. Blewett that it wasn't until after the legislature went home that the court said CI 30 wasn't ratified.

Mr. White said the consensus of the 1987 committee was that the legislation was constitutional.

Senator Harp asked Mr. Blewett why CI 30 would throw out the jury system. Mr. Blewett said, if the bill passed, it was possible that the legislature could pass a law saying juries wouldn't be necessary in certain cases.

Senator Jenkins said he thought the (CI-30) amendment was added in January and wasn't thrown out until May when the session ended. He asked if Mr. White was aware of any challenge during that time. Mr. White said he understood there was a case before the court on the issue of involuntary discharge. He was not made aware of the case until it was too late to appear, he said.

Senator Jenkins asked what was the specific defect of CI 30 that made the court say it was illegal. Mr. White understood that it was misleading to the public because of the way it was printed.

Senator Jenkins asked, if he carried a \$500,000 liability insurance policy and was sued for \$1,500,000, who would pay the extra money. Mr. White said, that as a practical matter, you probably wouldn't be sued in excess of that amount, but the company would be pressed to pay the policy limits. If they did, that would end the case.

Senator Halligan felt the insurance industry would have to give some input before the bill was acted upon.

Senator Brown said that CI 30 qualified, was voted upon by the electorate and then struck down by the supreme

court. He felt it was a valid request for the public to have the right to vote on the issue again. It wasn't the people's fault that it was not ratified, he said.

Mike Sherwood said the voters in 1986 did not approve CI 30, the language that was before the committee. He said they approved language that gave them full redress. The public did not see the amendment in its entirety and, lastly, the correct text was as different as black from white, he said. They did have an opportunity to approve the language that was supposed to be in CI 30 in 1988 which was called CI 48 of which a copy was attached to Mr. Sherwood's testimony.

Senator Brown asked if the MTA would oppose the bill if the language were identical to CI 30. Mr. Sherwood said it was very costly and he thought money could be better spent.

Closing by Sponsor: Senator Pinoneault said he wasn't "wined and dined" by the insurance companies, but came with the bill for the reason pointed out by Senator Brown. He said he respected the jury system. He wished to bring some certainty into the law and thought the people of Montana deserved another look into this issue.

HEARING ON SENATE BILL 347

Presentation and Opening Statement by Sponsor: Senator Fred Van Valkenburg, Missoula, District 30, said that Senate Bill 347 was a bill that would adopt rules of criminal procedure for the state of Montana. In 1985, the state bar began a project to adopt these rules in substitution to the statutory rules that had been in place since 1967 in Montana. The bar finished its project late in 1988 and submitted them to the Supreme Court to review in January, 1989. The court withheld adoption of the rules so that the legislature could adopt them. They have been reviewed by the legal community of the state. He said that Robert Deschamps, the Missoula County Attorney, who was chairman of the commission was present to testify.

List of Testifying Proponents and What Group they Represent:

Mike Sherwood, Montana Trial Lawyers Association

Robert Deschamps III, Missoula County Attorney
John Connor, County Prosecutors Services Bureau, as a
member of the commission and in behalf of the
Montana County Attorneys Association, and in
behalf of Marc Racicot, Attorney General
Allen Chronister, State Bar

List of Testifying Opponents and What Group They Represent:

None

Testimony:

Mike Sherwood said he had been active on the committee and supported the bill in its entirety. He said it was a well-thought-out compromise between judges and lawyers.

Robert Deschamps said there was broad-based representation on the committee that drafted this bill. As many as 4 district judges were on the committee at times, 3 or 4 county attorneys, Marc Racicot - Montana Attorney General, John Conner, Mike Sherwood and many other attorneys. Some of the code dates back to 1890, he said, and as well, that many important decisions were not brought into the rules. He said that a summary of the rules existed in the Montana Lawyer. He said there had been some opposition pertaining to doing away with handling of domestic abuse cases. It was put back in after seeing the opposition, he said.

John Connor commented that changes proposed in the bill were generally supported by the commission. He urged support.

Allen Chronister supported the bill in behalf of the state bar.

Questions From Committee Members: Senator Mazurek asked if the coroners had been asked for input regarding the inquest provisions in Sec. 9 and wondered if it was a change. Mr. Deschamps didn't know.

Senator Mazurek asked about Sec. 16, which demanded a person to come before the county attorney. Mr. Deschamps said that had been law for at least 12 years.

Senator Mazurek asked what were the sources for the bill. Mr. Deschamps said there were four main sources:

Statutes existing in the state of Montana, federal statute, uniform rules of criminal procedure and some were from "scratch."

Closing by Sponsor: Senator VanValkenburg closed the hearing.

HEARING ON SENATE BILL 344

Presentation and Opening Statement by Sponsor: Senator John Harp of Kalispell, District 4, said the bill had been requested by the governor, an act to appoint a judicial nomination commission to serve at the pleasure of the governor. There would be 7 members, having 4 year terms. The biggest change would be to allow the governor to appoint the four lay members commission, representing a different business, profession or industry. The four members who were appointed in 1988 by the former governor will complete their term about the time the present governor's term is nearly complete. The commission is made up of four lay people two attorneys actively engaged in the practice of law from different congressional districts and one district court judge selected by the supreme court.

List of Testifying Proponents and What Group they Represent:

Rick Bartos, Chief Counsel for the Governor

List of Testifying Opponents and What Group They Represent:

Allen Chronister, State Bar
Sue Weingartner, Montana Defense Trial Lawyers
Zander Blewett, Great Falls Attorney, himself

Testimony:

Rick Bartos said the governor urged quick passage of SB 344. There are approximately 125 quasi-judicial boards and commissions that a new governor has the responsibility and obligation on which to place individuals. Because of the mechanics of the judicial nomination commission, he is unable to fill 4 members of the commission until 1992. It is felt that a governor should and must have the ability to select persons who reflect the philosophy for which the people of Montana voted. Section 2-15-1.4 relating to judicial nominations has been thought by some to be treated separately, since it

was a different branch of government. Three individuals are appointed by the supreme court, he said and one is a district court judge. Another safety valve, he told the committee, was that any person who survives the nomination process must receive the advice and consent of the Senate. If there is any problem with the nomination, the Senate has the ability to use the veto. He urged the committee to allow the governor to appoint the four individuals on the commission.

Allen Chronister testified in opposition to the bill. He said the bill represents a departure in the long history of the state of non-partisan appointments to the bench. Elected and appointed persons to the bench have always been non partisan, he said. He said the governor has the power to remove the 4 judges at any time he wishes to impose his wishes on the commission. A term can be ended, he added, by the legislature before it runs out.

Sue Weingartner opposed the bill because the current selection process works well. It is important that the board retain its autonomy so that the judicial system may not be politically influenced.

Zander Blewett thought the bill was unfair and partisan. He felt it was unnecessary and a bad bill.

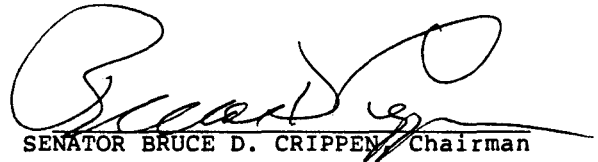
Questions From Committee Members: Senator Mazurek asked why the governor's office proposed a bill that would remove all the judges at once. Rick Bartos said that the staggered terms on the commission were the three lay persons. The governor feels he was elected to carry out a philosophy of governing the state. In order to do that, Mr. Bartos said, the governor has to have the influence or have the affect on the judicial nomination commission. Because the terms are in effect for the next 4 years, the governor presently has his hands tied for that duration.

Senator Mazurek said there would be a lack of continuity if these judges were all removed at once. He thought that staggered terms should be proposed. Rick Bartos said he felt there would be continuity because of the Supreme Court appointed justices and the district court judge who sit on the commission. If the four other judges were removed all at once, there would still be continuity, he stated.

Closing by Sponsor: Senator Harp thought it was a myth that the Montana judicial system was outside of the political system. He closed the hearing.

ADJOURNMENT

Adjournment At: 12 noon



SENATOR BRUCE D. CRIPPEN, Chairman

ROLL CALL

JUDICIARY

COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date 2-7-89

NAME	PRESENT	ABSENT	EXCUSED
SENATOR CRIPPEN	✓		
SENATOR BECK	✓		
SENATOR BISHOP	✓		
SENATOR BROWN	✓		
SENATOR HALLIGAN	✓		
SENATOR HARP	✓		
SENATOR JENKINS			
SENATOR MAZUREK	✓		
SENATOR PINSONEAULT	✓		
SENATOR YELLOWTAIL	✓		

Each day attach to minutes.

SENATE JUDICIARY

EXHIBIT NO. 1

DATE 2-7-89

BILL NO. SB 312

Amendments to Senate Bill No. 312
First Reading Copy (WHITE)

Requested by Senator Pinsonneault
For the Committee on Judiciary

Prepared by Valencia Lane
February 6, 1989

1. Page 2, line 1.
Following: "of"
Strike: "this full"

Wade

Robison

Eric Background

SENATE JUDICIARY

EXHIBIT NO. 2.p.1

DATE 2-7-89

BILL NO. 2/7/89 SB312

SB-312

I. Legislative Limitations
Upon The Right to "Full
Legal Redress" as described
in Article II, Section 16 - Mont. Const

25 min

A. Whether tort reform
measures of the legislature
which limit recovery in any
respect will survive constitutional
challenges under the decisions
of the Mont. S. Ct. in White (1983)
and Post (1985)

1. White = no non economic
damages and capped economic
damages.

2. Post = capped damages
w/o distinction between economic
and non economic.

B. Apparent Rationales

1. The right to "full legal
redress" (Art II, Sec. 16) was held
to be a "fundamental" right
and legislation limiting such
rights are subjected to a
"strict scrutiny" test by the
courts. Neither legislation
passed that test.

requiring 06
a showing
a compelling
state interest.

→

② "Strict Scrutiny" test vs.
"Rational Relationship" test

Slight Scrutiny
Intermediate
Strict

(A) Rooted in the legal analysis involving applications of the "equal protection" clause of state ~~and~~ constitution.

(B) "Strict Scrutiny" = substitution of court judgment; fact based inquiry; burden upon legislature rarely approved. (Compelling State Interest)

(C) "Rational Relationship" = presumption favors constitutionality; no requirement for showing compelling state reason. - "Slight Scrutiny".

(D) Majority of Jurisdictions (Notably CA) have used a "rational relationship" test in upholding the constitutionality of tax reform measures. (65 Cal. L. Rev. 129, 130, N. 7)

(E) AZ appears to be only other state finding a "fundamental" right to legal access.

III. Status of Legislation Enacted
In 1987.

(A) Each of the approximately 20 bills referred to by Sen. Pincomeau, with the exception of the legislation relating to punitive damages, one submitted to Constitutional Challenge and "Strict Scrutiny" under the White and Ford decisions requiring absent a showing of "compelling state interest."

(A) Morrison v Morrison
 OH Law Review citation:

(B) Richardson "Montana
Centrals Joint & Several Liability"
 - Mont-law Review - Vol 41

III. SB 312

(old (i.)) → (A) Eliminates reference to "every" injury and "full full" (ok) legal redress, clearly expressing constitutional intent that an individual's right to legal redress for damages in tort actions is not a "fundamental" right.

(1) In considering "equal protection" applications courts would apply traditional "Rational Relationship" test

Recognizes
(B) Provides for legislature's authority to enact statutory changes in civil remedies, claims, damages and allocation of (new (3)) responsibility for damages. ~~(old (3))~~

SENATE JUDICIARY

EXHIBIT NO. 2, p. 5

DATE 2-7-89

BILL NO. SB 312

IV. Relationship of SB 312 TO
JOHNSON vs. State Pending In
Supreme Court

(A) Appeal on a challenge to
1987 Wrongful Discharge Statute
(39-2-901 to 914). (Status: ^{Pending} ~~Schedule for Oral~~ ^{Arg.})

(B) Lower Court should limitations
on employee's rights to recover as
unconst under White and Post.

(C) Members of MLC As
Amicus Curiae raise the basic
Constitutional law issue presented
by White and Post, contending
that those cases were incorrectly
decided in concluding that
common law tort remedies are
"Fundamental Rights". Request
a clear ruling that White and
Post no longer control the
interpretation of Section 16, Art II

(D) Respondent (JOHNSON)
argues that MLC ^{position} expands
scope of appeal and should
not be considered as a
part of the appeal.

V. Effect of Decision In
Johnson Upon SB312 Proposal

(A) Ct. could endorse Respondent position that issues presented by NLC members are outside of scope of appeal, ignoring the request to reverse White and Post. (SB312 Necessary)

(B) Ct. could follow White and Post as controlling precedent (SB312 Necessary)

(C) Ct. could adopt position of NLC members, reversing White and Post. (SB312 Necessary)

(D) Ex parte (prose) must be allowed to confirm or disconfirm this conclusion under a voter info statement that does not include the defective reference that invalidate
CI-30.

NLC Respectfully Request - That
Comm. Report SB312 Out With
The Recommendation: "Do Pass"

SENATE JUDICIARY
EXHIBIT NO. 3
DATE 2-7-89
BILL NO. SB 312

MONTANA



Tavern Association

Affiliated and Associated with the NLBA
PROFESSIONAL PLAZA - SUITE AB-2
900 N. MONTANA AVENUE - P.O. BOX 851
Helena, MT 59624 / PHONE 406-442-5040

TO: SENATE JUDICIARY COMMITTEE
Senator Bruce Crippen, Chairman

FROM: Donald W. Larson, Legislative Committee Chairman
Montana Tavern Association

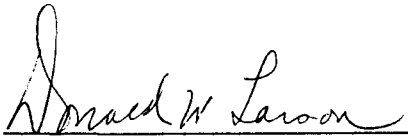
RE: Testimony in support of SB312
Hearing: Tuesday, February 7, 1989

The Montana Tavern Association joins in support of SB312.

In the General Election of 1986, Constitutional Amendment 30 was on the ballot and it passed by a substantial margin.

In May of 1987, the Montana Supreme Court voided the election on technicalities and thereby the passage of CI-30. It is the position of the Montana Tavern Association that the Court, along with voiding the election, also voided the will of the voters of Montana, both for and against the issue.

The MTA believes it is only right and fair that this issue be placed on the ballot AGAIN and let the people of Montana decide it AGAIN.


DONALD W. LARSON

Dr. Scott Erler

SENATE JUDICIARY
EXHIBIT NO. 4
DATE 2-7-89
BILL NO. SB 312

I'm here to testify in favor of Sen. Pinsincult's bill to put the Liability initiative back on the ballot.

I'm sure it's not necessary to remind you, but I feel the people of this state have already clearly spoke on this issue by passing I-30 back in 1986 by 56% of the vote.

I think this vote shows that people understand limits and accept them, it also shows they expect the legislature to have the power to make them.

The recent passage of CI-18, also validates these same concepts.

I know there has been some question as far as why, enough signatures were not gathered for I-48 last June. My wife and I collected almost 500 signatures in Missoula. We did not have much trouble collecting signatures in fact, the only people who wouldn't sign were "plaintiff's attorneys".

What I did pick up on was a lot of cynicism from people I talked to. Common comments were "I thought we already did this" and "why do we have to do this again". There are alot of people out there who are upset at the lack of respect shown their vote on I-30.

The action which threw out a mandate of the people has hurt the credibility of state government and certainly the credibility of the Supreme Court.

It's disappointing that we have to go through the expense and hassle of another campaign. I hope Sen Pinsincult's bill and one more election will ~~not~~ finally put this part of the "liability issue" to rest.

Brigitte

Good

SENATE JUDICIARY

EXHIBIT NO. 5 p. 1

DATE 2-7-89

BILL NO. SB 312

1) 87 Legislature

Married Tort Reform

Sensible Well Thought Out

Conscientious effort

JT & Several

Punitives

Periodic

Wrongful Discharge

Immunity non-profit corp

Product Liability - measure

Elimination of directors personal liability

Bad Faith Insurance

Five year product liability

Collateral Source

No emotional distress contract action

Workers Comp

2) Problem w/ Drs & Harp

Can be dealt w/

Med-Legal Panel; Locality Rule

2 1/2) What else needs to be fixed - barely a year has passed since the date

3. Bill - all out attack on jury system & injured persons

Planted by Insurance Industry

Claims there is "has been a crisis" - PS on

Business Week Aug 4, 86

FF - pulled out of our State

John J. Byrne chairman of holders co

Wm M. McCormick chairman of FF

Bringing of what they expected to make in 86

100 M personally for Byrne

30 M " " McCormick

Have a list of CEO of major insurance co's 82-85

Carl Lindler - American Financial Corp - \$4,742,000

SENATE JUDICIARY

EXH BIT NO. 5 P. 2

DATE 2-7-89

BILL NO. SB 312

4) This bill totally does away w/ checks & balances
Allows legislature to take away our "all rights"
Injured person only gets $\frac{1}{2}$ his medical bills
" " " " $\frac{1}{3}$ his lost earnings

5) Constitution provides for "full legal redress"

Insurance industry wants to remove full "give partial"
so it won't have to pay damages for severely
injured persons who it insured

6) This will allow legis to pass a law outlawing juries
in civil cases

Who will benefit

Only country left w/ true jury system

"The great leader"

Since 1600 it has been attacked

By powerful & greedy

Jury allows one w/ no power, no money to fight
City Hall

Do we even want to give out of state groups
like this a foot in the door on something as
valuable as the jury system

7) Insurance industry has already vastly attacked juries

It threatens them w/ higher premiums if jury
doesn't do as it says

We can't stop the threats

We can stop the death of the jury system

Vote Do Not Pass

SB 312

★ In it a public sector liability question

Each side gets 25 minutes

10:27

Robirchon

MT Liab Coalition

Voters Mislead

Strict Scrutiny

Rational Basis or Slight Scrutiny

★ { Why were bills passed if subj to constitutional
Challenger
Why did CI 48 Fail
Shouldnt we wait & see
Did we just waste everyone's time
Johnson care

★ Bill is so incredibly broad

Sup Ct found voters were or could have been
mislead

MT Tavern Assoc

Bill. Cham of Commerce - Kay Forter

Rick Bantor - Governor's Office

Lynn Harshell

Tom Rolf - Ind Car Dealer - who is the complainer
agnt

Laurie Chwell - Bozeman Cham of Comm

Dr Scott Erler

Testimony of Michael Sherwood, MTLA

Re: Senate Bill No. 312

OPPOSING

Senate Bill No. 312 should be rejected in its entirety because:

1. This language is identical to CI 48 which failed to generate sufficient signatures to be placed upon the ballot in 1988. (See attached copy of petition)

2. This type of legislation focuses upon the injured victim as the villain in the insurance premium crisis when the focus should be upon cost containment and profit reduction by the insurance companies:

(a) A Government Accounting Office Study, released shortly after the 1987 session, revealed that the insurance industry made net, after taxes, an 81 Billion Dollar profit from 1975 to 1984.

(b) Figures provided on the attached fact sheet show that the Industry continues to make record profits.

(c) In 1987 the legislature passed in excess of 20 major tort reform bills --- Insurance rates continue to rise.

(3) Recent initiative fights in California and Florida indicate that citizens have finally rejected limitations on the rights of injured victims as a means of controlling insurance costs. (See attached fact sheet). The insurance industry spent approximately

\$70 million dollars in an initiative fight in California. The voters rejected proposals to limit attorney fees and restrict recovery. They voted in an initiative to impose a 20 percent rollback on liability rates.

(4) The language contained in Senate Bill No. 312 is NOT the language contained in the compromise bill proposed in the 1986 special session. (See attached comparison).

PETITION TO PLACE CONSTITUTIONAL AMENDMENT
NO. 48 ON THE ELECTION BALLOT

If 10% of the voters in each of 40 legislative districts sign this petition and the total number of voters signing the petition is 37,897, this constitutional amendment will appear on the next general election ballot. If a majority of voters vote for this amendment at that election, it will become part of the constitution.

We, the undersigned Montana voters, propose that the secretary of state place the following constitutional amendment on the November 8, 1988, general election ballot:

This initiative would amend the Montana Constitution's provision on the administration of justice. Currently the Constitution provides that a speedy remedy must be afforded for "every injury" and that no one shall be deprived of "full legal redress" for injury incurred in employment. The initiative would delete the words "every" and "full legal." It would expand the Legislature's authority to establish, limit, modify or abolish rights and remedies for civil liability. A two-thirds vote of each house of the legislature would be required to set dollar limits on compensatory damages for economic loss resulting from bodily injury.

- FOR limiting the constitutional right to a legal remedy for "every" injury and expanding the Legislature's authority to modify legal remedies for injuries.
- AGAINST limiting the constitutional right to a legal remedy for "every" injury and expanding the Legislature's authority to modify legal remedies for injuries.

Voters are urged to read the complete text of the measure, which appears below. A signature on this petition is only to put the measure on the ballot and does not necessarily mean the signer agrees with the measure.

BE IT ENACTED BY THE STATE OF MONTANA:

Section 1. Article II Section 16, of the Constitution of the State of Montana is amended to read:

"Section 16. The administration of justice. (1) Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. Right and justice shall be administered without sale, denial, or delay.

(2) No person shall be deprived of ~~this full legal redress~~ for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state. ~~Right and justice shall be administered without sale, denial, or delay.~~

(3) This section shall not be construed as a limitation upon the authority of the legislature to enact statutes establishing, limiting, modifying, or abolishing remedies, claims for relief, damages, or allocations of responsibility for damages in any civil proceeding; except that any express dollar limits on compensatory damages for actual economic loss for bodily injury must be approved by a 2/3 vote of each house of the legislature.

Section 2. Effective Date. This amendment is effective on approval of the electorate."

WARNING

A person who purposefully signs a name other than his/her own to this petition or who signs more than once for the same issue at one election or signs when not a legally registered Montana voter is subject to a \$500 fine, 6 months in jail, or both. Each person must sign his/her name and address in substantially the same manner as on his/her voter registry card, or the signature will not be counted.

EXHIBIT NO. 6
DATE 2-7-89
FILE NO. SB 312



CALIFORNIA

In California, where nearly \$100 million was spent by supporters and opponents of five propositions dealing with auto liability, insurance reform and general tort issues, only a Ralph Nader-backed insurance reform proposal was approved, 51% - 49%. Proposition 103, which already has been challenged by the insurance industry, would, among other things:

- impose a 20 percent rollback on most types of liability insurance from levels in place on 11/8/87;
- allow rate increases between 11/8/88 and 11/8/89 only for those companies threatened with insolvency;
- establish prior-approval rating on 11/8/89;
- establish a mandatory 20 percent discount on auto liability premiums for good drivers;
- remove the insurance industry's exemptions from civil rights, antitrust and unfair business practices laws; restrict cancellations and non-renewals of policies for auto insurance to the following reasons:
 1. non-payment of premium;
 2. fraud or misrepresentation affecting the policy or the insured;
 3. a substantial increase in the hazard insured against;
- require the insurance commissioner to provide consumers with a comparison of the rate in effect for each personal line of insurance for every insurer.

Proposition 104, an insurance industry-backed proposal to establish a "verbal threshold" version of no-fault auto liability was soundly defeated by voters, 75% - 25%. The proposal would have, among other things: mandated the purchase by every auto owner first-party no-fault insurance with benefits of \$10,000 medical, \$15,000 work loss and \$5,000 funeral;

- restricted work loss recovery to 80 percent of after-tax income with a maximum of \$1,000 per week;
- eliminated tort liability for all no-fault benefits and for all noneconomic damages unless the victim dies or the injury involves serious and permanent disfigurement or is serious and permanent;
- referred all no-fault disputes to an Insurance Department-run arbitration panel;
- eliminated virtually all bad-faith actions;
- capped attorneys' fees to 15 percent for all no-fault proceedings, and imposed a sliding-scale cap on fees for all other automobile actions (33% for 1st \$50,000, 25% for 2nd \$50,000, and 15% over \$100,000).

Proposition 106, narrowly defeated by the voters, 53% - 47%, would have limited attorneys' fees in all tort actions to 25 percent of the first \$50,000, 15 percent of the next \$50,000, and 10 percent of everything over \$100,000.

Proposition 101, the so-called "Polanco Initiative," would have radically modified auto liability law in California had the voters not defeated it, 86% - 14%. Its provisions included:

- a limit on attorneys' fees in auto cases of 25% of economic damages, except in cases of serious and permanent injury or irreparable permanent disfigurement;
- a definition of "economic damages" which excluded collateral sources and required that such damages be "objectively verifiable";
- a limit on general damages of 25% of economic damages except in cases of serious and irreparable permanent disfigurement or serious and permanent injury;
- a procedure for resolving any disputes over whether the plaintiff met the above injury threshold under which the plaintiff is examined by a "neutral" physician;
- a 50% reduction in BI and UI auto liability premiums from the November 1988 levels, followed by a one-year rate freeze, then annual increases of no more than the physicians' services component of the

Consumer Price Index

The California Trial Lawyers Association endeavored its support to Proposition 100, the so-called "ICAN Initiative." Drafted by consumer and legislative leaders, as well as state Attorney General John Van Kamp, Prop. 100 was a wide-ranging insurance reform measure that would have:

- mandated a 20 percent rollback of auto insurance (BI, PD, liability, medical payment, and collision) from 1/1/88 levels;
- required justification by clear-and-convincing evidence of all territorial rating systems;
- required a 20% discount for "good drivers";
- mandated detailed reporting for auto insurers;
- establish a program under which the insurance commissioner would provide price-comparison to all auto insurance consumers;
- established a flex-rating system for all insurance except reinsurance, life, title, workers' compensation mortgage, county fire, and certain physicians' insurance;
- established an Office of the Insurance Consumer Advocate;
- repealed the state anti-trust exemption for insurance;
- authorized banks to sell insurance;
- prohibited the Insurance Commissioner or Insurance Consumer Advocate from accepting employment in connection with the insurance industry within 12 months of leaving office;
- cracked down on fraudulent activities by compelling selling insurance to senior citizens, and prohibited caps on attorneys fees.

Proposition 100 was defeated by the voters, 54% - 41%.

FLORIDA



In a campaign that cost parties a total of \$15 million, Amendment 10, a doctor-sponsored \$100,000 cap on all noneconomic damages in all tort cases, defeated by a margin of 57% - 43%. Thirty-eight newspapers came out in opposition to the proposal, which was also opposed by a majority of major elected officials in the state.

The language found in Senate Bill No. 12 introduced in the 49th Legislature (Special Session) reads:

(3) This section shall not be construed as a limitation upon the authority of the legislature to enact statutes limiting or modifying remedies, claims for relief, or damages in any civil proceeding. A law establishing a maximum dollar amount of compensatory damages that may be recovered for injuries may not be enacted except by a two-thirds vote of each house of the legislature.

The language contained in CI 30 reads:

(3) This section shall not be construed as a limitation upon the authority of the legislature to enact statutes establishing, limiting, modifying or abolishing remedies, claims for relief, damages, or allocations of responsibility for damages in any civil proceeding; except that any express dollar limits on compensatory damages for actual economic loss for bodily injury must be approved by a 2/3 vote of each house of the legislature.

The language contained in Section (3) of Senate Bill 312 is identical to that contained in CI30 and differs significantly from that contained in Senate Bill 12, the compromise bill proposed in the special session.

1.

ACTUAL

SENATE JUDICIARY
REPORTED BY THE INDUSTRY

EXHIBIT NO. 6

1985 PROFITS:

\$5 BILLION

(\$5 BILLION)

DATE 2-7-89

SB 3

In reporting its 1985 "loss" the industry counted ~~\$2.1~~ billion dollars in distributed dividends as a loss; it ignored \$1.9 BILLION in tax rebates which it received; it did not include \$6.5 BILLION in capital gains, which it received.

2. In 1985 the Dow Jones Average increased by 27.7%, a record.

The value of casualty insurance industry stock increased 46.2%.

3. The GAO predicted a net gain for the insurance industry of \$90 BILLION between 1985-1990.

5. In 1986 profits reported by casualty companies increased by \$10 BILLION over 1985. Net income increased 568%.

6. The industry's 1987 (1st 1/2) profit was \$6.5 BILLION, a 200% increase over 1986. Net income was \$7.5 BILLION.

7. The median jury verdict in 1959 was \$8,000.

The median in 1984 (1959 dollars) was . . . \$8,000.

Tables

Table II.1: Combined After-Tax Gains for Property/Casualty Insurance Industry Year for the Period 1976-1985 (Consolidated Basis)^a

Dollars in millions

Year	Underwriting gains/losses ^b	Investment gains/losses ^c	Pre-tax total	Federal income tax ^d	After-tax total
1976	(\$1,726)	\$7,173	\$5,447	\$148	\$5,299
1977	1,926	5,063	6,989	1,015	5,974
1978	2,548	7,758	10,306	1,389	8,917
1979	24	11,610	11,634	896	10,738
1980	(1,712)	15,870	14,158	593	13,565
1981	(4,464)	10,858	6,394	55	6,339
1982	(8,303)	18,387	10,084	(716)	10,800
1983	(11,088)	19,441	8,353	(1,218)	9,571
1984	(19,379)	17,875	(1,504)	(1,732)	228
1985	(22,597)	30,219	7,622	(2,030)	9,652
1976-1985	(\$64,771)	\$144,254	\$79,483	(\$1,600)	\$81,083

^aConsolidated totals eliminate "double counting" by excluding intercompany transactions between parent and subsidiary companies.

^bNet premiums earned, less losses and expenses. These results are based on undiscounted reserves.

^cNet investment income plus realized and unrealized capital gains.

^dNegative federal income tax occurs because companies report losses for tax purposes and consequently generate negative income taxes. Negative income taxes can be applied to past taxes paid, and they generate refunds or are carried forward to apply against future tax liabilities.

Source: Data used in the preparation of this table obtained from A M. Best Company publications.

Table II.2: Net Premiums Earned, Underwriting Gains/Losses, and Combined Ratios by Insurance Line for the Period 1976-1985

Dollars in millions

Insurance lines	Net premiums earned	Premiums as a percent of all lines	Underwriting gains/losses ^a	Underwriting losses as a percent of all lines	Combined ratios
liability (Private passenger)	\$192,432	20.49	(\$16,509)	25.49	107.9%
physical damage (Private passenger)	134,515	14.32	815	(1.26)	98.6
workers compensation	128,099	13.64	(1,589)	2.45	100.9
owners multiple peril	96,376	10.26	(3,813)	5.89	102.4
commercial multiple peril	66,002	7.03	(7,014)	10.83	108.5
general liability	61,746	6.57	(13,255)	20.46	120.0
liability (Commercial)	46,150	4.91	(6,746)	13.50	117.6
physical damage (Commercial)	25,599	2.73	(94)	0.15	99.1
medical malpractice	14,143	1.51	(5,177)	7.99	135.7
other lines	174,066	18.54	(9,389)	14.50	— ^b
All lines	\$939,128	100.00%	(\$64,771)	100.00%	105.9%

Appendix II

Tables

Table II.1: Combined After-Tax Gains for Property/Casualty Insurance Industry for the Period 1976-1985 (Unadjusted Basis)^a

Dollars in millions

Year	Underwriting gains/losses ^b	Investment gains/losses ^c	Pre-tax total	Federal income tax ^d	After-tax total
1976	(\$1,726)	\$7,173	\$5,447	\$148	\$5,299
1977	1,926	5,063	6,989	1,015	5,974
1978	2,548	7,758	10,306	1,389	8,917
1979	24	11,610	11,634	896	10,738
1980	(1,712)	15,870	14,158	593	13,565
1981	(4,464)	10,858	6,394	55	6,339
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1983	(11,088)	19,441	8,353	(1,218)	9,571
1984	(19,379)	17,875	(1,504)	(1,732)	228
1985	(22,597)	30,219	7,622	(2,030)	9,652
1976-1985	(\$64,771)	\$144,254	\$79,483	(\$1,600)	\$81,083

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^cNet investment income plus realized and unrealized capital gains.

^dNegative federal income tax occurs because companies report losses for tax purposes and consequently generate negative income taxes. Negative income taxes can be applied to past taxes paid, and they generate refunds or are carried forward to apply against future tax liabilities.

Source: Data used in the preparation of this table obtained from A.M. Best Company publications.

Table II.2: Net Premiums Earned, Underwriting Gains/Losses, and Combined Ratios by Insurance Line for the Period 1976-1985

Dollars in millions

Insurance lines	Net premiums earned	Premiums as a percent of all lines	Underwriting gains/losses ^a	Underwriting gains/losses as a percent of all lines	Combined ratios
Auto (Private passenger)	\$192,432	20.49	(\$16,509)	25.49	107.9%
Auto (Commercial)	134,515	14.32	815	(1.26)	96.6
Workers compensation	128,099	13.64	(1,589)	2.45	100.9
Fire multiple peril	96,376	10.26	(3,813)	5.89	102.4
Auto multiple peril	66,002	7.03	(7,014)	10.83	108.5
Liability	61,746	6.57	(13,255)	20.46	120.0
Auto (Commercial)	46,150	4.91	(8,746)	13.50	117.6
Auto (Commercial)	25,599	2.73	(94)	0.15	99.1
Professional practice	14,143	1.51	(5,177)	7.99	135.7
Other	174,066	18.54	(9,389)	14.50	— ^b
All lines	\$939,128	100.00%	(\$64,771)	100.00%	105.9%

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1976-1985	(\$64,771)	\$144,254	\$79,483	(\$1,600)	\$81,083

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^cNet investment income plus realized and unrealized capital gains.
^dNegative federal income tax occurs because companies report losses for tax purposes and consequently generate negative income taxes. Negative income taxes can be applied to past taxes paid, and they generate refunds or are carried forward to apply against future tax liabilities.
 Source: Data used in the preparation of this table obtained from A.M. Best Company publications.

Table II.2: Net Premiums Earned, Underwriting Gains/Losses, and Combined Ratios by Insurance Line for the Period 1976-1985 (Dollars in millions)

Insurance lines	Net premiums earned	Premiums as a percent of all lines	Underwriting gains/losses ^a	Underwriting gains/losses as a percent of all lines	Combined ratios
Liability (Private passenger)	\$192,432	20.49	(\$16,509)	25.49	107.9%
Physical damage (Private passenger)	134,515	14.32	815	(1.26)	99.6
Workers compensation	128,099	13.64	(1,589)	2.45	100.9
Homeowners multiple peril	96,376	10.26	(3,813)	5.89	102.4
Commercial multiple peril	66,002	7.03	(7,014)	10.83	108.5
General liability	61,746	6.57	(13,255)	20.46	120.0
Liability (Commercial)	46,150	4.91	(8,746)	13.50	117.6
Physical damage (Commercial)	25,599	2.73	(94)	0.15	99.1
Medical malpractice	14,143	1.51	(5,177)	7.99	135.7
Other lines	174,066	18.54	(9,389)	14.50	- ^b
All lines	\$939,128	100.00%	(\$64,771)	100.00%	105.9%



SENATE JUDICIARY
EXHIBIT NO. 7 p.1
DATE 2-7-89
BILL NO. SB 312

JAMES W. MURRY
EXECUTIVE SECRETARY

110 WEST 13TH STREET
P.O. BOX 1176
HELENA, MONTANA 59624

(406) 442-1708

February 7, 1989

The Honorable Bruce Crippen
Chairman, Senate Judiciary Committee
Montana State Senate
State Capitol
Helena, Montana 59620

Dear Senator Crippen:

I apologize for not being able to appear before your committee, but unfortunately, my schedule required me to be elsewhere at the time of your hearing on Senate Bill 312. I would appreciate you including this letter in your committee's official deliberation on Senate Bill 312.

Senate Bill 312 proposes to amend our states' constitution in a manner which we believe is an attack on the basic rights of Montanans. This time, the attack is on one of the most important and basic rights, the right to full compensation for every injury.

If the provisions of this amendment were adopted, they would alter the Montana Constitution's Declaration of Rights to allow the courts to have clear authority to turn a blind eye to some injuries. The removal of the word "every" from the Montana Constitution, as proposed by this bill, would be a clear signal to the courts to start picking and choosing which injuries are worthy of redress and which are not.

In addition, the amendment states that the Constitution does not limit the Legislature from setting or changing laws on remedies, damages, etc., except that any dollar limit on damages has to be approved by a two-thirds vote of the Legislature.

The Montana State AFL-CIO opposes any weakening of the constitutional protection of a person's right to redress for injuries. All citizens ought to have the right of full recovery for all injuries they suffer, but particularly those injuries suffered on the job.

Our Constitution and its Declaration of Rights is not the place for exceptions, qualifiers and limitations. Our Constitution must continue to embody the basic rights and responsibilities of citizens, those principles and notions which we embrace as the unchanging foundation of our civilized society.

SENATE JUDICIARY

EXHIBIT NO. 7 1 p. 2
DATE 2-7-89
BILL NO. SB 312

The Honorable Bruce Crippen
February 7, 1989
Page 2

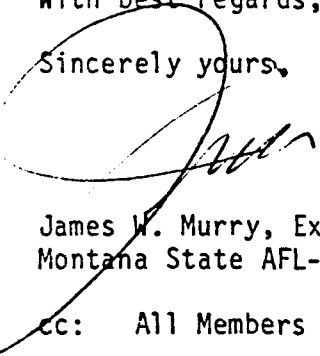
We do a terrible injustice to our Constitution if we set up a system whereby the basic right of protection from injury is conditioned on a long list of exceptions, limitations and exclusions as defined by legislative action, court cases and Supreme Court decisions.

In fact, this amendment would seem to be at odds with the intent of Section 1 of the Declaration of Rights, which states in part that "All government of right ... is instituted solely for the good of the whole." This amendment is not for the good of the whole, but for the few who do not care to protect the safety of others through their actions or inactions. It is from these few irresponsible citizens that our Constitution seeks to protect us.

We urge your committee to defend the Montana Constitution and the basic rights of all Montanans by giving this bill a "do not pass" recommendation.

With best regards, I am

Sincerely yours,



James W. Murry, Executive Secretary
Montana State AFL-CIO

cc: All Members of Senate Judiciary Committee

DATE

2-7-89

COMMITTEE ON

NATURAL RESOURCES

Judiciary

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Alice MacDalyre	Human Rights Div	SB314		
John C Hoyt	self	SB312		✓
Pete Santos	Gov Office	SB344	✓	
Zander Blewett	Self	SB344		✓
Zander Blewett	Self	SB312		✓
Tom Rowe	SELF	SB312	✓	
John Connor	Dept of Justice Mt. County Attorneys Assn.	SB347	✓	
Brenda Nordlund	MT Women's Lobby	SB314	✓	
Robert L. Deschamps	Mont. Crim. Procedure Comm.	SB347	✓	
Mike Sherwood	MT. Trial Lawyers	SB347	✓	
Lynn Houdyshell	HEZENA Builders	SB312	✓	
Scott Elin DDS	Mont DENTAL ASSN	SB312	✓	
Marie E. Durkee	Mt. Tavern Assn.	SB312	✓	
Sup. Kingsbauer	MT Defense Trial Associates	SB344		✓
Margaret Evans	LVVMT			
James D. Jensen	MT. Environmental Info. Center	SB312		✓
Bill Long	MT. Bankers Assn	SB312	✓	
Mike Sherwood	MTLA	SB312		✓
Laurie Shaban	Bozeman Chamber	SB312	X	
Kay Foster	Billings Chamber		X	
Tim Robison	Mont. Liability Coalition	SB312	X	
Allen Chronister	State Bar	SB344 SB347	X	X