

MINUTES

MONTANA SENATE  
51st LEGISLATURE - REGULAR SESSION  
COMMITTEE ON BUSINESS AND INDUSTRY

Call to Order: By Chairman Gene Thayer, on February 14, 1989, at 10:00 a.m.

ROLL CALL

Members Present: Chairman Thayer, Vice Chairman Meyer, Senator Boylan, Senator Noble, Senator Williams, Senator Hager, Senator McLane, Senator Weeding, Senator Lynch.

Members Excused: None

Members Absent: None

Staff Present: Mary McCue, Legislative Council

Announcements/Discussion: Chairman Thayer asked everyone testifying to be sure to sign in. He said that normally each bill was heard individually, but because the three bills dealt with the exact same subject, he was going to open the hearing on all three bills simultaneously. He said each sponsor was going to have the opportunity to introduce his bill, then proponents could speak on any bill, or any part of all of them at one time. He reminded committee members to take good notes.

Senator Lynch asked if they could have an indication of how many opponents and proponents there were. Chairman Thayer asked for a show of hands, so the committee could evaluate the situation.

Chairman Thayer announced the hearing would have to be recessed at about 11:12 a.m., because the House and Senate were meeting in a joint session, to hear the Governor's education proposal. He stated the hearing would resume immediately upon adjournment.

HEARING ON SENATE BILL 313

Presentation and Opening Statement by Sponsor: Senator Mazurek, Senate District 23, said he had introduced SB 313 at the request of the State Bar of Montana Committee. He said the bill was essentially the mid range position of the three bills being heard that day,

and he had put it in to clarify the Supreme Court ruling of two years ago. He said he thought Senator Meyer's bill was probably the most liberal in favor of debtors. SB 313 took the law, rather as it existed now, and tried to define and set guidelines for how banks would treat financing of real property. Senator Halligan's bill sort of restored the law to the way many people, particularly creditors, thought it existed prior to the Chunkapura Decision. He said there was a need for legislature to act in the area being discussed. He said the subject of the bills was trust indentures.

Senator Mazurek said Montana had traditionally used mortgage financing, which allowed a lender to foreclose by filing a law-suit against the borrower's real property, when a note was not paid. He said the property was sold to satisfy the loan, and if the proceeds weren't sufficient for payment, the lender could pursue other assets of the borrower. He stated the small tract financing act allowed lenders to take a trust indenture deed of trust, and if payment was not made, the lender could foreclose nonjudicially. He could, over a 120 day period, sell the property by giving notice to the borrower. He stated no deficiency payment was taken if the sale proceeds did not pay off the loan. He said there was a provision in the law which said the lender could elect to foreclose a trust indenture like a mortgage. He said people believed, prior to the Chunkapura Decision, that if a lender elected to foreclose a trust indenture judicially, they could obtain a deficiency if the sale proceeds were insufficient in covering the debt. He said the Chunkapura Decision had ruled there could not be a deficiency judgment on residential property, even when foreclosure was made judicially.

Senator Mazurek said SB 313 kept the logic, that if you had residential property with a trust indenture, the lender could not get a deficiency judgment when they foreclosed. He said the bill defined what was residential, and what was commercial property. He said it would also give the lender an action for waste, against the borrower. He stated the waste provision would allow the lender to sue for damages the borrower caused the property, during the borrower's time of possession. He said page 4 outlined the proceeds and protection provisions, when there was other collateral involved. He said SB 313 took the law, as it currently existed, and tried to answer procedural questions that were facing lenders.

Senator Mazurek presented amendments which clarified the definition of residential property, on page 1, line 21. (See Exhibit #1)

HEARING ON SENATE BILL 349

Presentation and Opening Statement by Sponsor: Senator Halligan, Senate District 29, said he felt Senator Mazurek had explained the differences in the bills very well. He said he thought the foundation for SB 349 had a lot to do with the economics of buying and selling commercial and residential property. He felt SB 349 was probably the bill to look at, in terms of putting the law back to the balance between creditors and debtors rights, which existed prior to the Supreme Court decision. He said the trust indenture was a tool created because mortgages were not serving the purpose. He said, once financial institutions were allowed this tool, they were given two opportunities; the advertisement of sales with no deficiency judgment, or the judicial route with a deficiency judgment. He said all this bill did was put the law back into balance. He said he felt they must pay attention to the economic impact, on the residential and commercial borrower, of each bill.

Senator Halligan presented a waste amendment Representative Good had given him, and stated the amendment was actually supposed to have been part of the bill draft. (See Exhibit #3) He stated his bill had an error in printing, and the words 'by request of the Governor' should be stricken. (See Exhibit #2)

HEARING ON SENATE BILL 275

Presentation and Opening Statement by Sponsor: Senator Meyer, Senate District 17, said the policy of the Montana Legislature, when the small tract financing act was enacted in 1963, was to help assist housing and business expansion, and that was the reason for SB 275. He said the banking industry came to the legislature in 1963, to secure a vehicle to collect on collateral for real estate loans. He said the industry proposed banks would get the procedure, in the form of a trust indenture, and debtors would get protection through a no deficiency judgment. He said that protection was only extended to occupied single family dwellings, even though the small tract financing act did not speak to the type of collateral, but spoke to housing and business expansion.

Senator Meyer said SB 275 was designed to make legislature's intent clearer, that the protection against deficiency judgments was to extend to both housing and business property, even when foreclosed as a mortgage. (See Exhibits #4 & #5) Senator Meyer had amendments being prepared for his bill, but they had not been delivered yet.

List of Testifying Proponents and What Group They Represent:

Jim Benn - First Federal Savings and Loan Association  
Missoula, Montana  
George Bennett - Montana Bankers Association  
Mike McKee - President, First Federal Savings and Loan  
Association, Missoula, Montana  
Gerald Krieg - Montana Bar Association Committee  
Ernie Sandberg - Empire Federal Savings and Loan  
Association, Livingston, Montana  
Steve Grose - Montana League of Savings Institutions  
Bob Pyfer - Vice President, Montana Credit Unions  
League  
Roger Tippy - Montana Independent Bankers  
Joe Bower - Montana Bankers Association's Real Estate  
Committee  
Bob Pancich - Assistant Investment Officer, Montana  
Board of Investments  
John Franklin - President, 1st United Bank, Sidney  
Montana

Testimony: Jim Benn said he had been involved in drafting SB 349, and there was a need for legislature to act. Lenders and debtors needed certainty, and a balance, when entering into agreements. He said they believed the Chunkapura case was wrongly decided, because there was no given statute distinction between residential, commercial, or agricultural property. He said lenders had come to the legislature and asked for the capacity of quick, unlitigated access to collateral. He said, in exchange for that, they gave up the right to a deficiency judgment. He said the statute did not preclude the filing of a law-suit on a trust indenture, or make it an unenforceable obligation. He said the Chunkapura Decision eliminated the lenders capacity to force their rights to collect the money they had lent. He said the matter was a policy decision which needed to come out of legislature, to allow the lenders the capacity to make higher loan value transactions, and foreclose those obligations when necessary.

Mr. Benn gave a history of the Chunkapura case, and restated that they felt the case was wrongly decided. He said that if legislature did not clarify the law, there would be an articulated policy in Montana, which would make lenders react more conservatively, with higher underwriting standards. He said this could lead to an adverse affect on housing credit in Montana, and make it difficult to sell Montana paper on the national market. He said the solution they were proposing was in SB 349. He said the bill suggested the right to get a deficiency, proposed clarifying language changes in the statute, and provided an amendment for the waste provision. He said they wanted legislature to adopt a policy which reinstated the law, to where lenders thought it was, prior to the Chunkapura Decision.

George Bennett stated their association had participated in the Chunkapura Decision, as a friend of the court. He said the committee was looking at the law, as the Supreme Court made it, and had to decide if that was the way they wanted the law to continue to be. He said that with Senator Meyer's bill, they would be extending the Supreme Court's original decision. With Senator Mazurek's bill they would be perpetuating the Supreme Court Decision on rehearing, with some clarifications. With Senator Halligan's bill they would be returning the law to where we thought it was from 1963 until 1986, when the court decision was rendered. He said his association supported SB 313, and opposed the others.

Mr. Bennett reviewed the court case, and explained the changes that took place. He said the Supreme Court originally decided a deficiency judgment could not be obtained when there was an existing trust indenture. He said their group presented friends of the court briefs, which he felt caused the Supreme Court to substantially narrow its opinion on rehearing. He stated the committee should make their bill choice to be in perspective only, and should specify to trust indentures after a certain date.

Mr. Bennett said one of the major factors, in the Supreme Court narrowing its opinion, was that loans were not only sold to the secondary market, but to the State of Montana as well. He said the committee's action, on their policy choice, would affect the viability of the small tract financing act. He stated that if the interpretation stayed as it was now, lenders were going to cut down on the availability of

loans for residential property, and require substantially more collateral. He said they would like to see the law returned to what it was from 1963 to 1986, so the protections of mortgage foreclosures were extended to debtors. He said that would protect their ability to sell their loans on the secondary market, and elsewhere, to generate the credit needed.

Mike McKee said the Chunkapura Decision had rendered uncertainty, for the lender and the borrower, within the lending market, and had resulted in a substantial impact. He stated single family, owner occupied, residential property was their principal business. He cited equity, for the borrower and the lender, as what was being addressed, and the Supreme Court had eliminated that equity and replaced it with uncertainty. He said the decision was too ambiguous.

Mr. McKee said they strongly opposed SB 275, opposed SB 313, and were a definite proponent of SB 349. He related a case history on how the Chunkapura Decision had adversely affected an existing loan they had, and told how it had affected their ability to take action. He said the decision had reversed the procedures of making a loan. He said they had always looked at the borrower's capacity to repay, first, but now they had to look to collateral first, and almost ignored the repayment capacity. He said this was going to have a definite, negative impact on the housing in Montana.

Gerald Krieg said he was speaking as a proponent for SB 313. He said the Chunkapura Decision left a lot of unanswered questions. He stated, it seemed to clearly decide there was no deficiency judgment in the case of a foreclosure, and implied it may rule differently in the face of commercial property. He said those holding trust indentures on commercial property, or anything other than residential property, had spent the last two years being unsure whether there was a right to a deficiency judgment. He said the decision left questions, as to what qualified for an owner occupied loan. He said the Chunkapura Decision had not taken existing statutes into consideration, such as the one action rule, and the small tract financing act.

Mr. McKee said the decision had caused the bar association to appoint an ad hoc committee to review, and clarify the law. He said SB 313 addressed deficiency judgments, and narrowly tried to affirm and specifically define the result of the Chunkapura Decision, regarding the single family occupied

dwelling. He said it basically allowed the deficiency judgment in a judicial foreclosure, which was subject to the right of redemption. He said SB 313 provided a separate action for waste, and dealt with the one action rule, by allowing the enforcement of other security. He stated the commercial areas presented a need to recognize that loans were not made on the basis of assets, but on the basis of repayment ability. He said it was important to have recourse against that, in order to prevent a crippling affect on the commercial lending business. He strongly urged one of the bills be adopted, and they thought SB 313 offered an acceptable middle position.

Ernie Sandberg said he was a proponent of SB 349, and an opponent of SB 313 and SB 275. He said he felt the committee had heard how SB 349 would operate, as opposed to the other two, and he agreed whole-heartedly. He said he thought exempting residential real estate, through a deficiency judgment, would create a problem when more expensive homes were placed in foreclosure, and offered to a small, unaffording population, but he believed there were some cases when a deficiency judgment would be in order.

Steve Grose said, for the reasons already given by Mr. McKee, Mr. Benn, and Mr. Sandberg, they wanted to go on record as supporting SB 349, and opposing SB 313 and SB 275.

Bob Pyfer said the majority of credit unions in Montana did not do mortgage loans, but a few did. He said they agreed there was a need to do something about the situation. He said people had thought they knew what the law was, until 1986, but with the Chunkapura Decision the statutes no longer stated what the law was. He said their preference was for SB 349, because it reinstated the law prior to Chunkapura, as it was understood, and reestablished some continuity. He said their second choice would be SB 313. He said it was a good thing to clarify the one action rule. He stated they did not prefer, in any case, SB 275. He said he had not seen the amendments, but SB 275 confused him. He said they felt SB 349 enhanced home lending, and provided a greater incentive to finance a higher portion of the purchase price.

Roger Tippy said they endorsed the position of the Savings and Loan League, and favored SB 349. He said he also agreed with the comments Mr. Benn had made.

Joe Bower said their biggest obstacle in underwriting a

loan, was the collateral. He said that if someone didn't have the required 20% down payment for a conventional loan, they could look at other means of financing, such as a private mortgage investor. He said the biggest problem getting approval, through a private mortgage investor, was the property itself. He said that by not allowing the secondary markets the option to foreclose a trust indenture judicially, the result would be tougher underwriting standards. He said the result could be the requirement of a larger down payment, and possibly a shorter loan period. He said they favored SB 349.

Bob Pancich said the Board of Investments presently managed over \$150,000,000 worth of mortgages in Montana. He said they used five different funds for placements of the mortgages. He said they also place mortgages in the permanent trust, mainly on the in-state investment side. He said they presently had approximately \$40,000,000 worth of personally guaranteed, commercial loans in their combined portfolios. He said being precluded from going against those personal guarantees, in the event of foreclosures, was going to be devastating to the fund. He said they had about six foreclosures since the Chunkapura Decision, until the first six months of this fiscal year, when they had forty-five. He said the trend was moving up, because people saw Chunkapura as a way to walk away.

He reiterated the fact, that underwriting standards were going to change greatly, if they did not have a method of redressing borrowers. He said he felt the pressure on the Board of Investments, to do more investing in Montana would increase as other secondary markets dried up. He stated it would not be prudent to have a large percentage of the pension funds tied up in mortgages. He said they spoke in favor of SB 349.

John Franklin cited an actual case, experienced by their bank, which was the direct result of the Chunkapura Decision. He stated the clients had the ability to pay, but chose to walk out, and leave the lending institution holding the bag. He said the court decision had left the institution with no recourse. He said they were a proponent of SB 349.

Announcement: Chairman Thayer recessed, by stating the balance of the hearing would be held when the Senate adjourned at approximately 12:00 noon.

Questions From Committee Members: Senator McLane asked which of the three bills would do the best job of



correcting the Chunkapura Decision? Mr. Krieg said SB 313 would allow a deficiency judgment for a judicial foreclosure for any trust indenture, unless security in that trust indenture was a single family residence. He said SB 349 would not make that exception, and would allow a deficiency judgment any time there was a judicial foreclosure. He said he was confused about SB 275, because he had seen two versions.

Senator Meyer said SB 275 had been written in Missoula, at the college, and had not been drafted well.

Chairman Thayer said it had been testified that SB 349 attempted returning the law to where everyone thought the law was, prior to the court decision. He asked Mr. Krieg if he had said SB 313 did the same thing? Mr. Krieg said SB 313 didn't quite return to where it was before. He said SB 313 basically carved out a narrow exception for single family residential property. He said that may, or may not be the same kind of exception carved out by Chunkapura. He said the Chunkapura exception was not very well defined, and it wasn't known what the court would do, when faced with something other than a single family residential trust indenture.

Senator Noble asked if there was a problem before the Chunkapura Decision? Mr. Krieg said he didn't think there was a serious problem, but there were some other matters that could result in problems. He said the potential problem had existed for a long time, but so far no court decision in Montana, had been required in that area. He said, even with the pre Chunkapura rationale, a party having a mortgage on combined securities, could be prevented from taking more than one action against the different pieces of security. Even if more than one item needed repossessed, the one action rule could prevent a second action on the remaining security. He said SB 313 had a provision attempting to address the one action rule, and he hoped the committee would incorporate that section, no matter which bill they chose. He stated waste was a possible problem, but he did not know of any other problems that existed before Chunkapura.

Senator Mazurek told Senator Williams, a small tract was fifteen acres or less, and was incorporated into all three bills, because they all referred to the small tract financing act.

Senator Weeding asked why deficiency judgments should not be placed against the one family dwelling? Jim Benn said

there was a significant difference in the redemption right, granted to a resident occupying a portion of the property, as opposed to the normal redemption period for all other types of property. He said there was a one year redemption period, which commenced on the date the sheriff conducted the execution sale of property. He said, that if the property was a debtor occupied residence, the resident was entitled to retain possession for the one period of redemption, without paying anything.

Mr. Benn said the redemption statutes presupposed the lender would bid the fair value of the property at the time of sale. He said he thought there was a misconception, that if lenders had deficiency rights, they would intentionally underbid the property to create a deficiency judgment, but the intent of the statutes held no incentive for a lender to intentionally create a deficiency. He said, if a lender gave up their lien on the property, the property could be sold, free of the lien, and the debtor could flee with those proceeds and his other property.

Chairman Thayer asked what has being implied in the testimony, regarding the legislature's policy setting duties, and what had happened since the Chunkapura Decision? He wanted to know if they were still lending as much on loans, as they had prior to the decision. Mr. McKee said residential type lending agencies had definitely increased their lending and underwriting standards, and were requiring higher down payments on that type of loans, because of the uncertainty. He said the Chunkapura Decision had suddenly made collateral, and larger down payments the primary concern, rather than a persons ability to pay. He said this change caused great concern for the impact of availability of affordable housing in the state. Mr. Mckee stated the trend was moving quite strongly in that direction.

Senator Noble asked, if the committee enacted SB 349, would we get back to lower down payments, and less stringent lending standards for residential loans? Mr. McKee said he personally believed they would be back into a progressive environment which lending institutions had for the last twenty-five years. He said he thought that would include lower down payments, and an effort to make housing easier to afford.

Senator Meyer asked who set the price of a house, or the amount to be loaned on a particular piece of property? Mr. McKee said they became involved with the

transaction, after a sale and purchase agreement had been executed. He said they independently valued the property through an appraisal, before they made their loan, based on the lower of (a) the sale price, or (b) the appraisal. He stated they made the final decision, as to the amount to be loaned.

Senator Weeding asked Senator Mazurek if they were attempting to return to a pre Chunkapura status? Senator Mazurek said he felt SB 313 attempted to choose a middle road approach, for legislature to set a policy. He said SB 313 narrowly defined what residential was, allowed the lender access to other collateral pledged on the loan, and allowed the waste provision, in lieu of a deficiency judgment. He said he thought SB 313 was an effort to clarify the law, and offer some consumer protection.

Chairman Thayer asked who the committee was, which Senator Mazurek referred to in his testimony, about who designed the bill? Senator Mazurek said he thought they were members of the Montana State Bar Association, and asked Mr. Krieg, who confirmed that it was an ad hoc committee appointed by the president of that association. Mr. Krieg further stated the committee had varied opinions, but SB 313 seemed to embody the closest version of a consensus of the committee.

Chairman Thayer said he would like the record to indicate, that Senator Meyer's bill was originally scheduled for an earlier hearing, and he had witnesses ready to appear. He stated, that when Senator Meyer consented to move his hearing, to concur with the other two bills, he had lost access to the witnesses on SB 275.

Senator Weeding asked what interests the witnesses for SB 275 would have presented. Senator Meyer said they were attorneys? He stated his bill draft had been done incorrectly, and it needed some changes, in order to carry out his original intent.

Chairman Thayer asked why the Montana Bankers Association, in their support of SB 349, had not included a request for language to clarify the one action rule? Mr. Bennett said he thought SB 349 would reverse the Chunkapura Decision. He said the one action rule related to the interrelationship between uniform commercial code, and their mortgage laws, and he thought that could be addressed in SB 349, through amendment.

Mr. Benn told Chairman Thayer, the one action provision, or the problems related to it, had not been addressed in SB 349, but they would have no problem amalgamating them into the bill. He said their only objection to SB 313 was the exclusion of residential property.

Closing by Sponsor: Senator Meyer said he closed the hearing on SB 275.

Closing by Sponsor: Senator Mazurek said he thought Chairman Thayer's last question was a good one, and he urged the committee, if they chose SB 349, to look carefully at the possibility of merging section 3, of SB 313, with the exception of lines 22 and 23 on page 4, which dealt only with residential property. He stated they should also look at merging the two waste provisions of SB 349 and SB 313, into the vehicle they chose to pass. He said he thought there was an assumption in SB 349, that there was an existing right in the law, to maintain an action for waste against the borrower.

Senator Mazurek reminded the committee the borrowing segment had not been represented at the hearing, and he reminded the committee to keep them in mind. He stated that when the Chunkapura Decision was rendered, there had been a discussion about doing something, and there hadn't been sufficient consensus to validate a change. He said the court had reached its' decision, because there was no set fair market value in the statute. He said borrowers didn't always realize they could get a deficiency judgment on a trust indenture, and he felt that was a segment who hadn't testified at the hearing. He said there were very good arguments for choosing SB 349 as a policy, but if they lost the whole battle, he thought that would do a disservice, and he urged keeping the borrower in mind.

Closing by Sponsor: Senator Halligan closed the hearing on SB 313.

#### DISPOSITION OF SENATE BILL 313

Discussion: None

Amendments and Votes: None

Recommendation and Vote: None

DISPOSITION OF SENATE BILL 349

Discussion: None

Amendments and Votes: None

Recommendation and Vote: None

DISPOSITION OF SENATE BILL 275

Discussion: None

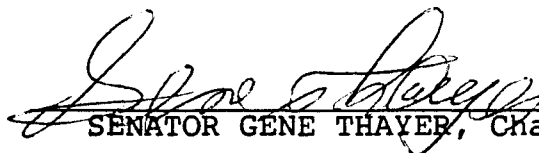
Amendments and Votes: None

Recommendation and Vote: None

Chairman Thayer apologized for the unavoidable interruption, and thanked everyone for their courtesy during the hearing. He urged the three bill sponsors to meet, regarding amalgamation of all the concerns into one bill. He stated they would like to take executive action by Friday, if possible. He said he felt Senator Mazurek's final statements were valid, and it was unfortunate the witnesses for SB 275 were unable to be present. He said he agreed, their interests had to be kept in mind, even though they were not present at the hearing.

ADJOURNMENT

Adjournment At: 12:54 p.m.

  
SENATOR GENE THAYER, Chairman

GT/ct

ROLL CALL

BUSINESS & INDUSTRY COMMITTEE

DATE 2/14/89

51st LEGISLATIVE SESSION 1989

NAME	PRESENT	ABSENT	EXCUSED
<u>SENATOR DARRYL MEYER</u>	✓		
<u>SENATOR PAUL BOYLAN</u>	✓		
<u>SENATOR JERRY NOBLE</u>	✓		
<u>SENATOR BOB WILLIAMS</u>	✓		
<u>SENATOR TOM HAGER</u>	✓		
<u>SENATOR HARRY MC LANE</u>	✓		
<u>SENATOR CECIL WEEDING</u>	✓		
<u>SENATOR JOHN "J.D." LYNCH</u>	✓		
<u>SENATOR GENE THAYER</u>	✓		

Each day attach to minutes.

Amendments to Senate Bill No. 313  
First Reading Copy (WHITE)

Requested by Senator Mazurek  
For the Committee on Business and Industry

Prepared by Valencia Lane  
February 13, 1989

1. Page 1, line 21.  
Following: "term"  
Strike: "includes but"  
Following: "is"  
Strike: "not"

2. Page 1, line 22.  
Following: "or a"  
Insert: "single unit of a"

SENATE BUSINESS & INDUSTRY

EXHIBIT NO. 2

DATE 2/14/89

BILL NO. SB 313

Copy

February, 8, 1989

TO: Barbara Buda, Printing

FROM: Nancy Waltermire, Assistant Secretary of the Senate

RE: Senate Bill No. 349

At the request of Senator Halligan, chief sponsor of Senate Bill No. 349, please remove "By request of the Governor".

Thank you for your cooperation in this matter.



PROPOSED AMENDMENT TO SB 349  
INTRODUCED COPY

following line 25, page 8, add:

NEW SECTION. Section 8. Waste. If real property taxes and assessments on real property which is encumbered by a trust indenture are six (6) months or more delinquent at the time such property is sold by advertisement and sale as part of a nonjudicial foreclosure, the Beneficiary shall be entitled, after such sale, to maintain an action for waste against the grantor and his successors in interest who had possession of the property during the time when such unpaid taxes were accruing. The damages for waste shall be limited to unpaid taxes and assessments which accrued prior to the time that possession of the property is delivered to the purchaser at such sale. The Beneficiary shall also be entitled to recover a reasonable attorneys fee plus costs as part of such action.

*SB 275 Meyer*

FEB 13 '89 17:01 JSBW,PC GREAT\_FALLS\_406-727-5419

THE REASON FOR THE BILL

The policy of the Montana Legislature when the Small Tract Financing Act was enacted in 1963 was to help assist with housing and business expansion. The Montana Supreme Court has now ruled that although it acknowledges the banking industry had come to the legislature in 1963 to secure a more streamlined vehicle to collect on collateral for real estate loans, and had proposed a trade off so that the banks would get their streamlined procedures in the form of trust indentures and debtors would get protection with no deficiency judgments, that protection only goes to single family occupied dwellings even though the Small Tract Financing Act in no place speaks in terms of that type of collateral. Rather, the policy of the Act refers to housing and business expansion. My Bill is designed to make it clear, as the legislature intended as the Supreme Court itself acknowledged, that the protection against deficiency judgments is to extend to both housing and business property even when foreclosed as a mortgage. On the other hand, since I recognize that there can be complicated commercial loans with various types of collateral, my Bill is designed to allow for deficiency judgments where more complex business loans are involved as opposed to just a loan secured only by a trust indenture on a single piece of business property.

WHY THE LEGISLATION?

It has come to my attention through litigation in Great Falls that persons who had signed a Note and Trust Indenture believing they were not going to be personally liable because the Trust Indenture was the collateral have in fact been sued in foreclosure and deficiency judgments entered against them. I understand the Montana Supreme Court in the *Chunkapura* cases held that you could get a deficiency judgment if a trust indenture was foreclosed as a mortgage when the trust indenture was on commercial or agricultural property, but not if the trust indenture was on an occupied, single family dwelling. That seems very inconsistent to me and unfair since the Small Tract Financing Act under which trust indentures are authorized provides in Section 71-1-302 that the public policy of the State is to permit use of trust indentures to help the financing of homes and "business expansion" as essential to development of Montana.

Also, the Supreme Court itself stated in the *Chunkapura* cases that allowing a deficiency judgment would be inconsistent with the provisions of the Small Tract Financing Act. The Court also said in *Chunkapura* that the "banking and lending industry came to the legislature in 1963, contending that various mortgage foreclosure requirements and the redemption rights that debtors had under mortgage foreclosure hampered financing of improvements on small tracts", and that

Ex. # 4

2/14/89

the banks had therefore proposed a trade off whereby bankers would give up their deficiency judgment rights on default if the borrowers would give up their rights of possession and redemption. My Bill is designed to assure the protection of the borrowers which I think the Legislature intended to enact in 1963 as the Montana Supreme Court itself recognized in its first *Chunkapura* decision. If the Court says there was to be this trade off as proposed by the bankers and the statutes in the Act don't distinguish between housing and business loans, then I don't see how the Court could? My bill is fair to borrowers and banks because it does what the Court said the legislature intended in 1963, but protects banks as to complicated loans where there is more types of collateral. In those cases they can get deficiency judgments if they foreclose as a mortgage.

DataCom 9161

**71-1-234. Attorney's fee — petition and notice.** If the mortgagee shall demand attorneys' fees in case of the sale of real estate under and by virtue of the power of sale contained in any mortgage or deed of trust in this state, except in case of the sale of real estate by virtue of a power of sale conferred upon a trustee under a trust indenture as defined in the "Small Tract Financing Act of Montana", he shall petition the district court of the county in which said real estate or any part thereof may be situated to fix the amount of such attorney's fee, and a copy of such petition shall be served upon all parties having or claiming an interest of record in the property to be sold or such of them as may be found within the state, which copy of said petition must be served at least 10 days before the day fixed for hearing, and notice of the time and place of such hearing shall be served at the same time as the copy of said petition is served. Such petition shall be acted upon by the district court before the notice of sale by publication or posting, as hereinbefore provided for, shall be given.

History: En. Sec. 3, Ch. 165, L. 1917; re-en. Sec. 9473, R.C.M. 1921; re-en. Sec. 9473, R.C.M. 1935; amd. Sec. 20, Ch. 177, L. 1963; R.C.M. 1947, 93-6007.

**71-1-235. Instruments — negotiability and remedies.** Nothing in this part shall be deemed to affect the negotiability of an instrument, and nothing in this part shall be deemed to limit remedies otherwise available to the purchaser of a promissory note secured by a mortgage unless such purchaser at the time of purchase had notice that the note was so secured.

History: En. 93-6010 by Sec. 11-168, Ch. 264, L. 1963; R.C.M. 1947, 93-6010.

**Cross-References**

When promise or order unconditional,  
30-3-105.

**Part 3**

**Small Tract Financing**

**71-1-301. Short title.** This part may be cited as the "Small Tract Financing Act of Montana".

History: En. Sec. 1, Ch. 177, L. 1963; R.C.M. 1947, 52-401.

**71-1-302. Policy.** Because the financing of homes and business expansion is essential to the development of the state of Montana and because such financing, usually involving areas of real estate of not more than 15 acres, has been restricted by the laws relating to mortgages of real property and because more such financing of homes and business expansion is available if the parties can use security instruments and procedures not subject to all the provisions of the mortgage laws, it is hereby declared to be the public policy of the state of Montana to permit the use of trust indentures for estates in real property of not more than 15 acres as hereinafter provided.

History: En. Sec. 2, Ch. 177, L. 1963; amd. Sec. 1, Ch. 337, L. 1974; R.C.M. 1947, 52-402.

**71-1-303. Definitions.** As used in this part, unless the context requires otherwise the following definitions apply:

(1) "Beneficiary" means the person named or otherwise designated in a

SB 275 Meyer

SENATE BUSINESS & INDUSTRY  
BILL NO. 5  
DATE 2/14/89 P.1  
BILL NO. SB 275

The Montana Supreme Court in the *Chunkapura* decision ruled that under Section 71-1-317, MCA, the holder of a trust indenture was precluded upon foreclosing the trust indenture as a mortgage from recovering a deficiency judgment against the grantor (giver) of the trust indenture. The court based its rationale on reviewing the history of mortgage and trust indenture law in Montana and finding that the banking and lending industry had come to the legislature in 1963 contending that certain other statutes and case law hampered the financing of improvements on small tracts in Montana because banks and investors were unwilling to invest in mortgages when on default their funds would be tied up during the period of redemption. The court therefore found that a quid pro quo had been proposed to the legislature whereby lenders would give up their deficiency judgment rights on default if the borrowers would give up their rights of possession during the period of redemption and their redemption rights. The result, the Supreme Court found, was the adoption of the Small Tract Financing Act under which trust indentures are authorized to be executed.

There has been a divergence in thinking among lawyers since the Act was enacted in 1963 as to whether or not if a trust indenture was foreclosed as a mortgage the trust indenture holder (bank or other lending institution) could recover a deficiency judgment against the maker of the trust indenture or a guarantor of it if the value of the property turned out to be less than what was owed. It was always agreed that because of the specific provisions of what is now Section 71-1-311, there could be no deficiency judgment if the trust indenture was foreclosed by the advertisement and sale provisions under the law as opposed to as a mortgage by judicial proceedings.

Again, based on this quid pro quo that the Supreme Court had found underlay enactment of the Act at the request of the banking and lending industry, the Supreme Court found in the first *Chunkapura* decision that if the trust indenture was foreclosed in judicial proceedings as a mortgage, no deficiency judgment could be recovered. (A copy of the first decision is enclosed.)

Thereafter, the banking industry lobbied the court heavily through briefs filed with the court asking the court to reconsider, and after the court reconsidered, it issued its second decision in the case, a copy of which is also enclosed.

The banking industry was able to convince the court that the quid pro quo the court relied upon in its first decision did

not apply to "loans made in commercial settings, nor to trust deeds secured by residential or other property which are only part of larger, more complex loans for commercial or agricultural purposes."

There is nothing under the Small Tract Financing Act to show that the legislature thought any such thing. In fact, if you look at Section 71-1-302 of the Act, copy enclosed, it was clear that the legislature in adopting the Act intended it relate to the financing of both homes and business expansion. It therefore appears there is not rational basis for the Supreme Court differentiating between residential loans on the one hand, and business and agricultural loans on the other at least in view of the policy expressed in the Act when it was initially enacted. However, there is a rational basis for allowing deficiency judgments where it is clear that the trust indenture that is being foreclosed is only part of other security for a loan. As an example, what if someone borrowed money for business purposes and in addition to putting up business property both personal and real as collateral, also put up their home. This is really not unusual, and if the Supreme Court hadn't backed off its first decision, then if a bank had a trust indenture lien against the home, it was between a rock and a hard place because it could not proceed to foreclose the trust indenture on the home because it then couldn't proceed against the other collateral, arguably. Therefore the Supreme Court's decision made some sense but it would make more sense to codify what it was trying to say in the statutes rather than leaving matters up in the air at this point. The statute that is drafted contemplates that you cannot secure a deficiency judgment in a mortgage foreclosure action as the legislature contemplated when it adopted the Act to begin with, unless there is a situation where a loan for business or agricultural purposes has collateral other than a trust indenture on property as collateral for payment of the loan. This should meet the problem the Supreme Court noted in its second *Chunkapura* decision that there is a difference between simple business or agricultural loans where there is merely a trust indenture against a small parcel of property as allowed under the Act, as opposed to complex loans where there are various types of collateral for payment of the loan in addition to a trust indenture on a small tract of property.

DATE

2/14/89

COMMITTEE ON

Business & Industry

## VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppo
GEORGE T. BENNETT	MOANT. BANKS ASSN	349	X	
David Calahan	1 <sup>st</sup> Interstate Bank	349		X
<del>John Franklin</del>	1 <sup>st</sup> United Bank Albany		X	
Harold F. Krieg	MT. Bar Assn Committee	313	X	
<del>Wm Wagner</del>		349	X	
James J. Benn	First Federal S/L Loan	275		X
<del>MICHAEL E. MCKEE</del>	<del>FIRST</del>	313		X
"	"	349	X	
MICHAEL E. MCKEE	FIRST FEDERAL S/L - MISSOURI	349	X	
"	"	275		X
"	"	313		X
STEVE GROSE	MT LEAGUE OF SAVINGS INSTITUTIONS	275		X
"	"	313		X
"	"	349	X	
Joe Bower	Mount Bankers Assn	349	X	
"	"	313		X
"	"	275		X
Ernest A. Sandberg	Empire Federal Savings	275		X
"	"	313		X
"	"	349	X	
CHIP ERDMANN	MT League Savings Inst	275		X
"	"	313		X
"	"	349	X	
Bob Percich	Board of Investment	349	X	
Roan Tippy	Mt. Independent Bankers	349	X	
Bob Ryfer	Mt Credit Unions Inc	349	X	

(Please leave prepared statement with Secretary)