MINUTES

MONTANA SENATE
52nd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dick Pinsoneault, on January 16, 1991, at 10:00 a.m.

ROLL CALL

Members Present:
Dick Pinsoneault, Chairman (D)
Bill Yellowtail, Vice Chairman (D)
Robert Brown (R)
Bruce Crippen (R)
Steve Doherty (D)
Lorents Grosfield (R)
Mike Halligan (D)
John Harp (R)
Joseph Mazurek (D)
David Rye (R)
Paul Svrcek (D)
Thomas Towe (D)

Members Excused: none

Staff Present: Valencia Lane (Legislative Council).

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Announcements/Discussion: none

HEARING ON SENATE BILL 31

Presentation and Opening Statement by Sponsor:

Senator Tom Towe, District 46, said the 1987 legislative session passed a bill protecting employees from indiscriminate blood and urine testing, consistent with the Montana constitution. He stated that the employer could not, as a condition of employment, require such testing except in hazardous work, nor could an employer continue such testing.

Senator Towe advised the Committee that there is a problem because that legislation did not set a standard for testing which is corrected by SB 31. He explained that part 2 of the bill specifically states that testing must be performed by laboratories certified by the National Institute on Drug Abuse (NIDA), a division of the U.S. Department of Health and Human Services.

Senator Towe stated that the second part of the bill (bottom of page three and top of page four) says these are the federal) standards taken out of NIDA. He said the bill makes provision for more detailed and precise testing levels when required, and calls for retaining such tests for a period of one year.

Senator Towe told the Committee that the Department of Transportation (DOT) and other agencies are federally preempted in a proposed amendment. (Exhibit #1).

<u>**Proponents' Testimony:**</u>

Dan Edwards, International Representative, Oil, Chemical, and Atomic Workers (OCAW) Union, said labor does not support or condone use of drugs or alcohol on the job, but unless performance is affected, it believes in the employees' right to privacy.

Mr. Edwards explained that in 1985 he was Director of Health and Safety for the OCAW in Denver, and at that time there was no background or case law in the field of drug testing. He stated he is currently on the advisory board of NIDA, and that a study is underway to determine objective data relating to drug and alcohol use and work-related injury.

Mr. Edwards stated that the only change the bill proposes is that testing be done through NIDA certified labs. He explained that it is a difficult test procedure and that labs received blind samples at times. Mr. Edwards added that if a lab misses one test, it can be suspended from testing for that particular drug.

Mr. Edwards told the Committee some would argue that current NIDA levels may be too low. He explained that "metabolite" is a by-product of drug use, and that is what tests find. He said tests do not find drug impairment levels, adding that lower levels of testing would produce a greater chance for lab error.

Mr. Edwards stated that "fitness for duty" testing is available in California, as an alternative form of testing, and includes stress from death, recent divorce, etc.

Will Rehmann, Labor Relations Director, Montana Nurses Association, stated his support of the bill with the proposed amendments, and said he concurred with Mr. Edwards' statements. Mr. Rehmann added that Montana's drug treatment and counseling programs are working. He provided written testimony (Exhibit #2), and advised the Committee of "defend" a glucose product which causes some drugs to not show up in testing.

Scott Chricton, Executive Director, American Civil Liberties Union - Montana (ACLU), said he believed the bill fully respects the intent of the 1987 Legislature. He provided written testimony (Exhibit #3) which includes a summary on the symposium on the Montana Constitution.

John Manzer, Teamsters, stated his support of SB 31.

Dave Ditzel, Locomotive Engineers, stated his support of the bill.

Bob Heiser, United Postal Workers, stated his support of the bill.

Jay Reardon, Local 72, Steel Workers, stated his support of the bill.

Bob Maxwell, Southeast Montana Building and Trades Council, stated his support of the bill.

Michael Mizenko, Plumbers and Pipefitters Local #139, stated his support of the bill.

Warren Holmes, Local 72, Billings, stated his support of the bill.

Julie Holzer, Cenex Refinery - Billings, and Montana AFL-CIO, stated her support of the bill.

Patrick Melby, Rimrock Foundation, Billings, stated his support of the bill.

John Cochran, Billings Local, stated his support of the bill.

Dean Schanz, Exxon Refinery, stated his support of the bill.

Johnny Monahan, Montana Iron Workers, stated his support of the bill.

Pat Keim, Burlington Northern, stated his support of the bill with the amendments proposed by Senator Towe.

John Judge, Montana AFL-CIO, stated his support of the bill and the proposed amendment and read from written testimony (Exhibit #5).

Opponents' Testimony:

Steve Browning, Montanan's for a Drug-Free Society, provided written testimony (Exhibit #6). He said a new bill being introduced would deal with the underlying defects of current law, and requested that the Committee delay executive action on the bill until this new bill is heard.

John Fitzpatrick, Director of Community Affairs for Pegasus, said he had no objection to certified labs, but felt the cut-off standards create a major loophole in Montana law. He advised the Committee that in Montana employers can test on pre-employment physicals, and said the federal government can do random drug tests.

Mr. Fitzpatrick explained that opiates and cocaine can be out of the body in 72 hours, although marijuana which is fat soluble stays in the body often for long periods of time. He said a drug user can beat the 100 nanogram level by stopping use for several days in advance of testing.

Mr. Fitzpatrick said he had a problem with the notion of minimum standards regarding fitness for work. He stated he believes an employer also has reasonable right to look into a prospective employee's character, and commented that using drugs is a crime and in some cases is a felony. Mr. Fitzpatrick added that drug use is in many case progressive, and has associated characteristics. He said drug use is associated often with crime, and that he believes employers have the right to question this.

Mr. Fitzpatrick stated it is ironic that labor, who pushes for the lowest standards for water, air, lead and other levels, pushes for the highest standards for drugs.

Kathy Anderson, Montana Wood Products Association, said interstate log haulers are not allowed to be tested for drugs. She asked if the bill would cause federal funds coming into Montana to be at risk.

Questions From Committee Members:

Senator Rye asked Mr. Edwards if he agreed with Mr. Fitzpatrick's statement that employers had a right to look at the characters of prospective employees. Mr. Edwards replied that Mr. Fitzpatrick's statement that a user could stay clean for a few days an pass the 100 nanogram level was erroneous, that a regular marijuana user's level would be much greater than 100 nanograms.

Senator Svrcek asked about drugs being breathed in a social setting rather than active use. Mr. Edwards replied that the NIDA lowering of levels is a long way from being done, and that it is a real process to test at a level of 20 nanograms.

Chairman Pinsoneault asked why Montana and federal standards should be different.

Closing by Sponsor:

Senator Towe said he believes SB 31 is right for Montana now, and that he would be willing to change testing levels in future legislative sessions, if necessary. He added that he does not know where federal standards are going right now.

Senator Towe advised Kathy Anderson that he did not believe any federal funds would be at risk because of SB 31.

Senator Towe stated he believed Mr. Fitzpatrick was actually addressing Steve Browning's new bill. He stated he was only trying to make certain that testing is accurate, adding that right now, there is a 20 percent chance that a test will read positive whether the person being tested has been using or not.

Chairman Pinsoneault stated the Committee would take concerns with Steve Browning's bill under advisement.

HEARING ON SENATE BILL 1

Presentation and Opening Statement by Sponsor:

Senator Joe Mazurek, District 23, said SB 1 has 331 pages, 241 sections, and is a modernization of the Uniform Commercial Code (UCC). He advised the Committee that a national conference of attorneys, law professors, legislators, and judges works to establish ares of uniformity among the states. Senator Mazurek explained that the conference has been in existence for 99 years, and encompassed all of the states by 1912.

Senator Mazurek stated the UCC governs commercial transactions in all states of the union, and said that since 1951 the commercial transaction field has changed dramatically.

Senator Mazurek explained that SB 1 adopts changes in four areas: Article 2A (sections 7-86) dealing with leases; Article 4A (sections 189-226) dealing with electronic fund transfers; Article 3 modernizing to keep up with technology in check handling; and Article 6 dealing with bulk transfer. Senator Mazurek said the national conference began to address leases in 1986, that there is currently no state law dealing with electronic fund transfers, and urged the Committee to consider dealing with bulk transfers (inventory of businesses). Senator Mazurek commented that the American Law Institute has suggested repeal for bulk transfer (Exhibits #7a, 7b, 7c, 7d).

Senator Mazurek advised the Committee he did not gather witnesses for this hearing, and asked if they would leave an hour open during executive session, if necessary, to receive additional information.

Proponents' Testimony:

Bob Pyfer, Montana Credit Unions League, commented on national level input in SB 1. He said Article 4 is very complicated and that he sees it as something the Committee must deal with. Mr.

Pyfer asked the Committee not to give the bill an immediate effective date.

Opponents' Testimony:

There were no opponents of SB 1.

Questions From Committee Members:

Senator Halligan asked about the elimination of bulk transfers. Senator Mazurek replied that they simply wouldn't have to be dealt with, and added that bulk transfer is not often breached in Montana.

Senator Towe asked if there anything to protect purchasers in Article 4. Senator Mazurek replied that it would ultimately be protection for purchasers. Senator Towe asked Staff Attorney, Valencia Lane, to check on this.

Senator Towe asked if leasing were generally accepted. Senator Mazurek replied that California, New York, and Massachusetts have considered leasing and it appears to be generally accepted.

Chairman Pinsoneault advised the Committee that executive action would be held off for time to look into these matters.

Closing by Sponsor:

Senator Mazurek waived closing.

HEARING ON SENATE BILL 6

Presentation and Opening Statement by Sponsor:

Senator Joe Mazurek, District 23, provided the Committee with written testimony on SB 6 (Exhibit #8). He explained that he was uncertain how to interpret the 1990 amendment to the Uniform Statutory Rule against Perpetuities Act, except that the bill was designed to correct a problem arising after the Act was passed in 1989.

Senator Mazurek did state that SB 6 was an attempt to carry out the original intent of the 1989 Act, to make the intentions of trust valid.

Proponents' Testimony:

John Cadby, Montana Bankers Association, stated there are four trust companies in Montana who looked at the bill and believe it is great.

Opponents' Testimony:

There were no opponents of SB 6.

Questions From Committee Members:

Chairman Pinsoneault asked Mr. Cadby if he could get some of the trust officers who reviewed SB 6 to put together a diagram for committee review. Mr. Cadby replied he would be happy to comply.

Closing by Sponsor:

Senator Mazurek waived closing on SB 6.

EXECUTIVE ACTION ON SENATE BILL 53

Motion:

Senator Towe made a motion that the amendments prepared by Valencia Lane, Staff Attorney, be approved.

Discussion:

Valencia Lane explained that Senator Devlin gave his permission to put all of the proposed amendments as one, exactly as requested by the Department of Justice, Larry Akey, and Senator Devlin.

Amendments, Discussion, and Votes:

The motion to amend SB 53 carried unanimously.

Senator Yellowtail stated he was not comfortable with opening the door for playing for a pot.

Senator Brown stated that Senator Mazurek also had questions on the bill, and asked the Committee to wait until Senator Mazurek could be present for discussion.

Senator Grosfield questioned gambling as it relates to the tribes. Senator Brown said the state must enter into negotiations with the tribes to get them to comply.

Senator Towe asked Valencia Lane to study this issue and report to the Committee. Chairman Pinsoneault added that a huge federal law on gambling is being implemented.

Senator Yellowtail commented that Valencia Lane may want to contact Kathleen Fleury, Attorney, Indian Affairs.

Recommendation and Vote:

None this date.

ADJOURNMENT

Adjournment At: 11:40 a.m.

Senator Dick Pinsoneault, Chairman

Joann T. Bird, Secretary

DP/jtb

ROLL CALL

SENATE JUDICIARY COMMITTEE

52nd LEGISLATIVE SESSION -- 1991

Date 16 Jan 91

NAME	PRESENT	ABSENT	EXCUSED
Sen. Pinsoneault	✓		
Sen. Yellowtail	✓		
Sen. Brown	✓		
Sen. Crippen	✓		
Sen. Doherty	✓		
Sen. Grosfield	✓		
Sen. Halligan	✓		
Sen. Harp	✓		
Sen. Mazurek	✓		
Sen. Rye	✓		
Sen. Svrcek	✓		
Sen. Towe	✓		

Each day attach to minutes.

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Exhibit #1
SB 31

Amendments to Senate Bill No. 31
White Reading Copy

Requested by Senator Towe
For the Committee on Judiciary

Prepared by Valencia Lane
January 14, 1991

1. Title, line 6.
Following: "THE"
Insert: "NATIONAL INSTITUTE ON DRUG ABUSE (NIDA),"

2. Page 2, line 7.
Following: "the"
Insert: "national institute on drug abuse (NIDA),"

3. Page 5, line 15.
Following: line 14
Insert: "(d) Federal preemption of any part of this section must be narrowly construed to limit the extent of the federal preemption."

sb003101.avl

1/10/91 Ex. 2
SB 31
15 Jan 91

Mr. Chairman,

My name is Wilbur Rehmann, Labor Relations Director for the Montana Nurses Association. (MNA)
I am here to speak in support of Senator Towe's SB 31.

The MNA represents over 900 Registered Nurses in collective bargaining units all across Montana from Libby to Glendive. And we support the current Statute in Montana regarding drug testing and we support the changes as proposed by Senator Towe.

We have negotiated contract language in various hospitals around the state that preserves an employee's right to privacy while providing an effective education, treatment and counseling program. We would strongly oppose any changes that would allow any company to require mandatory testing of employees.

We support setting the standards as proposed in SB 31, the procedures and limits set in the bill protect employees from possible [illegible]

The current Montana law on drug testing works and with the few changes proposed by Senator Towe we believe the balance between an employees right to privacy and ~~an~~ society's needs on drug testing.

Wilbur W. Lehmann

Individual committee members with information on successful programs I would be glad to answer any questions or provide information.

federal register

Ex#2A
16 Jan 91
SB 31

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Part IV

Department of Health and Human Services

Alcohol, Drug Abuse, and Mental Health Administration

Mandatory Guidelines for Federal Workplace Drug Testing Programs; Final Guidelines; Notice

16 Jan
SB 31

ACLU OF MONTANA

AMERICAN CIVIL LIBERTIES UNION

O. BOX 3012 • BILLINGS, MONTANA 59103 • (406) 248-1086

State Office
335 Stapleton Building
Billings, Montana 59101

BOB ROWE
President

SCOTT CRICHTON
Executive Director

JEFFREY T. RENZ
Litigation Director

January 16, 1991

DRUG TESTING TESTIMONY

Mr. Chairman, Members of the Committee, for the record I am Scott Crichton, Executive Director of the ACLU of Montana. I am here to represent the more than 800 families who are members of our organization. Our organization's mission is simple to state-we defend the Constitutions of our state and federal government- with particular concern to the Montana Declaration of Rights and the U.S. Bill of Rights.

I am here today to support SB 31. As you are well aware, Montana has a very unique drug testing law that has been on the books since 1987. I remind you that this law was arrived at through broad bi-partisan efforts to strike a balance between the public interests for a safe workplace and the private interests of workers against unwarranted urine tests. We believe SB 31 fully respects the intent of the original legislation. We also concur that in those instances where there is a legitimate rationale for demanding a urine specimen of an employee, that the procedures and levels spelled out in SB 31 protect workers as best as possible against false positives.

There are no doubt going to be tensions between an ever expanding federal government and legitimate state's rights interests. There are going to be conflicting opinions on what makes sense for Montana's business compared to the interests of large national and international corporations that do business here.

I am submitting a one page summary for the committee's review from a 1989 symposium on Montana's Constitution. This is just the first instance this session where privacy rights will need careful consideration. I would like to close by by quoting from the Florida State Law Review something to keep in mind about one of the real unique treasures of this Treasure State-

> A majority of states do not have a specific provision protecting privacy. Montana's privacy right has been described as "the most elegant and the most uncompromising of the various privacy statements."

Respectfully submitted,

Scott Crichton

Scott Crichton

"Eternal vigilance is the price of liberty"

Exhibit 3A
16 Jan 91
SB 31

Outline for the Constitutional Symposium "89

Nov. 16,1989

"LIBERTIES" - The Montana Constitution and Art. II

INTRODUCTION: GOVERNMENT POWER vs. PEOPLE'S RIGHTS and THE MONTANA CONSTITUTION OF 1972

PRIVACY

Montana was one of the first states to explicitly recognize the right of privacy as a basic right to be included in the Constitution. Art. II § 10 provides that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without a compelling state interest." The concept of privacy encompasses two major rights or freedoms, beneath which can be subsumed a large portion of all of the rights included in the bill of rights of the United States Constitution as well as the rights addressed in Article II of the Montana Constitution. First is the right to be free from intrusion, the freedom to be "let alone." Cases raising this issue most often are involved with questionable searches and seizures or compelled testimony. Second is the right to choose, the freedom to make personal choices without government compulsion. Cases raising this issue most often involve such matters as abortion, seat belt laws, sexual preference and the recreational use of drugs. It is clear that the Montana right of privacy was intended to protect citizens from government intrusion and from governmental activity that would interfere with individual autonomy to make decisions in matters that are generally considered private.

Privacy is the basic right to be free from government interference: Freedom from fear that an SS trooper will knock down your door; that a KGB agent will attach listening devices to your telephone; that an uninvited military guest will trash your home;

Exhibit #4
16 Jan 91
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SUMMARY SHEET

§40.29 LABORATORY ANALYSIS PROCEDURES

Employees must use DHHS/NIDA certified drug testing laboratories.

Basic laboratory analysis procedures require:

(1) Use of a chain of custody document to track specimens throughout lab processes
(2) Accession area of lab, for storage of specimens. Small portions (aliquots) are used for the analysis
(3) Screening of specimens using immunoassay. Cut-off levels are established to determine if a specimen contains drug metabolites. If the amount of metabolite is below the cutoff, the specimen is reported as negative.
(4) Specimens that are positive in the initial screening to be tested on gas chromatography/mass spectrometry (GC/MS). If the amount of metabolite is above the cutoff level, the specimen is confirmed positive; if it is below the cutoff level, it is reported as a negative result.

All results are reported (in writing or by electronic means, not by telephone) to the employer's medical review officer.

Quantitative levels (the specific amount of metabolite found) are reported only to the MRO when requested.

The MRO receives the certified copy of the lab results.

The laboratory must send to the employer a monthly report of all testing conducted for the employer. This report contains statistical data; not individual specimen results.

The laboratory will retain all records related to the specimens for a minimum of 2 years. The laboratory will provide secure storage of all positive specimens for at least 1 year.

The employer, the DOT agency, or DHHS may inspect the laboratory at any time.

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§40.29 LABORATORY ANALYSIS PROCEDURES

(a) **Security and chain of custody**
The laboratory must meet physical security requirements at all times, including providing escorts for visitors and maintenance personnel. An internal laboratory chain of custody must account for control and accountability of the specimens from entry into the laboratory until final disposition and, as required, storage.

(b) **Receiving**
Each laboratory has a receiving or accessing area that checks specimens upon arrival for evidence of possible tampering and custody and control accuracy. If there are problems, the employer will be notified, and depending on the severity of the discrepancy, the laboratory may not process the specimen, i.e., ***no test will be performed.*** Once accepted by the laboratory, the specimen bottles will remain in the accession area in secured storage. Aliquots (small amounts) of the specimen, tracked by internal laboratory chain of custody forms, will be used for conducting required tests.

(c) **Short-term refrigerated storage**
Specimens that are not tested within 7 days of arrival will be refrigerated at a temperature not to exceed 6 degrees centigrade.

(d) **Specimen processing**
Laboratories will normally process specimens in batches. The batch size will depend on the workload and size of the lab. Each batch will contain the required standards for calibrating the instrumentation and a minimum of 10 percent quality control specimens. Both the controls and blind (unknown) performance test samples will appear as ordinary samples to laboratory analysts.

(e) **Initial test**
The laboratories must first conduct an initial test using an immunoassay approved by the Food and Drug Administration. If this test does not indicate the specimen is positive for one or more of the five drugs or classes of drugs the specimen will be reported as negative. This test is sometimes referred to as the screening test. The DHHS establishes the initial test cutoff level (positive or negative decision point) for each drug. These levels are established so that true negatives (containing zero drug) and negatives containing drugs, but at a level that could have been legally or unknowingly consumed, are identified as ***negative.*** Only specimens containing drug concentrations above the cutoff level will be sent to the next level of testing.

(f) **Confirmatory test**
All specimens identified as positive on the initial test must be *confirmed* using gas chromatography/mass spectrometry (GS/MS) techniques at cutoff levels established by DHHS. This technique is the most precise methodology for identifying drug metabolites. It is a quantitative analysis that identifies the fingerprint of the drug that is present.

(g) **Reporting results**
The laboratory will report positive or negative test results only to the employer's Medical Review Officer (MRO). Results will be reported within an average of 5 working days after receipt of the specimen at the laboratory. The test results will be certified (reviewed/signed off) by the appropriate lab officials before the test result is reported to the MRO. The report will identify the drug or metabolites tested for and whether it was positive or negative. In the case of a negative report, the laboratory certifying scientist does not have to sign copy two of the custody and control form. What is required is a

1-16-91
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drugs (marijuana, cocaine, opiates, phencyclidine and amphetamines) using immunoassay for the initial screen and GC/MS for confirmation as specified in the regulations. However, a laboratory may use a subcontractor for analysis if: 1) the subcontractor is a DHHS/NIDA certified laboratory; 2) specimens are sent directly from the collection site to the subcontractor; 3) the subcontractor performs all analysis in accordance with this regulation; and 4) the subcontractor is responsible to the employer as if it were the prime contractor.

(k) **Laboratory Facilities**
Laboratory facilities will comply with applicable provisions of State licensing requirements. DHHS certified laboratories will have the capability, on the same laboratory premises, to perform initial and confirmatory tests for each drug or metabolite for which service is offered.

(l) **Inspection**
The DOT Secretary, a DOT agency, any employer utilizing the laboratory, DHHS, or any organization performing laboratory certification on behalf of DHHS reserves the right to inspect the laboratory at any time. Employer contracts with laboratories for drug testing or collection site services will permit the employer and DOT agencies to conduct unannounced inspections.

(m) **Documentation**
The laboratories will maintain and make available for at least two (2) years documentation of all aspects of the testing process. This period may be extended upon written notification by a DOT agency or by the employer.

(n) **Additional Requirements for Certified Laboratories**
(1) Each laboratory will have a procedure manual that meets DHHS requirements; (2) Each laboratory will prepare pure drug standards according to DHHS requirements; (3) Each laboratory will have written procedures for instrument set-up and normal laboratory operations, each subject to DHHS approval; (4) Each laboratory will have written procedures for necessary actions when systems are out of acceptable limits or errors are detected. Each laboratory must maintain documentation on the use of these procedures; and (5) Each laboratory must have qualified personnel available to testify in an administrative or disciplinary proceeding if the proceeding is based on a positive drug test.

Exhibit #5
SB 31

MONTANA STATE AFL-CIO
AFL CIO
APRIL 29 1956

DONALD R. JUDGE
EXECUTIVE SECRETARY

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

(406) 442-1708

Testimony of Don Judge on Senate Bill 31, Senate Judiciary Committee, Wednesday, Jan. 16, 10 a.m., Room 325

Mr. Chairman, members of the committee, I'm Don Judge from the Montana State AFL-CIO, and I'm here in support of Senate Bill 31.

Drug-testing of employees or prospective employees is, at best, a tricky business. Everyone has some rights in this issue.

Employers have the right to know that employees in certain sensitive positions are performing their jobs without drug interference.

Employees have the right to know that their safety is not at risk because of someone else's drug use.

Customers have the same right.

In addition, workers and job applicants have the right to be free from unfair or unfounded accusations. They have the right to uniform and fairly applied testing procedures.

This bill protects all those rights. It establishes uniform testing procedures that protect everyone's rights. It guarantees that the sensitive issue of drug testing will only be handled by certified laboratories that meet rigid federal government standards. It guarantees that test results will be based on a uniform and evenly applied set of criteria that are clear and unwavering.

Most of all, this bill guarantees that no one's rights will be stepped on because of shoddy testing procedures, sloppy records, inadequate facilities, or a host of other variables that could affect the outcome of a drug test.

Mr. Chairman, more than anything else, this bill will protect the name, reputation and future employment of workers who don't use drugs. It will prevent them from being unfairly tainted by a bad drug test.

Most workers don't use drugs, especially on the job. However, if they must be tested for drug use, we believe they have the right to uniform and reliable testing standards. Senate Bill 31 will provide those standards, and we urge you to approve it.

Exhibit #6
SB 31

■ Montanans for a Drug-Free Society ■

January 16, 1991
Senate Bill #31
Montanans for a Drug-Free Society

My name is Steve Browning, and I am appearing today on behalf of Montanans for a Drug-Free Society who opposes this bill for the following reason. It seeks to establish in law the standards for the initial cut-off level for controlled substances that would be analyzed by drug laboratories certified by the National Institute for Drug Abuse, a division of the United States Department of Health and Human Services. While the sponsor and proponents to this amendment are to be commended for their efforts to seek greater reliability and control for testing for controlled substances, this bill fails to deal adequately with the underlying defects of the current law.

Attached to this testimony is a statement by the former administrator of National Institute for Drug Abuse, which points out that the initial cut-off levels of the National Institute for Drug Abuse, that would be set in statute by this legislation, are scheduled to be dropped for cocaine and marijuana. Accordingly, this bill should not be passed by the legislature.

Coalition contact: R. Stephen Browning · 139 North Last Chance Gulch, Helena, MT 59601 · 406/449-6220 · Fax 406/443-0700

Ex. 6
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NIDA Releases Consensus Report

The National Institute on Drug Abuse (NIDA), a part of the U.S. Department of Health and Human Services, released a 102-page "consensus report" on June 18, 1990 as a follow-up to its conference on drug testing last fall.

The consensus report, entitled "Technical, Scientific and Procedural Issues of Employee Drug Testing," is intended to serve as the basis for the possible legislative development of a single federal standard to apply to all employee drug testing in regard to testing procedures and laboratory certification.

The report also is expected to trigger changes in the "Mandatory Guidelines for Federal Workplace Drug Testing Programs," also known as the NIDA guidelines, which now apply to public sector testing at the federal level and cast a long shadow over private sector testing as well. There already has been some movement to extend the NIDA guidelines' coverage to the private sector, most notably the legislation sponsored by U.S. Representatives John Dingell (D-MI) and Thomas Bliley (R-VA), H.R. 33.

"I am confident that this document will serve as the foundation for proposing revisions to existing regulations and will shape the direction of employee drug testing for the near future," said Dr. J. Michael Walsh, NIDA's Director of Applied Research and one of three co-authors of the consensus report.

The consensus report covers nine areas, including on-site testing, additional drugs, cut-off values, laboratory inspections and certification, medical review officers, and performance testing.

The report's positive recommendations include two critical for business: (1) that "additional drugs should be considered for inclusion in urine testing protocols... (possibly including) benzodiazepines, barbiturates, and other selected psychoactive agents"; and (2) that the screening "cut-off value for cannabinoids (found in marijuana)... could be reduced from 100 ng/ml (nanograms per mililiter) to 50 ng/ml... (and) the present screening cut-off value for cocaine... could be reduced to 200 ng/ml (from 300)."

Dr. Michael Walsh

However, somewhat troublesome are recommendations for NIDA to continue a high level of restrictions on on-site testing and an overextended role for medical review officers.

The report is available from the National Clearinghouse on Alcohol and Drug Information (1-800-729-6686).

JO 1
16 Jan 91
Ex 7A

WHY STATES SHOULD ADOPT ARTICLE 2A
OF THE UNIFORM COMMERCIAL CODE – LEASES

The leasing of large scale items ranging from oil-drilling platforms to automobiles is big business in this country, with an estimated dollar volume reaching $150 billion. Yet the laws governing leasing have not kept pace with the intricacies of today's leasing arrangements, resulting in considerable uncertainty for lessors and lessees alike.

To fill this gap, the Uniform Law Commissioners approved a new amendment to the Uniform Commercial Code: Article 2A – Leases. UCC–2A provides for the fundamentals of the leasing contract, including the formation of the contract, provisions for express and implied warranties, and damages for breach of a leasing contract.

Historically, we have thought of financed purchase transactions as conditional sales. As sales, such transactions fall under the UCC, particularly Articles 2 and 9. But a leasing transaction, even though very similar to a conditional sale in many ways, is not clearly subject to the UCC. The rights and remedies of the lessor and lessee, therefore, are not well defined, and courts have characterized these transactions differently from jurisdiction to jurisdiction. Many troubling issues have been extensively and confusingly litigated.

UCC–2A gives leasing transactions an appropriate underpinning in the law. Because of the broad similarities between lease and sales transactions, that underpinning is largely derived from the sales article of the UCC – Article 2. Hence the new article is 2A, indicating its relationship to Article 2. Article 2 has been adopted in every state except Louisiana.

There are a number of reasons all states should adopt UCC – Article 2A, Leases:

1 **LEASES SHOULD BE A PART OF THE UCC**

Since leases are an important part of business and commercial law, they should be governed by the Uniform Commercial Code. Further, the leasing business is interstate in character. Uniformity is as important to the conduct of leasing transactions as it is to sales transactions.

2 **LEASES AS SECURED TRANSACTIONS**

Perhaps the most important question answered in UCC–2A is when leases are subject to UCC–Article 9 on "Secured Transactions." Certain lease contracts establish what effectively are conditional sales, in which the lessor is no different from a creditor subject to Article 9.

The prior law has never effectively dealt with the issue, and concrete standards are established in UCC–2A and an accompanying amendment to UCC-1-

201(37), which is a basic definition section in the UCC. Under these provisions, a secured transaction occurs when the lessor has no meaningful residual rights in goods when the lease expires. In a true lease, the rights to the goods revert to the lessor when the lease term ends. But if the contract terms indicate that the rights to this residue are valueless, then it can be inferred that the lease really amounted to a conditional sale of the goods. Article 9 then should and would apply.

3 FINANCE LEASES

UCC–2A creates a separate category of leases called "finance leases" to eliminate existing confusion over the rights of parties in such leases. Finance leases are characterized by the unique position of the lessor — as purchaser of goods only for the purpose of delivering them to a lessee pursuant to a lease contract.

Because the lessor is not the real supplier of the goods, and acts merely to finance the goods in the hands of the lessee, certain of lessee's rights are best served by imposing obligations on the real supplier and by limiting some rights against the lessor. UCC–2A does not give a lessee implied warranties against a lessor in a finance lease, but passes the lessor's warranties against the real supplier under Article 2 on the lessee.

UCC–2A also further limits a lessee's already limited rights to reject goods, once accepted under the contract, or to cancel, terminate, modify, excuse or substitute performance under the lease contract. The lessee relies upon warranty rights against the supplier, and the lessor is treated as the financing entity it really is.

4 REMEDIES

Prior law does not provide clear remedies for leasing transactions. Because the parties to lease contracts share substantial characteristics with the parties to sales contracts, the full panoply of UCC—Article 2 remedies can easily be translated and applied to lease contracts.

UCC–2A not only provides clear measures of damages upon breach of contract, but also provides: clear standards for anticipatory repudiation by a party to a contract when anticipated performance by another party becomes insecure; for rejection of goods that do not conform to the contract; for excused non–performance of the contract; and for specific performance under appropriate circumstances.

UCC–2A remedies carry over the original Article 2 policies of encouraging cure of default without litigation and of mitigation of damages whenever and wherever possible.

5 WARRANTIES

UCC–2A establishes and standardizes warranties for true leases. It follows closely Article 2 of the UCC, but it does not protect title, since title remains with the lessor. Rather than title, UCC–2A warrants against infringement with lease rights.

There are two kinds of implied warranties: merchantability and fitness for a particular purpose. Both are directly derived from Article 2 of the UCC. The warranty of merchantability assures the resalability of goods between merchants. The fitness warranty presumes a purpose and reliance upon the lessor to supply goods fit for the purpose. These warranties can be excluded or modified by agreement.

UCC–2A implied warranties do not apply to finance leases. In that case the implied warranties under Article 2 of the supplier to the lessor are passed on to the lessee.

6 CONSUMER LEASES

UCC–2A defines a consumer lease as a lease in which the lessee takes the lease primarily for a personal, family or household purpose, when the total payments do not exceed $25,000. UCC–2A does provide some protection for lessees in a consumer lease. Among other things, there is a burden on the lessor to justify acceleration of rentals in a consumer lease. But most consumer protection is left to other laws.

FIXTURE AND ACCESSION PROBLEM

UCC–2A settles recurring problems of what to do with leased goods that become fixtures and accessions and who has priority in each case.

Fixtures are defined as "goods so related to particular real estate that an interest in them arises under real estate law." Generally, if goods are leased and become fixtures, the lessor with prior interest in them has priority over those with the real estate interests – if the lessor perfects his or her prior interest with a fixture filing under UCC – Article 9.

An accession occurs when leased goods are "installed in or affixed to other goods." Any existing rights in a lease contract are superior to any rights in the whole in which leased goods become accession after the lease contract is entered.

CONCLUSION

The changes in leasing transactions in recent years make it clear that modernization is long overdue. States now depend on the common law to resolve disputes over lease contracts. This creates great uncertainty, particularly for companies that conduct business in more than one state, since case law conflicts from state to state. Additionally, some important issues have never been adequately addressed in the common law, and UCC – 2A answers these immediate needs.

Ex. 7A 1/16/91
SB 1

UNIFORM COMMERCIAL CODE, ARTICLE 2A – LEASES

– A Summary –

The Uniform Commercial Code (UCC) Article 2A – Leases, governs true leases of goods. In a true lease, the lessor gives possession and right to use the goods to the lessee for a fixed period of time in return for rent. The title to the property and a meaningful residual interest remain with the lessor.

A "finance lease" is a true lease in which the lessor is not the fundamental supplier of the goods leased, but leases goods to lessees as a means of financing their acquisition. UCC – 2A governs "finance leases" as well as other true leases, but "finance leases" are treated differently from other true leases in certain respects. The principal differences in treatment will be discussed in subsequent paragraphs of this summary.

UCC – 2A is largely derived from the sales article of the UCC – Article 2. It provides basic contract rules, including matters of offer and acceptance, statutes of frauds, warranties, assignment of interests, and remedies upon breach of contract. There are five parts to the UCC – 2A: (1) General Provisions, (2) Formation and Construction of a Lease Contract, (3) Effect of a Lease Contract, (4) Performance of a Lease Contract, and (5) Default.

1 General Provisions

The General Provisions include the large, general definitions section and general rules pertaining to the construction of leasing contracts, including conflict of law provisions, choice of forum rules, and interpretation of remedies. Most of these provisions are drawn from Article 2 of the UCC.

UCC – 2A creates an entity called the "- lessee in the ordinary course of business." The definition parallels the "buyer in the ordinary course of business" in the UCC. Both take property free of prior encumbrances, under the appropriate conditions, and are essential to commercial enterprise.

UCC – 2A also defines "supplier" as "a person from whom a lessor buys or leases goods to be leased under a finance lease." This definition is important because goods in a "finance lease" must come from another source than a lessor.

2 Formation and Construction of a Lease Contract

In a sale transaction, the UCC provides warranties of title and against infringement by any claims of another person. There are similar warranties in UCC – 2A, although title is not protected, since title remains in the lessor. But the lessor does warrant the lessee's enjoyment of the leasehold interest against "a claim to or interest in the goods that arose from an act or omission of the lessor. " This warranty applies to all lease contracts. Infringement, however, is not warranted against in finance leases, and this warranty only binds a merchant-lessor; who deals regularly in goods of the kind.

Implied warranties are of two kinds, merchantability and fitness for a particular purpose. Both kinds of implied warranty are directly derived from the Article 2 of the UCC. The warranty of merchantability operates between merchants, and assures the resalability of goods. The fitness warranty presumes a purpose and reliance upon the lessor to supply goods fit for the purpose. Both kinds of implied warranties can be excluded or modified by agreement.

Implied warranties of quality (and against infringement) by lessors do not similarly apply to finance leases. UCC – 2A instead passes any implied warranties of the supplier-seller to the lessor-buyer under Article 2, to the lessee under a finance lease. The finance lessor does not directly make such warranties.

3 Effect of a Lease Contract

Generally, a lessee's rights under a lease contract or the residual rights of a lessor are freely transferable, unless the contract prohibits the transfer or unless transfer risks the other party's contract rights. An assignment, so-called, of lease rights is treated as any transfer is, and is presumed to transfer both rights and obligation, unless otherwise specified in the agreement.

If a subsequent lease is entered when there is an existing lease, the subsequent lease is subject to the prior lease. However, a subsequent "lessee in the ordinary course of business," who deals with a lessor who is a merchant dealing in goods of the kind leased and to whom the goods are entrusted under the prior lease, will take goods free of the prior, existing lease contract.

Another third party issue dealt with in Part 3 of UCC – 2A is lien priorities. Here, UCC – 2A becomes analogous to provisions in UCC, Article 9. A statutory materialmen's lien has priority over any interest in a lease contract, unless other law sets a different priority. Otherwise, lessee's creditors take subject to the lease contract. Lessor's creditors with prior interests to those arising under a lease contract, generally, take priority over interests arising under the contract.

However, a "lessee in the ordinary course of business" takes free of any prior perfected security interests, unless the lessee has specific knowledge of their existence. A prior interest of a lessee takes priority over a subsequent interest of a lessor's creditor. But there are special instances in which a creditor of a lessor has priority over a lessee's interest, even though the lease interest is prior in time. Included are instances in which depriving the creditor of possession of the collateral would be fraudulent to the creditor "under any statute or rule of law."

Goods that become fixtures present priority problems when leased. Fixtures are defined as goods "so related to particular real estate that an interest in them arises under real estate law." Who has priority between the lessor and those holding the real estate interests?

Generally, if goods are leased and become fixtures, the lessor with prior interest in them has priority over those with the real estate interests - if the lessor perfects his or her prior interest with a fixture filing under Article 9 of the UCC. A fixture filing is made by placing an appropriate financing statement in the real estate records. There are instances in which a lessor can retain an interest against the real estate holder without filing, but a fixture filing will generally be essential.

"Accessions" also present a special problem. An "accession" occurs when leased goods "are installed in or affixed to other goods." Any existing rights in a lease contract are superior to any rights in the whole in which leased goods become accession after the lease contract is entered. If the lease contract arises at the time goods become accessions or after, earlier interests in the whole have priority, If someone purchases the whole after a lease contract, rights under the lease contract take priority over the purchaser's rights. However, a "buyer in the ordinary course of business," or a prior creditor who makes advances without knowledge of the lease contract, takes priority over a lessor or lessee, even though the lease contract precedes the purchase or advance in time.

4 Performance of a Lease Contract

Part 4 of UCC – 2A deals with performance and repudiation of a contract, with substituted performance and with excused performance. If performance is to be impaired, however, UCC – 2A gives contracting parties the latitude to minimize losses.

For example, a party to a lease contract who has reasonable grounds for insecurity as to the performance of the other party, may demand written assurance of performance. Until written assurance is provided, the demanding party may suspend his or her performance. If assurance is not given in a reasonable time, the contract may be treated as repudiated.

When performance is impaired without the fault of either party, because of such events as failure of an agreed means of transport, a commercially reasonable substitute must be accepted. There are instances in which performance may be excused: "If performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was basic assumption on which the lease contract was made." The lessor must notify the lessee (and the supplier if there is a finance lease) of delay or non-delivery. These are examples of the options open to contracting parties.

5. Default

Upon default, UCC – 2A provides remedies in Part 5, including damages and equitable remedies, such as specific performance. UCC – 2A permits cover. That is, a party may seek goods from another source to limit losses. Mitigation of damages is encouraged. The general measure of any damage is actual loss.

Lease Transactions as Secured Transactions

The last issue of importance addressed in UCC – 2A is an added appendix, consisting of a crucial amendment to Section 1-201(37) of the UCC, which defines the term security interest. If a lease involves a "security interest," it is subject to Article 9 of the UCC. A lease involves a security interest, dependent upon four alternative factors or characteristics.

If the term of the lease is equal or greater than the remaining economic life of the goods; if there is a renewal option for no additional consideration or nominal consideration; if there is mandatory renewal or the lessee becomes owner at the end of the lease term; or if the lessee has the option to purchase at the end of the lease term for no additional consideration, or any combination of these factors, the lease would tend to be treated as creating a security interest and would be subject to Article 9.

Conclusion

UCC – 2A is comprehensive, dealing with every phase of leasing transactions. It draws a great share of its concepts from Article 2 of the UCC, but it is adapted to the peculiarities of the leasing form. It is an important advance in commercial law.

Ex. 74 1/16/91
SB 1

UNIFORM COMMERCIAL CODE ARTICLE 2A AMENDMENTS (1990)

— A Summary —

Article 2A of the Uniform Commercial Code (UCC), when it was promulgated in 1987, marked the first addition to the UCC since its original promulgation in 1951. The subject of this new addition is Leasing, confined to the leasing of personal property. Most of the UCC is comprised of earlier uniform acts that were promulgated by the Uniform Law Commissioners between 1896 and 1947. Each article had a substantial legal and legislative history before it was brought into the UCC.

UCC 2A did not have the advantage of so much history. Leasing as a means of financing the acquisition of capital goods is a phenomenon of roughly the 20 years just preceding the promulgation of UCC 2A. Therefore, the Uniform Law Commissioners (ULC) and the American Law Institute, its partner in the UCC, were moving into new territory, entirely, in the promulgation of this new article. To form an appropriate bridge between the familiar and the new, the drafters of UCC 2A modeled the new article on the tried and familiar principles of UCC Article 2, the Sales article. But inevitably, an effort to move into a new subject is an effort with some risks.

UCC 2A had its initial consideration in the California and Oklahoma legislatures. In California, it was subjected to an extensive study by the California Bar, and the scrutiny of others with interests in the area of leasing law. The result was a series of amendments to the act. Because of the large interest in this new piece of legislation, nationally, the California amendments were circulated throughout the country. There were more bar association studies, a symposium in the Alabama Law Review, and finally, a review by the New York Law Revision Commission. Two things emerged from all this intense scrutiny: *(1)* The initial decision to follow the principles of UCC Article 2 was fundamentally the correct decision and the basic structure of UCC Article 2A is sound; and *(2)* Some issues needed to be readdressed by amendment.

The ULC was gratified by the first conclusion that universally arose from that scrutiny. It was not particularly surprised at the second. This is entirely new legislation. That further scrutiny might find some issues to address is a logical expectation. So the ULC has proceeded to address these very few issues with amendments in 1990.

Most of the amendments proposed in 1990 are meant to clarify specific provisions of the act or to readjust them in fairly minor ways. There are three significant issues that are addressed. The three issues addressed involve the definition of a finance lease, the power to restrict assignments in a lease contract, and the character of remedies in the event a lease contract is breached. 1 2 3

A finance lease is a lease in which the lessor does not supply the goods that are leased. The lessor acts as a financier for the acquisition of those goods. Under the original UCC 2A, a lease was not a finance lease unless the lessee received a copy of the contract between the lessor and the supplier of the goods evidencing the acquisition of the goods, or unless the lease contract conditioned its effectiveness upon the lessee's approval of the purchase contract between the lessor and the supplier of the goods. In many leasing situations, which involve finance leasing, the lessor cannot comply with these requirements, thereby losing the attributes

SB 1
16 Jan
Ex 7B

Benefits of Revised UCC Article 3

(With Miscellaneous and Conforming Amendments to Articles 1 and 4)

Revised Article 3 to the Uniform Commercial Code (UCC), with conforming amendments to Articles 4 and 1, constitutes a companion to Article 4A. Both are needed to update the provisions of the UCC to provide essential rules for the new technologies and practices in payment systems since the UCC was promulgated nearly four decades ago. In 1990 the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) approved revisions to Articles 3 and 4, and they are now offered for enactment in the various states.

When the UCC was first promulgated, three billion checks were handled annually. Currently, over 50 billion checks are processed annually. To handle the increased load with greater reliability, computer and other technologies — such as the MICR line — have made the much needed faster processing possible.

In addition, the Expedited Funds Availability Act of 1987 requires banks to clear checks and to make funds more quickly available. This, too, has accelerated the need for automation and speed in the processing of checks.

The present Articles 3 and 4, written for a paper based system, cannot adequately address issues of responsibility and liability for the new technologies now employed and the procedures required by the Expedited Funds Availability Act and the Regulation CC. While agreements among parties to particular transactions have long provided some relief, such stop gap measures are no longer adequate.

Revised Article 3 is necessary to update, improve and maintain the viability of Articles 3 and 4. Absent such an update, further Federal preemption of state law is even more likely to occur.

Benefits in the Public Interest

Certainty — Revised Articles 3 and 4 remove numerous uncertainties that exist in the current provisions.

Speed and Reliability — The revisions remove encumbrances to use of new technologies of automation, and better conform to Regulation CC to expedite the availability of funds to customers and reduce risks to banks.

Lowers Costs — By providing for the new technologies, lower costs are possible to banks and thus to their customers.

Reduced Litigation — By clarification of troublesome issues — and by the provisions of Sections 3–404 through 3–406, which reform rules for allocation of loss from forgeries and alterations — the revisions should significantly reduce litigation.

Benefits to Users

"Good Faith" — The definition of good faith under Sections 3–103(a)(4) and 4–104(c) is expanded to include observance of reasonable commercial standards of fair dealing. This objective standard for good faith applies to performance of all duties and obligations established under Articles 3 and 4, and thus tracks the standard under Article 4A.

Fiduciary Provisions — Section 3–307 protects drawers and persons owed a fiduciary responsibility by imposing stricter standards for obtaining holder in due course rights by a person dealing with the defaulting agent or fiduciary. It also spells out the circumstances under which a person receiving funds has notice of a breach of fiduciary duty, and resulting liability.

Accord and Satisfaction — Under Section 3–311 payees can avoid unintentional accord and satisfactions by returning the funds or by giving a notice that requires checks to be sent to a particular office where such proposals can be handled. On the other hand, the drawer of a full settlement check is protected from the instrument being endorsed with protest and thus losing the money and being liable on the balance of the claim.

Cashier's Checks — Section 3–411 and related provisions considerably improve the acceptability of bank obligations like cashier's checks as cash equivalents by providing disincentives to wrongful dishonor, such as recovery of consequential damages.

Indorser Liability — Section 3–415 gives more time to hold a check before the user loses endorser liability.

Reporting Forgeries — Section 4–406 increases the time a customer has to report forged checks or alterations up to thirty days. It also requires a bank truncating checks to retain the item or the capacity to furnish legible copies for seven years.

Individual Agent and Corporate Liability — Section 3–402, as to corporate instruments signed by agents, (except as against the holder in due course), allows a representative to show the parties did not intend individual liability. It affords full protection to the agent that signs a corporate check, even though the check does not show representative status. Also, Section 3–403(b) makes it clear that a signature of an organization is considered unauthorized if more than one signature is required and it is missing.

Direct Suits — Section 3–420 allows a person whose indorsement is forged to sue the depository bank directly, rather than each drawee of the check involved.

Benefits to Banks

Certainty — Section 3–104 and related provisions clarify what types of contracts are within Article 3, thus promoting certainty of legal rules and reducing litigation costs and risks. Included as fully negotiable are checks that may omit "words of negotiability;" confusion over travelers checks is eliminated; variable rate instruments are included; and there is clarification of the impact of the FTC "Holder" Rule, clarification of the ability of parties to an instrument that is not included in Article 3 to contract for the application of its rules to their contract;

and clarification of money orders as checks rather than bank obligations.

"Ordinary Care" — In Sections 3–103(a)(7) and 4–104(c) ordinary care is defined, making clear that financial institutions taking checks for processing or for payment by automated means need not manually handle each instrument if that is consistent with the institutions's procedures and the procedures used do not vary unreasonably from general usage of banks. This clarification is designed to accommodate and facilitate efficiency, thus lowering costs and lowering expedited funds availability risks. The definition of ordinary care relates to those specific instances in the Code where the standard of ordinary care is set forth.

Statute of Limitations — Sections 3–118 and 4–111 include statutory periods of limitations which will make the law uniform rather than leaving the topic to widely varying state laws.

Employee Fraud — Section 3–405 expands a *per se* negligence rule to the case of an indorsement forged by an employee. It also covers that of a faithless employee who supplies a name and then forges the indorsement, but does not require a precise match between the name of the payee and the indorsement.

Bank Definition — The definition of bank is expanded for the purposes of Articles 3 and 4 to clearly include savings and loans and credit unions so that their checks are directly governed by the Code. Section 4–104 clarifies that checks drawn on credit lines are subject to the rules for checks drawn on deposit accounts.

Truncation — Section 4–110 authorizes electronic presentment of items and related provisions remove impediments to truncation. Truncation will reduce risks from mandated funds availability and improve the check collection process. Section 4–406 allows an institution the benefit of its provisions even though it does not return the checks due to truncation. If both the customer and the institution fail to use ordinary care, a comparative negligence standard is used rather than placing the full loss on the institution.

16 Jan
Ex 7C

Why states should adopt Article 4A of the UCC

New Article 4A of the Uniform Commercial Code concerns a type of payment made through the banking system called a "funds transfer." (A popular term for the bulk of these kinds of transfers is "wholesale wire transfer." This term is not used in Article 4A because all "funds transfers" are not "wholesale" and not "wire" transfers.) A "funds transfer" is, generally, a large, rapid money transfer between commercial entities. In the average "funds transfer" $5,000,000.00 changes hands. In most instances, such transfers will occur between banks using computers and electronic communications. (Consumer transfers through credit cards and ATM machines are not governed by Article 4A, but are governed by federal law.) Article 4A provides a body of law on the rights and obligations connected with "funds transfers."

There is currently no comprehensive body of law that defines the rights and obligations that arise from "funds transfers." Some aspects of "funds transfers" are governed by rules of the principal transfer systems. Transfers made by the Federal Reserve network (Fedwire) are governed by Federal Reserve Regulation J and transfers over the Clearing House Interbank Payment System (CHIPS) are governed by CHIPS rules. But these rules apply to only limited aspects of "funds transfer" transactions.

Article 4A will provide:

CERTAINTY

Currently, no participant in a "funds transfer" can know with certainty what the rights and obligations of parties are. Enactment of Article 4A solves the problem.

BALANCE

Article 4A carefully addresses the interests of banks, commercial users of this payment method and the public. It seeks a fair balance between interests involved in "funds transfers."

REMEDIES

What law exists does not provide clear remedies for "funds transfers" when something goes wrong. UCC-4A establishes who takes the risk of loss, who will be liable and what will be the damages.

UNIFORM COMMERCIAL CODE
ARTICLE 4A — FUNDS TRANSFERS

— A Summary —

The payment of obligations is of vital importance to almost all commercial transactions. Occasionally problems arise when payment is not made, or is made improperly. It is neither convenient nor prudent to pay large or even modest obligations in actual cash. So, individuals and corporations, big account holders and small, have turned to bank accounts and bank credit, and have paid obligations by written instruments that accomplish a transfer of bank credit - check, money order, bank draft, etc. For the past twenty years, in every state, the rights and obligations of parties to payment by check have been governed by Articles 3 and 4 of the Uniform Commercial Code (UCC). Checks will remain the method by which many obligations are paid for the foreseeable future. However, electronic technology is now a fact of life and new methods for transferring bank credit for the purposes of payment are a result. Article 4A is a reflection of this fact.

How has technology affected systems of payment? Most people are aware of automated teller machines for their personal use. Indeed, these machines have become very popular. But such technology is widely used to make large transfers of funds that satisfy obligations arising from commercial transactions as well. The technology is simply too convenient and too fast not to be used for the transfer of large sums around the world.

The amounts which move through the large value automated systems are truly staggering. In 1989 as Article 4A is promulgated, one trillion dollars are transferred on an average day. In 1989, a record day of three trillion dollars was recorded. This is roughly the 1989 gross national product of the United States. Undoubtedly, this record will be surpassed in due course and probably frequently in the future. Such figures indicate the impact of the technology. They also indicate the need for some governing law.

In 1989, as the new Article 4A is proposed to the states for adoption, there is no backstop statutory law to govern funds transfers. The rules for checks in Articles 3 and 4, which utilize the signatures and endorsements on the check as the basis for determining liability, do not apply to electronic funds transfers. Nor are the rules governing the liability of banks to customers under Article 4 helpful. Many transfers in the United States are effected through electronic transfer networks; one is owned and operated by the Federal Reserve and is known as FedWire and the other is owned and operated by the New York Clearing House and is known as CHIPS (Clearing House Interbank Payments Systems). Each of these systems has rules to govern transactions between participating banks, but they do not affect bank customers. Outside FedWire and CHIPS, common-law contract rules are the basis for determining liability. However, serviceable, negotiated contracts are rare. Bank customers usually need a funds transfer immediately and do not take the time to negotiate a contract. Transfers are frequently made in a legal void.

Article 4A is the remedy for this void. Because the total volume of funds transfers is very great and because many individual transactions are very large, the cost of uncertainty in the law could be very high. Article 4A is necessary to the continued usage of existing funds transfers and for the anticipated future expansion in this usage.

Some terminology is necessary to follow a funds transfer under Article 4A. A "sender" is any person or entity who sends a "payment order." The first sender is the originator, and subsequent senders are banks participating in the transfer. A sender communicates a "payment order" to a "receiving bank." Receiving banks become senders if they forward "payment orders" to other banks. The last bank in the communications chain is the beneficiary's bank, and it can never be a sender with respect to the specific funds transfer. The "beneficiary" is the entity that the sender intends to pay. A "payment order" is simply the form of communication that the parties to a funds transfer agree to use. The payment order's salient characteristics are that it calls for an unconditional payment of money from the sender to the beneficiary and that it is transmitted to a receiving bank.

Unless the persons or entities involved in a payment of money use the same bank, a funds transfer involves at least four parties: the originator of the payment; the bank to which the originator communicates the first payment order; the beneficiary's bank that receives the final payment order; and last, the beneficiary. Intermediary receiving and sending banks also may be involved. These are banks that act as conduits of payment when there is no capacity to communicate directly between the originator's bank and the beneficiary's bank.

An example illustrates the process of a funds transfer. Suppose Alpha Corporation wants to pay money to Beta Corporation to satisfy a large contractual obligation. Alpha is in New York, and Beta is in California. Alpha has a bank account with a balance sufficient to pay Beta at First Bank in New York. Beta maintains an account at Second Bank in California. The process of payment is simple. Alpha orders First Bank to pay the owed money to Beta through a transfer to Second Bank. Alpha's order is pursuant to an agreement that Alpha has with First Bank. When First Bank receives the payment order from Alpha, it communicates with Second Bank. The communication indicates that a specific amount at First Bank held for Alpha will be transferred to Second Bank with the understanding that it will be passed on to Beta. Second Bank accepts this second payment order and notifies Beta that the money is available to Beta. Value passes between the two banks through accounting entries in a process known as settlement.

With simple transactions, why do we need a whole new article in the Uniform Commercial Code? New law - or any law - isn't necessary if everything works. But what if something goes wrong? What if First Bank makes a mistake as to the amount to be paid? What happens if Second Bank doesn't notify Beta? What happens if the payment order is fraudulent, and not actually issued by Alpha? What happens if there is a bank failure? These are a few examples of possible errors.

A funds transfer is like a string of Christmas lights: everything is fine until a light burns out. There must be a remedy for the burned out light, and to the extent there are losses they must be paid. What are the remedies if someone takes a loss? Who bears the risk of loss at a given time in the transactional process? No adequate answers to these questions exist without a backstop statutory law that allocates the loss at the appropriate places in the funds transfer. Article 4A provides clear and reliable answers, and thereby keeps the string of lights burning.

To resolve the problem of who is responsible when something in a funds transfer goes wrong, Article 4A divides the actions of the parties to a funds transfer into three essential parts. First, a funds transfer is initiated by the originator and accepted by the originator's bank. Part 2 of Article 4A, entitled "Issue and Acceptance of Payment Order," governs the relationship between the sender of a payment order and the receiving bank that will execute the payment order. What constitutes acceptance and rejection (both rightful and wrongful) of a payment order, and what must be done to amend a payment order, are determined by the rules of Part 2, as these involve the relationship between the sender and receiving bank in a funds transfer. 1

As between sender and receiving bank, who suffers a loss if there is a mistake? Part 2 of Article 4A resolves this critical issue. Two kinds of mistakes can occur between sender and receiving bank, an unauthorized payment order and an erroneous payment order. The key to the rules on an unauthorized payment order is the "security procedure" that exists between sender and receiving bank. This is the agreed procedure that verifies the authenticity of a payment order or other relevant communication. In electronic funds transfer systems, the security procedure is an important element, and may involve codes, encryption, callback procedures, and the like. Any procedure that can be devised to protect the transaction is eligible. To be legally effective, it must only be commercially reasonable.

The security procedure determines who takes the risk of loss when there is an unauthorized payment order. If there is a commercially reasonable security procedure that is followed by the receiving bank, the sender must absorb the loss. If the sender proves that the security procedure was not followed or was breached by someone outside the control of the sender, the receiving bank takes the loss. The assumption is that the security procedure, if followed and not breached, will verify the authenticity of payment orders.

The risk of loss for an erroneous payment order also hinges upon compliance with a security procedure for detecting error. If the sender proves that it complied with the security procedure, the receiving bank takes the loss. Otherwise, the sender is responsible for erroneous orders.

2 The second part of a funds transfer is the passage of funds from receiving bank to receiving bank, until the beneficiary's bank is contacted. This is covered by Part 3 of Article 4A, which is entitled "Execution of Sender's Payment Order by Receiving Bank."

Rules governing the relationship between receiving banks are contained in this part. A principal obligation of a receiving bank (other than the beneficiary's bank) is to "execute" a payment order once it has accepted the order - that is, pass it on to the next bank in the string. It executes by issuing a payment order to the next bank. (The beneficiary's bank has a different obligation. It must pay the obligation to the beneficiary, and that is covered in Part 4 of Article 4A.) Unless agreed otherwise, a bank may use any commercially reasonable method to issue a payment order. A receiving bank is, generally, responsible for any error it commits in issuing a payment order. If a receiving bank overpays the beneficiary of a payment order, the excess is recovered from the beneficiary, not from prior senders. If a receiving bank pays a person or entity that is not the intended beneficiary, recovery is from the person receiving the money, and not from any prior sender. Only if a receiving bank underpays in a payment order, may the bank recover from prior senders, and then only an amount to cover the error and only if it issues a curative order.

Part 3 of Article 4A covers other issues pertaining to receiving banks. For instance, rules on reporting an erroneous payment order and late execution of a payment order are furnished.

3 The last part of a funds transfer involves actual payment to the beneficiary. It is the subject of Part 4 of Article 4A, "Payment." Each sender, going back to the originator, is obligated to pay. At a given time, the beneficiary is considered to have been paid. There is a two step approach to actual payment, although the steps are accomplished simultaneously if the transfer is made by Fedwire. First, credit is extended by each receiving bank to each sender when the sender's payment order is accepted - basically, a communications function. The second stage involves settling up between participants - the actual passage of value.

Perhaps the most important section in Part 4 is Section 4A-402. It provides that a sender of a payment order is obliged to pay the amount of the order to the receiving bank if the funds transfer is properly completed. It is essential to distinguish, in this regard, a payment order from a check.

A check is a kind of payment order. When a person writes a check on an account, it orders the institution in which the account resides to pay money to a named person (whose technical name is the payee). Although a check suspends the liability of the person who writes it for an underlying obligation until the instrument is rightfully presented for payment and paid at the institution in which the account resides, it can be passed from person to person as payment for other obligations and accrues and extinguishes liabilities for those persons as it passes between them. If the institution refuses to pay when the check is presented, then the person who initially wrote the check is liable for the underlying obligation as well as for the check. In contrast, acceptance of a payment order for a funds transfer by a receiving bank obligates the sender to pay that bank, and that bank alone. There is no instrument that may be passed from hand to hand as payment between other people. There are no lingering liabilities that result from the negotiability of an instrument. A payment order for a funds transfer is simple and direct.

How does settlement take place? If the sender is a bank, and the funds transfer is through one of the funds transfer systems, payment takes place according to the rules of the system that govern settlement between banks. Typically, payment is a matter of debiting an account of the sender with the receiving bank, and crediting the receiving bank's account. These methods hold whether the sender is an individual or a bank.

The beneficiary's bank, the last bank in the string, is responsible for paying the beneficiary. Payment generally takes place by crediting an account of the beneficiary, although satisfaction of a beneficiary's debt also constitutes payment, and payment in general occurs when the funds are available to the beneficiary for withdrawal. The originator of a payment order, that first light in the string of lights, generally is deemed to have paid the beneficiary on the underlying commercial obligation when the beneficiary's bank accepts the payment order. If it seems premature to discharge the originator, it is because at the time of acceptance by the beneficiary's bank, the originator has done all in its power to see that the beneficiary has obtained a credit balance at the beneficiary's bank in the agreed-upon amount. It is analogous to a situation where the originator has deposited cash to the beneficiary's account at beneficiary's bank. At that point, the originator's obligation to the beneficiary should be considered satisfied.

Finally, there are some other features of Article 4A to be considered. First, any transaction that is subject to the Electronic Funds Transfer Act of 1978 is not subject to Article 4A. This express exclusion places consumer transactions outside Article 4A, and leaves them to federal law. Second, the regulations and operating circulars of the Federal Reserve Board supersede any inconsistent provision of Article 4A. Third, transfer system rules will prevail if inconsistent with any part of Article 4A. Fourth, it is possible to vary the effect of most of the provisions of Article 4A, honoring the general Uniform Commercial Code policy of freedom of contract.

The fifth matter of special interest needs extra emphasis. Funds transfers occur and are useful so long as it is fast, efficient and inexpensive to use current and future electronic methods. A great deal of money can be passed through the current system for very little comparative cost. Therefore, Article 4A limits consequential damages for improper payment orders. Consequential damages might raise costs, reduce transaction speed by requiring the exercise of discretion by management, and increase uncertainty.

Article 4A of the Uniform Commercial Code is essential law. The continuance and viability of funds transfers depends upon its advancement in the states. And uniformity is an absolute requirement in every state, unconditionally and without deviation. Otherwise, there will be impairment of the functioning of funds transfers for the long term.

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ARTICLE 6

BULK TRANSFERS

INTRODUCTION

For a discussion of problems under Article 6, see Benett, "Bulk Transfers Under the Uniform Commercial Code," 19 U.Kan.L.Rev. 709 (1971); Lakin, "Bulk Transfers: What Hath the Uniform Commercial Code Wrought?" 35 Md.L.Rev. 197 (1975); Larson, "Bulk Transfers: Some Interpretive Problems," 2 Rutgers-Camden L.J. 101 (1970); Rapson, "Article 6 of the Uniform Commercial Code: Problems and Pitfalls in Conducting Bulk Sales," 68 Com.L.J. 226 (1963); Clontz, "Should an Article 6 Study Be the Next Task for the Permanent Editorial Board?" 4 U.C.C.L.J. 214 (1972); Hawkland, "Trouble With Article 6 of the UCC: Some Thoughts about Section 6-103," 82 Com.L.J. 113 (1977); Levit, "Bulk Transfers: Stepchild of the Uniform Commercial Code?" 46 Notre Dame Law. 694 (1971).

The provisions of Article 6 have been expressly pre-empted by the provisions of the Illinois Farm Equipment Fair Dealership Law (Ill.—S.H.A. ch. 5, ¶¶ 1501, 1506 (hereinafter, the "Farm Act"). The Farm Act provides that upon termination of a farm equipment dealership franchise, the dealer is to return unsold inventory to the manufacturer. When the dealer receives payment for the returned inventory, the title reverts to the manufacturer. The purpose of the title retention provision in the statute is to protect farm implement dealers from problems caused in recent years by the depressed and unstable farm economy. In re White Farm Equipment Co., 63 B.R. 800 (Bkrtcy.Ill.1986).

Following a study of Article 6 (and recommendations thereon) by a subcommittee of the Uniform Commercial Code Committee of the Corporation, Banking and Business Law Section of the American Bar Association as a result of criticisms in legal periodicals (including some of the aforementioned), the National Conference of Commissioners on Uniform State Laws, in cooperation with the American Law Institute, has appointed a Drafting Committee which has Article 6 under study. The Chairman of the Drafting Committee is Dean and Professor Gerald L. Bepko, Indiana University School of Law, Indianapolis, and the Reporter is Chancellor and Professor William D. Hawkland, Louisiana State University of Law Center, Baton Rouge. An excellent discussion of the scope and direction of revised Article 6 is contained in "The Article 6 Drafting Committee's New Approach to Asset Acquisitions," Steven L. Harris, 42 The Business Lawyer 1261 (1987).

The National Conference of Commissioners on Uniform State Laws voted on a revised draft of Article 6 at their annual meeting in 1988. They elected to present to each state the option of replacing current Article 6 with a revised Article or of repealing Article 6 and doing without a bulk sales law. They further

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elected to recommend that the states elect the repeal option. At its 1988 annual meeting, the American Law Institute expressed strong support for the repeal option considered by the National Conference. In reviewing the new version alternatively proposed by the National Conference, the ALI changed the Article's definition of "good faith" from Section 1-201(19)'s general "honesty in fact" standard to the merchant's standard of "reasonable commercial standards of fair dealing" set forth in Section 2-103(1)(b).

§ 6-102—FORM 1

Provision in Contract of Sale Requiring Compliance With Article 6 of the Uniform Commercial Code

(Bulk Transfers)

AUTHORS' COMMENT

The burden of proving that a bulk transfer has occurred is placed upon the creditor seeking to avoid the transfer. In order to show that a "major part" of the debtor's inventory has been transferred, the creditor should furnish proof of the total inventory of the debtor and the percentage of that inventory represented by the transferee's purchase. Bergen, Johnson & Olson v. Verco Mfg. Co., 690 S.W.2d 115 (Tex.App.1985), error refused n.r.e. See also Nichols Motorcycle Supply, Inc. v. Regency Kawasaki, Inc., 295 S.C. 138, 367 S.E.2d 438 (App.1988) (a sale of $30,000 of used and junk motorcycles and parts by a retail motorcycle dealer is a bulk transfer under the Code, when the dealer is left with only $20,000 worth of inventory and equipment after the sale).

If the contemplated transfer is clearly not a bulk transfer, a provision like the above is not necessary. For example, in Martin Marietta Corp. v. New Jersey Nat'l Bank, 653 F.2d 799 (3d Cir.1981), affirming in part and reversing in part 505 F.Supp. 946 (D.C.N.J.), the court held that a sale of 40,000 tons of sand per month for 3 months was not a bulk transfer in view of an inventory of about 500,000 tons during a relevant six-month period; that the plant from which the sand was extracted occupied 1500 acres and had a potential yield of 50 million tons of natural sand. In Aab v. Loehmann's Inc., 8 B.R. 777, 30 U.C.C. Rep.Serv. 1411 (S.D.N.Y.1981), the court rejected the bulk transfer contention of a trustee in bankruptcy of a company formerly engaged in the business of manufacturing and distributing finished apparel products, including women's apparel. In a one-week period a New York organization engaged in the operation of women's discount apparel stores at numerous locations throughout the United States purchased out-of-season or excess merchandise from the manufacturer for $10,655. This was a fair and reasonable value for the merchandise, and the quantity purchased during the mentioned period was similar to prior purchases. The court followed the earlier New York decision, Sternberg v. Rubinstein, 305 N.Y. 235, 112 N.E.2d 210 (1953), that a sale of off-season merchandise (shoes in that case) rendered obsolete by the passage of time was not out of the ordinary

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course of business and therefore was exempt from the bulk transfer law.

The court in Republic Steel Corp. v. Canyon Culvert Co., 104 N.M. 396, 722 P.2d 647 (1986) held that a bulk sale of equipment was not within the scope of Article 6 and did not become so when the seller, shortly thereafter, sold its inventory and certain other assets to a different buyer. The Court opined that a sale of equipment is "in connection with" a sale of inventory for purposes of Section 6–102(2) only if the purchaser of the equipment has reason to know that a substantial part of the seller's inventory has been or will be sold in a reasonably contemporaneous transaction. In reaching its decision, the court relied upon the fact that the seller had represented to the buyer that it had complied with any applicable provisions of Article 6. Thus, if it is unclear whether the contemplated transfer is a bulk transfer, then the prudent draftsman may use the above provision.

A prospective lender knowingly financing a bulk transfer will prudently require in his loan agreement the inclusion of such a clause in the purchase agreement. In Mayfield Dairy Farms, Inc. v. McKenney, 612 S.W.2d 154 (Tenn.1981), a bank obtained priority in a court sale of the assets of a grocery business after a bulk transfer of the assets of the business held defective for want of compliance with Article 6, which transfer it had financed for the purchaser on the ground that it had neither actual nor constructive notice of non-compliance and was a purchaser for value in good faith under § 6–110. An unpaid creditor had filed an action seeking satisfaction of its claim out of the assets of the business and requested the court to determine whether the security interest of the bank was subject to the defect in the purchaser's title. In this connection, it should be noted that an action to avoid the bulk sale may successfully be brought, even if the bulk seller is not named as a party defendant. In Stone's Pharmacy, Inc. v. Pharmacy Accounting Management, Inc., 875 F.2d 665 (8th Cir.1989), the court held that, where a bulk seller had declared bankruptcy and could not be named as a party defendant in an action by a creditor to avoid the sale because of the automatic stay in bankruptcy, it was error for the district court to dismiss the creditor's claim against the bulk buyer to avoid the transaction on the ground that the bulk seller was an indispensable party defendant.

In Cargill, Inc. v. Bunker Hill Elevator Co., Inc., 505 N.E.2d 75 (Ind.App.1987), the court held that a debtor's transfer to its secured party in settlement of its debt of a number of trucks and the right to tax refunds due the debtor was not subject to the bulk sale requirements of Article 6. The tax refunds are general intangibles, and therefore not covered by Article 6; and although the trucks are "equipment," the Act exempts transfers which are in settlement of a security interest, as these transfers were.

The downside risk of non-compliance with Article 6 was realized by a transferee in In re Verco Indus., 10 B.R. 347, 31 U.C.C.Rep.Serv. 653 (Bkrtcy.App.Panel, 9th Cir.1981), rev'd 704 F.2d 1134. In September, 1979 Verco, the debtor, agreed to sell a

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business and in December, 1979 consummated a sale of it to Spartan Plastics without compliance with California's Article 6. In July, 1980 Verco filed a Chapter 11 petition under the Bankruptcy Code and subsequently sued as a debtor in possession to void the transfer under Bankruptcy Code § 544. The consideration for the sale included $125,600 cash paid to the transferor and a promissory note back to it in the amount of $37,110. The bankruptcy court held that the transfer was voidable but that the purchaser was relieved of its obligation to pay the note. The Bankruptcy Appellate Panel reversed the latter holding and allowed recovery on the note as well as avoidance of the transfer. In addition, the Panel ruled that the transferee acquired no set-off claim against the estate of the transferor on the ground that the transferor was blameless and that avoidance of the transaction occurred solely because of the failure of the transferee to comply with Article 6. On appeal to the Ninth Circuit, the decision of the Bankruptcy Appellate Panel was reversed on the set-off issue and remanded for a determination of the amount of the set-off to which the transferee would be entitled. In all other respects, the decision of the Bankruptcy Appellate Panel was affirmed.

§ 6-102—FORM 2

Bulk Transfer Agreement Avoiding Compliance With Article 6

AUTHORS' COMMENT

In Mercantile Financial Corp. v. P. & F. Indus., Inc., 63 A.D. 2d 1014, 406 N.Y.S.2d 357 (1978), an agreement entered into by a parent corporation with a purchaser of its subsidiary's assets to indemnify the purchaser from the claims of the subsidiary's creditors, in lieu of compliance with Article 6 of the Illinois Uniform Commercial Code, was sustained over the objection of an unsecured creditor as not inconsistent with the purpose of Article 6 to protect unsecured creditors. The agreement was held justified in having a "business advantage" as its motive. Moreover, Article 6 did not require notice; it merely made the transfer ineffective.

§ 6-104—FORM 1

Bulk Transfer Affidavit Listing Creditors

AUTHORS' COMMENT

In Matter of Garden Turf & Supply Corp., 440 N.E.2d 710 (Ind.App.1982), the court sustained a sworn affidavit signed on May 31, 1978 of an accompanying list of creditors prepared no earlier than May 26, five days earlier. The case involved an action by the trustee in bankruptcy of the transferror against an auctioneer conducting the bulk transferor. The court held, *inter alia*, that the trustee had failed to prove damages.

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The question of the effect of an omission of a creditors' name from the transferor's affidavit and of the remedy of the creditor in that event arose in Adrian Tabin Corp. v. Climax Boutique, Inc., 34 N.Y.2d 210, 356 N.Y.S.2d 606, 313 N.E.2d 66 (1974). The trial court voided a bulk transfer made on an affidavit of "no creditors" at the suit of an omitted creditor, holding that the transferee had a duty of careful inquiry as to the existence of creditors and intimating that a review of the transferor's books and questioning him as to the source of the merchandise was necessary. The Appellate Division reversed, and the Court of Appeals affirmed. The reviewing courts held that a bulk transferee who has no knowledge of creditors of his transferor may rely on an affidavit of no creditors furnished by a transferor and that Article 6 did not impose a duty of careful inquiry that existed under pre-Code New York law. The court observed that the omitted creditor was not entirely without remedy—one might exist under the Uniform Fraudulent Conveyance law notwithstanding compliance with Article 6; conceivably a preferential transfer involved in the bulk transfer provided a basis for filing a bankruptcy petition against the transferor; in other jurisdictions optional section 6–106 would provide a remedy for the omitted creditor.

In Froehlich v. J. R. Froehlich Mfg. Co., 93 Ill.App.3d 179, 48 Ill.Dec. 612, 416 N.E.2d 1134 (1981), the court held that the president and principal shareholder of a corporate bulk transferor who was not the alter ego of the corporation was not personally liable to a creditor omitted from a bulk transfer affidavit. The court noted that the creditor had availed herself of a remedy flowing from her judgment against the corporation by receiving monthly payments from the transferee on its note to the transferor for the balance of the purchase price, a remedy contemplated by Article 6.

In Anderson & Clayton Co. v. Earnest, 610 S.W.2d 846 (Tex. Civ.App.1980), the court held that an action by a creditor against a transferee asserting his personal liability in a bulk transfer made without compliance with Article 6 failed, principally because of a failure of proof by the creditor. There was no evidence of the value of property sold and of property still held by the transferee; also there was no evidence that disposition had been made of the property in such a way as to place it beyond the reach of creditors.

Also see Hawkland, "Remedies of Bulk Transfer Creditors Where There Has Been Compliance With Article 6," 74 Com.L.J. 257 (1969).

§ 6–107—FORM 1

Long Form Notice to Creditors of Bulk Transfer

AUTHORS' COMMENT

Giving adequate written notice to all of the seller's creditors of a proposed bulk sale is critical, even if the seller or buyer

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believes that certain of the creditors may have actual knowledge of the proposed sale. In Cinocco Realty, Inc. v. J.L.J., Inc., 736 P.2d 421 (Colo.App.1987), the court held that a creditor's actual knowledge of an impending bulk sale did not excuse the buyer's failure to comply with the notice provisions of Article 6.

In Matter of Garden & Turf Supply Corp., 440 N.E.2d 710 (Ind.App.1982), an action by a trustee in bankruptcy of a wholesale lawn and garden distributor against an auctioneer which had conducted an auction sale of the assets of the distributor at the request of its sole stockholder and chief operating officer for the auctioneer's failure to comply with the requirements of the Indiana UCC Article 6, the court held that the notice requirements of UCC § 6–107 (Indiana § 6–106) were not incorporated in the auction setting of UCC § 6–108 (Indiana § 6–107) and that only reasonable notice was required. Reasonable notice would, said the court, contain the date, time and place of the auction, the general nature of the property to be sold (e.g. inventory), the name and address of the debtor and the name and address of the auctioneer. The notice involved met these requirements. The court found that while the auction sale did not meet all the requirements of UCC § 6–108 (Indiana § 6–107), all creditors on the list furnished by the transferor apparently received notice and that the purpose of the statute had been satisfied. The court further held that the trustee had proved no damages. The Ninth Circuit Court of Appeals has ruled that mere failure to give proper notice under the bulk sale requirement as required by Section 6–107 cannot be regarded as "concealment" for the purpose of tolling the statute of limitations set forth in Section 6–111 for bringing actions under the Bulk Sales Act. In re Borba, 736 F.2d 1317 (9th Cir.1984). Accord: Pipeline Materials, Inc. v. Turf Irrigation Corp., 754 P.2d 775 (Colo.App.1988) (failure to give notice does not constitute concealment; concealment occurs only where there has been some affirmative act on the part of the seller or buyer to hide the transfer from the seller's creditors). An opposite result was reached by the Court in In re Seminole Motors, Inc., 86 B.R. 245 (E.D.Okl.1987), which held that the seller's failure to give notice of a bulk transfer was concealment, which tolled the running of the six-month claim period.

16 Jan 9
Exhibit 8

THE 1990 AMENDMENT TO THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES ACT

In 1990 the Uniform Law Commissioners adopted an amendment, Section 1(e), to resolve a problem with certain clauses, called "later of" clauses, in property instruments, which are drafted to avoid invalidity under the rule against perpetuities. An example of such a clause is: "The maximum time of vesting or terminating any interest under this trust must occur no later than the later of (A) 21 years after the death of the survivor of the of the beneficiaries alive at the creation of this trust or (B) 90 years after the creation of the trust." If the property instrument (trust in this case) meets the prospective common law test of lives in being plus 21 years, there is no problem. If it does not, the "later of" clause may delay vesting in a way that misuses the Uniform Act.

The Uniform Act has a two track rule. It validates the common law rule, so that anything that will vest within the prescribed time is valid. But the Uniform Act also allows interests that do not meet the common law rule to become fully valid if they actually vest within 90 years. By using the "later of" language, the drafter of a property instrument actually causes it to violate the common law rule and forces the question of validity upon the 90 year actual vesting rule. It can be used to convert the 90 year rule into a kind of minimum time for vesting, in the event the drafter does not succeed in meeting the common law rule in a effort to delay vesting of interests for even longer. This is an unintended and unwanted effect. The 90 year rule is meant to forgive bad drafting and its most draconian effect upon valid future interests, but it is not meant to create a target for draftsmen.

The amendment terminates the unwanted effect of "later of" clauses by providing that they are always inoperative to produce a period of time that exceeds 21 years after the death of the survivor of specified lives.

SB53
Exhibit #5

Amendments to Senate Bill No. 53
White Reading Copy

Requested by Senator Devlin
For the Committee on Judiciary

Prepared by Valencia Lane
January 15, 1991

1. Title, line 6.
Strike: ";"
Insert: "AND"

2. Title, lines 7 and 8.
Following: "SHAKE-A-DAY" on line 7
Strike: remainder of line 7 through "GAMES" on line 8

3. Page 1, line 12.
Strike: "(1)"

4. Page 1, line 15.
Strike: "(a)"
Insert: "(1)"

5. Page 1, line 19.
Strike: "put"
Insert: "pay"
Following: "money"
Strike: "in"
Insert: "for music from"

6. Page 1, line 21.
Strike: "(b)"
Insert: "(2)"

7. Page 1, line 25.
Strike: "certain poker hand"
Insert: "winning combination"

8. Page 2, line 3.
Strike: "hand"
Insert: "combination"

9. Page 2, lines 9 and 10.
Strike: subsection (2) in its entirety

(This sheet to be used by those testifying on a bill.)

NAME: JOHN COCHRAN DATE: 1/16/91

ADDRESS: 2946 CUSTER BILLINGS MT

PHONE: 656 8269

REPRESENTING WHOM? OIL CHEMICAL AND ATOMIC WORKERS BILLING

APPEARING ON WHICH PROPOSAL: SB 31

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

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those **testifying** on a bill.)

NAME: Julie Holzer DATE: 1/16/91

ADDRESS: 712 Torch Dr. Billings Mt.

PHONE: 652 6420

REPRESENTING WHOM? Oil, Chemical, Atomic Workers Union – Laurel

APPEARING ON WHICH PROPOSAL: SB 31

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

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: John A Manzer DATE: 1-16-91

ADDRESS: P.O. Box 2648 G.F. 59403

PHONE: 406 453-1431

REPRESENTING WHOM? Teamsters Union

APPEARING ON WHICH PROPOSAL: S.B. 31

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

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

VISITORS' REGISTER

Senate Judiciary COMMITTEE

BILL NO. SB 31 DATE 1/16/91

SPONSOR Towe

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Julie Holzer	112 Torch Blgs	✓	
JOHN COCHRAN	2946 CUSTER BLG	✓	
D.B. DITZEL	44 N. Last Chance #1 Helena	✓	
Dan C. Edwards	Box 21635, Billings, 59104	✓	
Bob Heiser	Helena	✓	
John Fitzpatrick	900 North MT Helena Pegasus		✓
Robert L MAXWELL	Billings	✓	
WARREN Doug Holmes	Billings	✓	
John K. Manzer	P.O. Box 2648 G.F	✓	
Pat Keim	Helena	✓	✓
Dean Schay	Worden	✓	
Johnny Monahan	Great Falls	✓	
MICHAEL MIZENKO	Plumbers + Pipe Fitters #139 Gt. Falls	✓	
Curt LAINGEN MT MOTOR CARRIERS ASSN	HELENA	✓	
JAY REARDON	EAST HELENA MT	✓	
Colleen Schay	Worden, MT	✓	
Don Judge	MT STATE AFL-CIO, Helena	✓	
Steve Granzow	—		✓
Pat Melby	Rimrock Foundation	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

Senate Judiciary COMMITTEE

BILL NO. SB-31 DATE 1-16-91

SPONSOR Towe

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
E FENDERSON	STATE BLG TRADES, HELENA	✓	
W. Kelmann	Mont. Nurses' Assn	✓	
Scott Crichton	ACLU	✓	
Bryn Robinson	Helena	✓	
James Tutwiler	MCC		✓
KATHY ANDERSON	MT WOOD PROD ASSN		X
NANCY C. O'NEIL	Bozeman, Mt.	✓	
Janelle Fallan	Helena		✓
Jan Cool	Exxon Company, U.S.A.		✓
John Augustine	Conoco Inc		✓

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

Senate Judiciary COMMITTEE

BILL NO. SB 1 DATE 16 Jan 91

SPONSOR Mazurek

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Jock Anderson	Mt League of Savings I.	✓	
Bob Pyfer	MT Cred. Unions League	✓	
Roger Tippy	Mt Indep Bankers	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

Senate Judiciary COMMITTEE

BILL NO. SB 6 DATE 16 Jan 91

SPONSOR Mazurek

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

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