MINUTES

MONTANA SENATE
53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Sen. Bill Yellowtail, on January 12, 1993, at 10:05 a.m.

ROLL CALL

Members Present:
Sen. Bill Yellowtail, Chair (D)
Sen. Steve Doherty, Vice Chair (D)
Sen. Sue Bartlett (D)
Sen. Chet Blaylock (D)
Sen. Bob Brown (R)
Sen. Bruce Crippen (R)
Sen. Eve Franklin (D)
Sen. Lorents Grosfield (R)
Sen. Mike Halligan (D)
Sen. David Rye (R)
Sen. Tom Towe (D)

Members Excused: Sen. Harp

Members Absent: NONE

Staff Present: Valencia Lane, Legislative Council
Rebecca Court, Committee Secretary

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

Committee Business Summary:
Hearing: SB 46
SB 68
SB 64
Executive Action: NONE

HEARING ON SB 46

Opening Statement by Sponsor:
Senator Halligan, District 29, told the Committee SB 46 repeals the uniform partnership act. The uniform partnership act governs the creation of partnerships, establishes what the nature of the business organization is and provides some rules with respect to the rights and obligations of the partners.

Proponents' Testimony:

Steven C. Bahls, Professor and Associate Dean at the University of Montana School of Law, read from prepared testimony. Exhibit #1. Professor Bahls provided the Uniform Partnership Act of 1992. Exhibit #2 and #3.

Garth Jacobson, representing the Secretary of States office, testified in support of SB 46. Mr. Jacobson stated SB 46 will place creditors and the public on notice to what is going on in the partnership, who has authority, and who has withdrawn from the partnership. SB 46 would require additional staff in the Secretary of the States office, which would be revenue neutral by degenerating the additional revenue by virtue of the filings that are made. The Secretary of the States office has rule making authority to set the filing commencements with the cost of the filings. This may require an additional filing office depending on the number of filings. SB 46 is beneficial for the Montana business community. The Secretary of States office is in complete support of SB 46. Mr. Jacobson recommends SB 46 DO PASS.

Dan Ritter, on behalf of Montana Chamber of Commerce, voiced support that SB 46 DO PASS, based on the testimony of Professor Bahls.

Opponents' Testimony:
NONE

Questions From Committee Members and Responses:
Senator Towe questioned Professor Bahls regarding page 16, section 14. Professor Bahls replied that this has been a subject of litigation in Montana as to when property is partnership property. The current law states property is presumed to be partnership property if bought with partnership assets. This is not a complete resolutions of all questions that may come up. SB 46 defines the limits. SB 46 is more defining than existing law. It continues the general rule that if bought with partnership assets in the name of the partnership, it is presumed to be partnership property.

Senator Towe questioned Professor Bahl if getting into Bankruptcy Court would build more lawsuits with this kind of language. Professor Bahl responded SB 46 provides more benefit to the Bankruptcy Court as they would look to the state law to determine ownership of the property and who owns the assets. SB 46 provides more detail than the existing statute.

Senator Towe inquired about the filings and the acceptance of the banks. Professor Bahl told the Committee the note is an optional filing and partnerships need not file anything. When a bank deals with a partnership often all the partners execute the instrument so they can make sure someone of authority has signed. It would be much easier for banks to require the partnership to file with the Secretary of the State to create a presumption as to who has authority and then verify with the Secretary of State. Banks will require partnerships to file with the Secretary of State so they know who has authority and continue to have all the partners sign so they would receive the personal guarantees of all partners.

Senator Crippen questioned Professor Bahls about the sale and purchasing of partnership property. The existing statute provides partnership property held as tenency in partnership. Tenancy in partnership is subject to the dissolution rules of the partnership statute. If a partner sells, it is a sale of capital assets. The ownership interest of SB 46 continues with the common law that interest is personal property. The ownership interest would be a capital asset. The sale of partnership interest, is a sale of a capital asset.

Senator Towe asked for an explanation of page 8 and page 22. Professor Bahl replied the reference to the certified copy of the filed statement, refers to the filed statement with the Secretary of State. Partners need to file with the Secretary of the State first, then the county, with respect in filing business documents and documents relating to personnel property. With respect to real property, it is still appropriate to file with the county. The bank would be advised to verify a certified copy most recently filed with the Secretary of State. Under SB 46 we would have commercial certainty of who has authority by requiring a filing.

Senator Grosfield questioned the cost of the filing fee and the waiting period. Senator Bahls told the Committee the public is not assumed to have notice of the filing until 90 days after the filing. Senator Jacobsen stated the range of fees would be $15 to $20. The fees would increase over time.

<u>Closing by Sponsor</u>:
Senator Halligan closed on SB 46.

<u>HEARING ON SB 68</u>

<u>Opening Statement by Sponsor</u>:
Senator Blaylock, District 43, stated from 1889 till 1972 Montana could not be sued unless given permission. In 1972 it was adopted in the Constitution the right to sue if there was negligence on part of an employee of the State of Montana that had caused serious accidents. Because of the enormous exposure of roads in Montana the suits came in and the settlements were large. Montana could not afford to continue this kind of thing. Rather than do away with what was in the Constitution, the Legislators added a sunset and put limits on what the state was liable for; $700,000 per person; and $1,500,000 if more than one person is involved. SB 68 repeals the sunset and would make these limits and this law permanent. SB 68 does not prevent

future legislators to raise or lower these limits. Senator Blaylock urges your favorable consideration of SB 68.

Proponents' Testimony:
Brett Dahl, Department of Administration, stands in support of SB 68. Mr Dahl stated the purpose of SB 68 seeks to remove the termination date on the existing courts liability limits which was established in 1986 by the Legislature. The removal of the termination date allows the limits to continue indefinitely, but doesn't preclude interested parties from seeking to change limits in the future. The limits are important to the cities, counties and Montana because we self insure. Many of the services provided by the state include operating prisons and health care facilities. Law enforcement regulatory activities are virtually uninsurable so what these limits would do is reduce the uncertainty in funding these risks. If there are increases in the limits it could have a significant potential financial impact on the self insurance fund. Mr. Dahl urges the Committee to adopt SB 68 in the present form.

Alec Hansen, General Manager of the Montana Municipal Insurance Authority, operates a self insurance pool for 105 cities and towns in Montana. This program was created in 1986 when the commercial carriers either abandoned our cities and towns or jacked the rates through the roof. This program has worked well and has provided insurance coverage to members at affordable and predictable rates. This program was written around these limits. We base the premium estimates on these limits and the protection they provide. Failure to pass SB 68 would cost an estimated 34% in premium increases. Exhibit #4. This is a tremendous amount of money for cities and towns. Mr. Hansen urges the Committee to pass SB 68 as it is and not put the limits on another sunset. Mr. Hensen states this is a serious issue and urges the Committee to send SB 68 to the floor with a DO PASS recommendation.

Don Waldron, Montana Rural Education Association, will go on record in support of SB 68.

Bruce Moers, Montana School Board Association, states the need to get rid of the sunset. Schools are also impacted with premium rate increases. Mr. Moers urges consideration and recommends DO PASS SB 68.

Dennis Flich, City of Billings, will go on record in support of SB 68. Mr. Flich told the Committee the current building premium today is $325,075 for liability coverage. If these limits were taken off from the liability, the 34% increase would be over $110,000. This past year Billings had 296 single family building permits issued and if we estimated those at $125,000 market value, it would be about $390 city tax per house. That would just cover the increase in liability insurance.

Opponents' Testimony:
Rusell Hill, Montana Trial Lawyers Association, read from prepared testimony. Exhibit #5.

Questions From Committee Members and Responses:
Senator Grosfield asked Mr. Hill what he would suggest in increasing the limits to. Mr. Hill would not make a suggestion.

Senator Grosfield asked about the Indiana example. Mr. Hill replied he reviewed figures prepared by the tort claims division and between 1986 and 1991 no claims were reduced because of this provision, and is not aware of any in the last two years.

Senator Grosfield questioned Mr.Hill concerning the injuries and damages that result in public assistant. Mr. Hill replied we're not talking about whether or not they can recover, we're talking about a maximum amount of what they can recover.

Senator Towe questioned Mr. Hill about eliminating or continuing the sunset provision. Mr. Hill replied it would weigh in as a factor in a court consideration because if you don't have the sunset provision, the legislation can still come back at any point. Without a sunset provision, the statute and capital amounts are frozen in stone. This is not a flexible statute.

Senator Towe asked Mr. Hill about the 34% increase in higher premiums. Mr. Hill responded insurance crosses risks and costs by refusing to pay premiums or refusing to acknowledge the cost or risks of activities. It doesn't erase those risks or activities, it simply shifts them.

Senator Grosfield questioned Alec Hansen on a guesstimate of what the number would be if we were to lower the liability limits. Mr. Hansen did not have the information.

Chair Yellowtail, asked if we anticipated bills that would address the question of raising or adjusting these limits and if SB 68 does not pass would we require a bill that would extend the sunset. Mr. Hansen responded by saying that it is the legislators prerogative to remove the termination date and end the limits indefinitely or to come up with a new sunset date.

Senator Towe stated SB 68 requires a 2/3 vote, because it is limiting the sovereign community of the State of Montana.

Closing by Sponsor:
Senator Blaylock stated many of us wish we would not have to put limits on SB 68 and anyone who has been injured can be recompensed to the full extent of what the court decides. However, the State of Montana can not do that. Senator Blaylock feels if we do not put limits on SB 68 the state would have nothing. This may be unfair when there has been multiple

injuries, and people cannot be recompensed to the degree that they should be, but this is better than nothing.

HEARING ON SB 64

Opening Statement by Sponsor:
Senator Doherty, District 20, stated SB 64 would exempt employees and attorneys to the registration requirement for process servers. Process servers serve subpoenas to inform people to show up at the Court House in order to give testimony in a civil action. It would be simpler and less expensive for attorney employees to serve the subpoenas. We questioned if SB 64 would provide protection if an employee of an attorney falsely swore to an affidavit that they provided service to someone, and that person didn't show up, would they be subject to contempt of court because they disobeyed a valid courts subpoena. SB 64 provides protection so the person is not subject to the requirements when the employee is acting in the course of their employment. SB 64 is a simplification bill that may result in less expense in litigation. Senator Doherty stated this is a good bill and it should pass.

Proponents' Testimony:
Russell Hill, Montana Trial Lawyers Association will go on record in support of SB 64.

Opponents' Testimony:
Gary Dupuis, G.A.R.D, as civil process service, read from prepared testimony. Exhibit #6.

A letter from a registered processor, Jim Nixon, exhibit #7, was presented in opposition of SB 64.

Richard Rowe, ASAP Services, stated his inability to identify the need for SB 64. The requirement to be a process server is a test which is put forth by the State of Montana. A registered process server enables the citizens of Montana to know who is knocking at their door. A registered processor is diligent and discreet. Employees serving the process for the employer may be prone to be judgmental and will service with prejudice. The registered process server is required by law to serve both parties in litigation. If SB 64 passes in present form it would allow any licensed attorney to broker services of process including those from outside sources to his employee. Mr. Rowe asked to exclude this process served by the employee, and be limited to that which is signed by the attorney he is employed for.

Questions From Committee Members and Responses:
Senator Grosfield questioned Senator Doherty and Mr. Dupois the purpose of a 10 service minimum. No one could answer the

question.

Senator Rye asked Mr. Dupois whether process serving is competitive. Mr. Dupois replied in the State of Montana there are 45-50 registered processors. This is a sole business for many process servers. If SB 64 passed it could lessen the income of registered process servers throughout Montana.

Senator Rye asked Mr. Hill as to if there were more processors would we have more litigation. Mr. Hill responded by saying no, this is a matter of convenience.

Senator Rye asked Senator Doherty concerning the amendment proposed by Mr. Rowe. Senator Doherty replied the amendment would tie SB 64 down tighter. If an attorney has an employee serving a subpoena, the employee would have to file and affidavit stating they served the subpoena. If the person is not served, the employee along with the lawyer, will be in trouble for making a misrepresentation to the court. Senator Doherty stated he would accept the amendment.

Closing by Sponsor:
Senator Doherty closed by stating SB 64 is a matter of convenience and we are not going to stop using registered process servers. In some instances, before a trial, an attorney may need 10 or 15 witnesses subpoenaed and an attorney will have someone in the office dropping subpoenas off, more likely with a friendly witness or someone who knows that they are going to be involved in a lawsuit. SB 64 will be a matter of convenience and may reduce litigation costs.

ADJOURNMENT

Adjournment: 11:35 a.m.

Wm Yellowtail

BILL YELLOWTAIL, Chair

Rebecca Court

REBECCA COURT, Secretary

BY/rc

ROLL CALL

SENATE COMMITTEE Judiciary DATE 1-12-93

NAME	PRESENT	ABSENT	EXCUSED
Senator Yellowtail	X		
Senator Doherty	X		
Senator Brown	X		
Senator Crippen	X		
Senator Grosfield	X		
Senator Halligan	X		
Senator Harp			X
Senator Towe	X		
Senator Bartlett	X		
Senator Franklin	X		
Senator Blaylock	X		
Senator Rye	X		
Valencia Lane	X		

FO8

Attach to each day's minutes

SENATE JUDICIARY
EXHIBIT NO. 1
DATE 1-12-93
BILL NO. SB46

TESTIMONY OF
STEVEN C. BAHLS
in support of
Senate Bill 46
(Montana Uniform Partnership Act)

My name is Steven Bahls. I have the pleasure of serving as a Professor and the Associate Dean at the University of Montana School of Law. For the past eight years, I have taught the Agency and Partnership course at the School of Law. I also teach agricultural law. Prior to teaching, I practiced law for six years, primarily representing small businesses. I am the chair of the State Bar's Business Law Committee of the Tax, Probate and Business Section.

I am here today to support SB 46 (the Montana Uniform Partnership Act). The proposed bill was drafted and approved in 1992 by the National Conference of Commissioners on Uniform State Laws. I am here today at the request of the Montana Commissioners. The National Conference of Commissioners on Uniform State Laws has drafted numerous pieces of legislation already adopted in Montana, including the Uniform Probate Act and the Uniform Commercial Code. Its high quality, uniform legislation sets the standard for legislation in the United States. Please permit me to include in the record, the official comments to the Uniform Partnership Act as prepared by the National Conference of Commissioners on Uniform State Laws.

Montana partnerships are currently governed by Chapter 10 of Title 35. The current law was drafted 78 years ago by the Uniform Law Commissioners. It was adopted in Montana in 1947 and has remained relatively unchanged since then. The current law governs the definition of a partnership, the duties of partners to each other, the ability of partners to enter into contracts, the partners obligations to creditors and dissolution of a partnership. In short, the existing law governs the internal affairs of a partnership.

The new Uniform Partnership Act, as embodied in SB 46, does not greatly expand the scope or coverage of the existing law; instead it updates the law to reflect modern commercial realities. It also clarifies numerous ambiguities in the law. The distilled experience of 78 years since the promulgation of the original Uniform Partnership Law provides the basis for these changes.

Senate Bill 46, though drafted by the Uniform Law Commissioners, has been modified in one primary respect. Working with the attorney for the Office of the Secretary of State, I have drafted provisions for the optional filings that are consistent with the filing provisions of the Secretary of State for other business organizations. With this exception (and the exception of stylistic changes proposed by the Legislative Council) the Act remains a Uniform Act.

It is quite important for Montana to provide its businesses with an up-to-date partnership law. Partnerships and those dealing with partnerships should not be subjected to the uncertainty and ambiguity found in our existing out of date law. Partnerships exist when two or more persons carry on a business for profit as co-owners. People doing business together may be partners even if they do not have a written partnership agreement. It is one of the few types of business organization that the law permits to be formed without a required filing with the secretary of state. Partnerships are often formed without the aid of an attorney. Because many partnerships do not have the benefit of expert legal advise or a written partnership agreement, it is important that the law clearly and unambiguously provide for sensible governance of partnership affairs.

Though most of the proposed changes in the law could be described as in the nature of housekeeping (that is, clarification of ambiguities), several of the changes are more significant. I would like to describe these changes.

1. <u>Nature of a Partnership</u>. The current law does not clearly state whether a partnership is considered an aggregation of individuals or an entity. The provisions of the current law lead to inconsistent conclusions. The issue of whether a partnership is an entity or an aggregation of individuals is important in resolving several questions:

    - Can an individual partner bind the partnership even if his or her acts are not authorized by the partnership?

    - How is property to be held (e.g. by the partnership or in the joint names of the partners)?

    - Does a partnership continue when a partner dies?

    The new law clearly provides that a partnership is an entity. Section 11. As a result, under the new law:

    - Property can be held by the partnership. The cumbersome provision of the old law, that property is owned as tenants in partnership, no longer applies. It is the entity which conveys the property. Section 13 and 16(a)

    - The partnership, as an entity, can effectively prohibit partners from binding the partnership to a contract, unless the contract is authorized. Section 17

    - A partnership is no longer dissolved when an individual partner dies or resigns from the partnership. The old rule that a partnership is dissolved upon the death or resignation of a partner was cumbersome and created substantial problems for partnerships (especially partnership not employing an attorney) wishing to continue after the death or dissolution of a partnership. Section 18

2. Statement of Authority. The new law continues the previous general rule that partners are agents of each other. Section 15. At times, in practice, this rule can lead to unintended results. Sometimes partners are able to bind a partnership to a contract, even though the contract was not authorized by the other partners. Section 15. The new law would provide a vehicle to protect the partnership from a partner, who without authority, sells partnership assets or binds the partnership to a contract. The new law permits the filing of a statement of partnership authority with the Secretary of State. This statement can be used to limit the power of certain partners. Section 17.

The problem of partners entering into contracts without clear authority to do so is a significant problem. *See Walsh v. Ellingson Agency*, 188 Mont. 367, 613 P. 2d 1381 (1980) (dispute over whether one partner could convey property on the objection of another partner) and *Ditzel v. Kent*, 131 Mont. 129, 308 P. 2d 628 (1957) (dispute over whether partners agreement to pay a commission bound the partnership). Consider as an example the family farm partnership. Suppose the partners intend that only the first generation (not the second) partners have the authority to sign contracts that bind the partnership. Under the current law, contracts signed by the second generation might nonetheless by enforceable if the second generation partners appear to be acting with apparent authority. MCA § 35-10-301. Under the new law, a filing could be made with the secretary of state, disclaiming the authority of the younger partners to enter into transactions on behalf of the partnership. Section 17(1) and (2). If the younger generation attempts to transfer property in violation of the limits of their authority on record with the secretary of state, the transaction is ineffective.

The new law permits partners to effectively agree who has authority and, by filing a public notice with the secretary of state, to put creditors or others on notice who has authority. The result is increased certainty in commercial contracts.

In addition, existing law provides that a partner retiring from a partnership (or a deceased partners estate) can be liable for the debts of the partnership even if those debts arise after the date of the partners death or retirement. See MCA § 35-10-607(b). The new law permits partners to eliminate their liability for debts incurred after their death or retirement by filing a notice of their disassociation with the partnership with the secretary of state. Section 42. The family farm partnership might again serve as a good example. Suppose Dad retires and moves

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off the farm, leaving the farm to his children with whom he operated the farm in partnership. Unless Dad notified each farm creditor of his retirement and published notice in the local newspaper of his retirement, under existing law, Dad could be liable for <u>new</u> debts incurred by his children after his retirement. Under the new law, Dad can protect himself from liability for most new debts by filing a simple notice with the secretary of state.

3. <u>Fiduciary Responsibility</u>. The current law is largely silent as to the partners duties toward each other. As a result, it is up to the courts to establish the extent of the duty owed from one partner to another. Courts in various jurisdictions have taken inconsistent approaches. Some courts are quick to second guess the actions of partners because they are "trustees." *See, e.g. Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928), (the classic statement of partners' duties, adopted in Montana in *Murphy v. Redland*, 178 Mont. 296, 583 P.2d 1049 (1978)). Other courts are less eager to second guess the actions of partners, indicating that so long as the partner was acting in good faith the partner will be protected. *Johnson v. Weber*, 166 Ariz. 528, 803 P. 2d 439 (1990); *Duffy v. Piazza Construction, Inc.*, 62 Wash App. 19 815 P. 2d 267 (1991). Montana law is not clear about this issue. As such, to increase certainty, the new law provides

- Partners must act in good faith toward each other (Section 28(4));

- Individual partners may not make a profit at the expense of the partnership (Section 28(2)); and

- Courts may not second guess management decisions, unless the partner making the decision acted with gross negligence or acted recklessly (Section 28(3)).

The impact of the rule may again be illustrated by again turning to the family farm partnership. Suppose Dad, as a partner, substantially expands the farm by buying additional acreage with borrowed money. Further, suppose Dad's motivation is to expand the farm so that the farm might also support his daughter, who just graduated from the ag school in Bozeman. Let's assume that shortly after buying the land interest rates increase and land prices plummet. Suppose the farm is foreclosed and the children sue Dad for his alleged misjudgment in expanding the farm partnership for the benefit of his daughter. The new law would protect Dad from a court, with the benefit of 20/20 hindsight vision, second guessing his judgement unless Dad was grossly negligent or acted recklessly. By protecting Dad and other partners from second guessing, Dad and the other partners are freer to take calculated risks and make the judgements that entrepreneurs must make.

4. Dissolution. Under the existing law, a partnership dissolves when a partner dies or when a partner retires or quits the partnership. MCA § 35-10-603. When a partnership dissolves, any partner who has not wrongfully dissolved the partnership, may wind-up the partnership. MCA § 35-10-607(1), 609 and 610(1). Winding up usually consists of selling the assets of the partnership and applying the cash proceeds to pay the liabilities and the amounts due the partner MCA § 35-10-610(1).

   This existing statutory scheme is often inappropriate. Very often the remaining partners in a partnership desire to continue its business and simply buy out the interest of the retiring or deceased partner. To accomplish the goal of having the partnership continue, under existing law, often requires complex legal documentation.

   Under the proposed law, partnerships do not automatically dissolve when a partner dies, retires or otherwise disassociates. Section 38. Instead, the partnership may continue, if the partner's interest is purchased. The new law properly recognizes that a withdrawing partner, whose interest the partnership is willing to purchase, should not be allowed to force dissolution.

   Allow me to once again return to the family farm partnership. For purposes of this illustration, assume the family farm partnership has no written agreement and the partners have not agreed on a specific date of dissolution. Suppose Junior, a partner in the family farm partnership, decides to go to law school. After taking a course in partnership law and learning of his rights, he decides to quit the partnership. Under existing law, by quitting the partnership, Junior has forced dissolution. MCA § 35-10-603. Assume that the remaining members of the family wish to continue. Under existing law, Junior (contrary to the other partners' wishes) may wind-up the partnership. MCA §§ 35-10-607(1)(a) and 35-10-609. In doing so, Junior may force the liquidation of the assets of the farm to pay the liabilities and amounts due to the partners. MCA § 35-10-610(1). The winding up process, under existing law, could result in the loss of the family farm. The new law eliminates this risk by permitting the partnership to buy Junior's interest without dissolving the partnership. Section 38.

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The existing law is appropriate for partnerships operating in the first half of this century. It is no longer appropriate for partnerships operating in 1993. At the turn of the century most partnerships were relatively small partnerships with relatively few partners. Partners, perhaps, were more trusting of each other and less eager to ask a court to second guess decisions made by their co-partners. In today's increasingly complex world, it is not uncommon to have 20 or more partners in a partnership. Courts are asked with increasing frequency to resolve partnership disputes. Partners, and courts, need a clear law that recognizes today's commercial realities.

I recognize that this is a lengthy bill with many technical changes. Please remember, however, that the act is a Uniform Act, drafted by the many leading authorities in the nation. These experts, as have I, studied this bill line for line. Continued uniformity in the law is highly desirable. Failure to adopt this bill will mean that Montana will eventually be out of step as neighboring states adopt this Uniform Act. Montana businesses deserve the best, most modern, partnership law available. Adoption of SB 46 will cost the state nothing (any costs associated with additional filings are to be passed on as filing fees-Section 6(6)), but will provide added certainty for businesses operating as partnerships. This legislation, if adopted, will provide a quality partnership law serving partners well into the twenty-first century.

UNIFORM PARTNERSHIP ACT (1992)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 1-12-93
BILL NO. SB 46

Introduction

Partnership law in the United States has been derived from one source, the Uniform Partnership Act, since it was originally promulgated by the Uniform Law Commissioners in 1914. The Uniform Act is the law of partnership in the United States.

But 78 years is a long time in the reckonings of the law, and in 1992 the Uniform Law Commissioners have promulgated the first revision of the Uniform Partnership Act. The new Act reflects both continuity and change. On the one hand, it refurbishes a venerable form. Partnership as a form of business organization precedes corporations, limited partnerships, business trusts, and just about everything else except the most basic business organization of all, the sole proprietorship. And in UPA (1992), a partnership retains its basic, historic character.

But at the same time, the partnership form has to be adapted to the changes in the way business is done and the way it is expected to be done far into the next century. The change reflected in UPA (1992) is of an evolutionary sort. The distilled experience of the past 78 years is the basis for the new text.

A partnership is a form of business organization. It exists whenever more than one person associates for the purpose of doing business for profit. The notion is that the partners join their capital and share accordingly in profits and losses. They, also, share control over the enterprise and subsequent liabilities. Historically, every partner is equally able to transact business on behalf of the partnership. Creditors of the partnership are entitled to rely upon the assets of the partnership and those of every partner in the satisfaction of the partnership's debts. The character of any partnership depends upon the agreement of the partners.

A partnership may be as simple as two people meeting on a street corner and deciding to conduct some business together, arising from no more than verbal agreement and a handshake. A partnership may, also, be as complex as a large law firm, with tiers of partners and varying rights and obligations, memorialized in extensive written agreements. Partnership law must accommodate them all.

The Uniform Partnership Act governs the creation of a partnership, establishes what the nature of this business organization is, and provides some rules respecting the rights and obligations of partners among themselves, and those between partners and other parties that do business with the partnership and the partners. It provides the rules that govern the dissolution of a partnership when the appropriate time comes to dissolve it. The original Act did this, and the UPA (1992) is designed to do the essential task much better. UPA (1992) adds, as well, concepts not ever contemplated in the 1914 Act - the concepts of merger and conversion.

This summary is an effort to highlight the essential differences between the 1914 Act and UPA (1992). It cannot be a comprehensive review, but is designed to point out to the reader the progress of 1992 over 1914.

Nature of a Partnership

The first essential change in UPA (1992) over the 1914 Act that must be discussed as a prelude to the rest of the revision, concerns the nature of a partnership. There is age-long conflict in partnership law, over the nature of the organization. Should a partnership be considered merely an aggregation of individuals or should it be regarded as an entity by itself? The answer to these questions considerably affects such matters as a partner's capacity to do business for the partnership, how property is to be held and treated in the partnership, and what constitutes dissolution of the partnership. The 1914 Act made no effort to settle the controversy by express language, and has rightly been characterized as a hybrid, encompassing aspects of both theories.

It is not necessary to go into the dispute with much detail here, because UPA (1992) makes a very clear choice that settles the controversy. To quote Section 201, "A partnership is an entity." All outcomes in UPA (1992) must be evaluated in light of that clearly articulated language.

What are some of the outcomes of this decision to treat a partnership as an entity in UPA (1992) that are not part of the hybrid 1914 Act? The 1914 Act expressly permits a partnership to hold property as a partnership. The difference is the interest that each partner holds. In the 1914 Act, a partner was treated "as a co-owner with his partners of specific partnership property holding as a tenant in partnership." In UPA (1992), a partner has his or her partnership interest, but is not a co-owner of specific partnership property. The entity holds the specific property. The partners have their interest in the entity.

The 1914 Act approach, which reflects the retention of aggregate theory in that hybrid Act, constitutes a serious impediment to transferring property to and from the partnership. The 1914 Act, because of adopting aggregate theory in so far as ownership of property goes, has to provide rules that carefully limit and restrict the transfer powers of partners, so that individual partners cannot convey their ownership rights in ways to injure and inevitably defeat the partnership. Even so, subsequent cases have revealed the co-ownership aspect of partnership to be a serious weakness in partnership structure. That serious weakness is not continued into UPA (1992).

Dissolution of the partnership is another area in which selection of entity versus aggregate theory. Dissolution will be discussed a little later, but dissolution occurs whenever a partner disaggregates under the 1914 Act, but not necessarily every time he or she dissociates from the entity under UPA(1992). Partnerships based upon aggregate theory are simply more fragile than partnerships based upon entity theory.

__Creation of a Partnership__

Creation of a partnership requires association of two or more persons to do business for profit. The concept is not materially different between the 1914 Act and UPA (1992). What UPA (1992) does is to put expressly what has been regarded as implied in the 1914 Act. By and large the rules of the 1914 Act have been regarded as default rules, rules that apply in the event that there is no express provision in the partnership agreement. The reliance upon implication leaves certain gray areas that have caused problems. How far can a partnership agreement go in abrogating the fiduciary responsibilities of a partner to other partners, for example?

UPA (1992) clearly expresses the primacy of the partnership agreement. The agreement applies, and the rules of UPA (1992) are regarded as default rules, with the exception of certain rules that protect partners. For example, a partner's duties of loyalty and good faith cannot be abrogated by agreement. The agreement cannot take away a partner's right of access to the partnership books. In general, however, the partnership agreement expressly controls over the language of the statute in UPA (1992).

__Statement of Authority__

A partnership is created anytime individuals associate together to do business. Under UPA (1992) the partnership formed is an entity, not an aggregation of individuals. UPA (1992) makes it clear the partnership is controlled by the agreement of the partners. But the partnership must function to do business, and the 1914 Act treats partners as co-equal in the conduct of that business. Any partner is an agent of the partnership. Any partner has the capacity to transfer property on the partnership's behalf. Any person doing business with a partnership is entitled to rely upon these basic rules to bind the partnership. To a large extent, these rules continue to apply in UPA (1992).

But UPA (1992) adds a new partnership capacity to the rules of the 1914 Act. The adoption of entity theory, again, provides some different perspective. Entities such as corporations and limited partnerships are founded upon the filing of a certificate in the appropriate state office. UPA (1992) does not require filing a certificate to found a partnership, preserving the availability of the partnership form of organization to both large and the small entities. It, however, permits the filing of a statement of partnership authority. The statement can be used to limit the capacity of a partner to act as an agent of the partnership, and limit a partner's capacity to transfer property on behalf of the partnership. The statement is voluntary. No partnership need file such a statement, nor is the existence of the partnership dependent fiduciary responsibilities of each partner to the other partners.

UPA (1992) is not so silent. It articulates duties of loyalty and care to which each partner is to be held. There are baseline standards of conduct, therefore, that a partner has to meet. No agreement can abrogate these baselines. In addition, there is an express good faith obligation to which each partner is subject.

The duty of loyalty includes the duty expressed in the 1914 Act, but adds to it. There is a duty not to do business on behalf of someone with an adverse interest to the partnership's. A partner must refrain from business in competition with the partnership.

The standard of care is gross negligence or reckless conduct. A partner would be liable for such conduct, but not for ordinary negligence. The good faith obligation simply requires honest and fair dealing.

A partner may be sued more broadly in UPA (1992) than is the case in the 1914 Act. The earlier Act limited legal action to an action for an accounting.

Dissolution

A partnership dissolves under the 1914 Act upon the happening of specific events, either the end of the prescribed term of the partnership, as agreed by the partners, or when a partner dissociates, rightfully or wrongfully, with the partnership. At dissolution, the business of the partnership has to be wound up and fruits of the enterprise distributed to the partners - after the creditors are paid, of course.

Automatic dissolution of the partnership after dissociation of a partner does not take place under UPA (1992). Only a partner who dissociates with notice of "express will to withdraw" causes the dissolution of the partnership. Thus, if a partner dies or is simply bought out, there is not automatic dissolution. Of the changes that UPA (1992) makes over the 1914 Act, this may be the most significant. The ordinary dissociation of a partner does not mean the dissolution of the entity.

Dissociation entitles the partner to have his or her interest purchased by the partnership, and terminates his or her authority to act for the partnership and to participate with the partners in running the business. Otherwise the entity continues to do business without the dissociating partner. No other characteristic of a partnership under UPA (1992) better illustrates the adoption of entity theory.

Conversion and Merger

UPA (1992) has absolutely new provisions on "conversion" and "merger." A partnership may convert to a limited partnership or a limited partnership may convert to a partnership under these new statutory rules. A partnership may merge with another partnership or limited partnership, forming an entirely new entity, under the new rules of UPA (1992).

Since a partnership is really a matter of agreement of the partners, there is no absolute barrier to either conversion or merger for a partnership under the 1914 Act. It would require unanimous consent of the partners, and a winding down process for the prior partnership or partnerships. What the statutory provisions of UPA (1992) do is to provide a process, and to permit agreement to less than unanimous consent of all partners to accomplish either conversion or merger. Under UPA (1992), a partnership agreement can specify that either conversion or merger can be accomplished with less than unanimous consent. The agreement controls.

Conclusion

These are some of the principal advances of UPA (1992) over the 1914 Act. Partnership, as a fundamental form of business organization, needs to be updated for the next century. UPA (1992) provides the needed update.

Founded in 1892, the National Conference of Commissioners on Uniform State Laws is a confederation of state commissioners on uniform laws. Its membership is comprised of 300 practicing lawyers, judges, and law professors who are appointed by each of the 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands to draft uniform and model state laws and work toward their enactment.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 1-12-93
BILL NO. SB46

UNIFORM PARTNERSHIP ACT (1992)

Contents

ARTICLE 1. GENERAL PROVISIONS

ARTICLE 2. NATURE OF PARTNERSHIP

ARTICLE 3. RELATIONS OF PARTNERS TO PERSONS DEALING WITH PARTNERSHIP

This exhibit is 182 pages long. The original is stored at the Historical Society at 225 North Roberts Street, Helena, MT 59620-1201. The phone number is 444-2694.

ARM TECH

ADVANCED RISK MANAGEMENT TECHNIQUES, INC.

7919 PEBBLE BEACH DRIVE, SUITE 207, CITRUS HEIGHTS, CA 95610 • (916) 965-8324 • FAX (916) 965-4880

January 8, 1993

SENATE JUDICIARY
EXHIBIT NO. 4
DATE 1-12-93
SB 68

JAN 11 1993

Mr. Alec Hansen
Executive Director
Montana League of Cities & Towns
208 N. Montana Avenue, Suite 201
Helena, MT 59601

RE: **ESTIMATED TORT LIABILITY COST INCREASES**

Dear Mr. Hansen:

Currently in Montana, the statutory limit on tort liability judgements against public entities is $750,000 per person and $1,500,000 per occurrence. We understand that continuation of this damages limitation will be considered during the current Legislative Session.

You have requested Advanced Risk Management Techniques, Inc., as risk management consultants to the Montana Municipal Insurance Authority (MMIA), to estimate the cost to the cities and towns of the MMIA if such tort limit were increased to: 1) $1,000,000 per person/$2,000,000 per occurrence; 2) $1,500,000 per person/$3,000,000 per occurrence; and 3) if there were no limit.

We have prepared our cost estimates based upon the actuarial projections contained in the March, 1992 report of the MMIA's actuarial consultant, Allen Hall, FCAS, MAAA, of Capitol Actuarial Consultants. Our results are summarized below and reflect FY 1992/93 estimated costs.

Tort Limit	Estimated Claims Cost	Increase	Percentage
$ 750,000 / 1.5 million	$ 2,261,000	--	--
$ 1,000,000 / 2 million	$ 2,622,760	$ 361,760	16%
$ 1.5 million / 3 million	$ 2,894,080	$ 633,080	28%
Unlimited	$ 3,029,740	$ 768,740	34%

Please call if you have any questions.

Sincerely,

Gregory L. Trout

Gregory L. Trout
Prinicpal

Headquarters
25251 PASEO DE ALICIA, SUITE 100, LAGUNA HILLS, CA 92653-4694 (714) 472-8324 • FAX (714) 472-9228
Independent Consultants

Montana Trial Lawyers
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Governor

January 12, 1993

SENATE JUDICIARY
EXHIBIT NO. 5
DATE 1-12-93
BILL NO. SB 68

Sen. Bill Yellowtail, Chair
Senate Judiciary Committee
Room 325, State Capitol
Helena, MT 59624

RE: SB 68

Mr. Chair, Members of the Committee:

Thank you for this opportunity to express MTLA's opposition to SB 68, which would eliminate the current sunset provision in Montana law regarding limits on governmental tort liability. MTLA opposes SB 68 because of several concerns:

1. Liability caps operate to disadvantage only the most seriously injured victims of wrongdoing. Only catastrophic injuries and damage will trigger the \$750,000/\$1.5 million caps contained in Sec. 2-9-108, MCA, and those are precisely the injuries and damages most likely to require public assistance from other sources (including other agencies of government) if they cannot recover from the negligent, even grossly negligent, governmental entities at fault.

2. Tort liability serves two purposes: it not only compensates victims, but it also deters wrongdoing, often far more effectively and efficiently than administrative bureaucracy. The liability caps contained in Sec. 2-9-108, MCA, pervert the essential cost-benefit analysis which government must perform to properly serve its citizens. Governmental operations involving the greatest potential for injury or damage also enjoy, under Sec. 2-9-108, MCA, the greatest insulation from incentives to perform their duties properly. Liability caps, in other words, don't remove economic risks--at best they transfer those risks, and at worst they substantially increase those risks.

3. Ironically, liability caps in the long run may actually <u>increase</u> the amount paid in claims. Indiana, for example, enacted caps in medical-negligence cases in 1975 and soon discovered that nearly 28 percent of Indiana claimants recovered the \$500,000 maximum, while only 13 percent of claimants in

neighboring Michigan and Ohio (neither with caps in place) recovered as much as $500,000. Why? Because the Indiana caps not only reduced exposure but also reduced incentives for defendants to vigorously defend claims.

4. The limits on governmental liability contained in Sec. 2-9-108, MCA, may be unconstitutional. The Montana Supreme Court declared similar caps unconstitutional in White v. State of Montana, 661 P.2d 1272 (1983) and Pfost v. State, 713 P.2d 495 (1985). MTLA believes that, when faced with an appropriate challenge, the Court will invalidate Sec. 2-9-108, MCA.

5. Even if the Montana Supreme Court, faced with an appropriate challenge to Sec. 2-9-108, MCA, applied a more lenient standard of review than it applied in White and Pfost, MTLA believes that it would invalidate caps on governmental tort liability which do not include a sunset provision. Such caps, regardless of whether they are rationally related to a legitimate government interest when enacted, impact victims more severely every year because of inflation, cost-of-living increases, and similar factors. Sunset provisions at least guarantee that the Legislature will re-evaluate and adjust, if necessary, the relationship between caps and the governmental interests served by those caps.

6. By repeatedly subjecting Sec. 2-9-108, MCA, to sunset provisions since its enactment in 1986, the Montana Legislature has continually evidenced its intention to remove governmental-liability caps unless advocates of those caps demonstrate that, in its application, the statute appropriately balances the interests of individual citizens and their government. Because so few claims for personal injury or property damage implicate the liability limits contained in Sec. 2-9-108, MCA, that statute has not yet been seriously tested either in court or in public.

7. When they apply, the liability caps contained in Sec. 2-9-108, MCA, will interact unpredictably with other statutory provisions such as joint-and-several liability and comparative negligence. In Colorado, for instance, a jury award to the victim of a 1990 propane gas explosion was first reduced because of statutory caps, then apportioned equally on the basis of fault among four different defendants, two of whom were out of business and uninsured. (See the accompanying March 3, 1992, Wall Street Journal article.)

Montanans and their Legislature have not yet directly confronted the injustice of such liability limits. MTLA respectfully urges this Committee to guarantee that they never have to. However, if this Committee determines to retain the governmental-liability limits contained in Sec. 2-9-108, MCA, MTLA respectfully suggests that it amend SB 68 to increase those limits and provide a new termination date of June 30, 1995.

Thank you for considering these comments. If I can provide additional information or assistance, please notify me.

Respectfully,

Russell B. Hill

Russell B. Hill, Executive Director

EXHIBIT 5
DATE 1-12-93
SB 68

THE WALL STREET JOURNAL A1
March 3, 1992

Tort Reform Test

Overhaul of Civil Law In Colorado Produces Quite Mixed Results

Frivolous Litigants Win Less, But Some Real Victims Are Not Made Whole

Insurers Who Left Return

By Milo Geyelin
Staff Reporter of The Wall Street Journal

DENVER—Everyone talks about legal reform, but Colorado has bet the ranch on it.

State laws here protect ski resorts and dude ranches from lawsuits over accidental injuries. Bars are virtually immune from legal blame for the acts of drunk patrons. Jury awards for pain and suffering top out at $250,000. And defendants can't be forced to ante up more in damages just because they have the deepest pockets.

Some of Vice President Dan Quayle's most controversial proposals to overhaul the civil justice system have found a testing ground here. Shocked by soaring commercial and municipal insurance rates, Colorado began reforming its civil system six years ago. Though many states have enacted laws to limit civil suits and damage awards, none has done more than Colorado.

The idea was to make insurance more available, knock down premiums and give businesses a breather from costly litigation. More than that, reformers wanted to redress what they perceived as an injustice: the prevalence of unpredictable and often unjustified jury awards spurred on by avaricious lawyers working for contingency fees.

Mixed Bag

So what's the verdict? Insurance companies that fled Colorado in droves in the mid-1980s, blaming lawyers and high jury awards, have come back, bringing with them increased competition. Limits on damages have helped lower insurance companies' payouts, leading to some drops in insurance rates. Lawsuits of dubious merit are filed less frequently now because they are harder to prove. Defendants seem less inclined to settle out of court just to avoid the nuisance and risk of litigating.

But, to the dismay even of some reformers, that's not the entire story. Commercial insurance premiums have gone down much less than the business community anticipated. Auto insurance, the major insurance cost for consumers, is actually more expensive than it was before the legal reforms were passed.

Frivolous suits are less likely to reap big awards, but so are lawsuits that nearly anyone would consider valid. Cases involving catastrophic injury to the plaintiff and egregious wrongdoing by the defendant are highlighting the flip side of reform: The most seriously hurt are most likely to see their damages reduced the most under the new laws.

Roxie Lypps's Dilemma

A propane gas explosion in the mountain resort of Crested Butte in March 1990 illustrates some of the unexpected problems with legal reform. Investigators found that the gas supplier, Salgas Inc., had violated more than a dozen state safety regulations. Three people were killed, and 14 were injured. One of the injured, Roxie Lypps, a former teacher and part-time bank employee, was buried beneath bricks and debris and had severe burns over 40% of her body. After two years of painful burn therapy and skin grafts, Ms. Lypps is still unable to work full time and faces an increased risk of skin cancer.

A Denver state court jury awarded Ms. Lypps $1.5 million last November. Of that amount, $486,000 was for punitive damages intended to punish Salgas and its parent, Empire Gas Co. of Lebanon, Mo., for negligence. The rest was compensation for injuries. But in December, a judge was forced to reduce the total amount by more than half. One reason: The jury's award of $600,000 for pain and suffering was over the state limit of $250,000.

That reduced Ms. Lypps's compensatory damages to $621,642. Then another Colorado law came into play: Individual defendants in civil suits can't be forced to pay more than their share of the blame when others at fault have no money. In this case, Empire and Salgas blamed the blast on a repair two previous owners had made. The previous owners were out of business and uninsured. But the jurors weren't told this because another Colorado law prohibits lawyers from disclosing whether defendants have insurance. When the jury divided blame equally among all four companies, the net effect was to cut Ms. Lypps's remaining compensation to $310,822.

'Victims Again'

That, in turn, knocked down the punitive damages because Colorado law prohibits juries from assessing more in damages to punish wrongdoers than they award to compensate victims. Ultimately, Ms. Lypps expects to receive a total of about $316,000 after all her legal fees and other expenses are deducted.

"I'm well beyond [concern over] the money," says Ms. Lypps, 47 years old. "But the court system should allow the jury to award what they feel is fair. . . . To me it's totally unfair. We end up being the victims again."

In cases of serious injuries such as hers, what remains may not be enough to pay for medical care and rehabilitation. Because defendants and their insurers are now insulated from huge damages, costs are transferred to state and federally funded health programs when victims' insurance limits run out.

In Longmont, Colo., seven-year-old Leah Speaks has been in a permanent coma since last May, when her mother was killed and her sister badly injured by an uninsured drunk driver coming from a bar. The driver had knocked back five beers and six whiskey shots, enough in many states to have the bar held legally responsible for the accident.

But in Colorado, damages against bars that serve customers too much to drink are limited to $150,000 and apply only if the bartender acted willfully. The bar in this case settled out of court for the full amount. But it was hardly enough to pay for a lifetime of medical and nursing care. Federal Medicaid and disability payments are already footing the bill, says Leah's aunt and guardian, Roberta Gies.

Leah Speaks and Roxie Lypps weren't the kind of victims legal-reform advocates had in mind when they began overhauling the state's civil justice system in 1986. The reformers were aiming at cases such as the one involving Oscar Whitlock, a University of Denver student who became paralyzed in a trampoline accident during a fraternity party.

Mr. Whitlock blamed the university for not supervising the fraternity, and in 1985 an appeals court upheld a jury award of $5.3 million. Though ultimately overturned, decisions like this offended basic beliefs here that individuals must bear responsibility for their own risks.

Such multimillion-dollar jury awards for seemingly meritless lawsuits also were being blamed for Colorado's deepening insurance crisis. Insurers said they could no longer accurately predict risk. Throughout the state, thousands of commercial and municipal liability policies suddenly were canceled in 1985. Rates and deductibles were soaring for other businesses and professions, while coverage declined. Rural physicians stopped delivering babies when rates for doctors who performed obstetric procedures doubled.

Dude ranches accustomed to paying $20 a year per horse for liability coverage were suddenly paying $400. Bars and restaurants saw rate increases of 600%. "A lot of my friends went bare," says John Ziegler, owner of Jackson's Hole Sports-Grill in Denver.

Underestimating Risk

Nearly half of Colorado's municipalities had their policies canceled or faced major restrictions. Even cities with excellent risk records felt the brunt. "Basically, there was no reason," says Darrell Barnes, risk manager for Colorado Springs, which had its $5 million liability policy canceled in September 1985. "Our claims never exceeded our premiums."

The problem was national, but Colorado seemed particularly hard hit. Some carriers, blaming lawyers, pulled out of the state altogether. Business groups and insurers banded together to urge reform. "If someone breaks into your house," Aetna Life & Casualty Co. warned in a full-page ad in Denver's Rocky Mountain News, "better hope they don't break a leg. Lawsuit abuse is out of control."

The extent to which lawsuits actually were to blame remains in dispute. Some state officials question whether there really was an insurance crisis. Colorado is among 18 states that filed an antitrust suit in 1988 against more than two dozen insurers. The suit alleged an industry conspiracy to pull out of the commercial and municipal liability market to limit exposure after years of risky underwriting.

Insurance companies deny the charges and are vigorously contesting the suit. But former Colorado insurance commissioner John Kezer says that at least part of the industry's crisis was self-inflicted. For years, insurers had been underpricing policies and "low-balling" risk to grab premium dollars and invest at record-high interest rates, he says. When those rates tumbled in 1985, the industry's cash surplus shrank. A nationwide contraction in insurance availability ensued, coinciding with a rise in claims.

68 Laws in Six Years

Unpredictable jury awards exacerbated the problem, increasing pressure on defendants to settle cases, says former University of Denver law school dean Edward A. Dauer, chairman of a task force that investigated the crisis. Colorado was not experiencing a "litigation explosion," he says, but the insurance industry "needed predictability in risk."

Legal reform became the clarion call, and Colorado's conservative, business-oriented legislature swiftly embraced it. Legislators enacted 68 laws over six years.

Lawyers became more reluctant to bring difficult-to-prove cases. Juries and judges became more skeptical of injury claims and angry about lawsuit abuse. "Juries who sit on auto-accident cases see themselves as more likely the victim of a lawsuit than the victim of an accident," says William Keating, a Denver plaintiffs' lawyer.

Injury cases, as a result, have become more expensive to pursue and difficult to prove, says another plaintiffs' lawyer, Gerald McDermott. "That in and of itself is going to result in some cases that have some merit not being pursued," he argues. For cases involving less than catastrophic injuries, jury verdicts and settlements have dropped.

Some Rates Drop

The laws have most directly helped professions and businesses that were singled out for special protection. Malpractice rates at physician-owned COPIC Insurance Co., Colorado's largest medical malpractice insurer, have dropped 17% since 1988, the year Colorado overhauled its malpractice law to limit liability and damages for doctors.

But, in general, the overall impact on the insurance policyholder has not been great. The insurers have benefited more than individual consumers. Industry losses over the past six years have fallen 30%, while general commercial liability premiums have dropped only 9% overall, according to A.M. Best Co., an independent data gatherer.

At Breiner Construction Co., a small contractor in Denver, commercial liability rates dropped 15% in 1990—the first drop after six years of increases. "It has come down," says Breiner's president, Rosemary Breiner, "but not as much as it went up."

State regulators haven't been able to determine the impact that legal reform has had on lowering insurance rates because commercial insurers don't have to reveal this information in public disclosures. Moreover, Colorado has benefited from an upswing nationally in the insurance industry's business cycle. That alone was largely responsible for bringing back insurers to the state, regulators say.

Meanwhile, automobile insurance rates, a major bone of contention with Colorado residents, have continued to rise steadily. Between 1988 and 1990, rates rose 8% on the average, nationwide. But in Colorado, they rose 9.2% in the same period. "That's what's creating some animosity on the part of myself and some others," grouses Assistant Senate Majority Leader Ray Powers, a conservative Republican who, like some other powerful legislators, is having second thoughts about continued reform efforts.

Highly publicized accidents such as the one at Crested Butte and another at Berthoud Pass, near Denver, are contributing to legislators' caution. In the Berthoud Pass incident, a state road worker clearing fallen rocks from the pass shoved a 6.7-ton boulder down the mountain in 1987, thinking it would roll just a few feet. The rock crashed into a tour bus 725 feet below, killing eight and injuring 25.

One tourist, Marcus Lang, wh[illegible] blinded and brain-damaged, linge[illegible] Denver General Hospital for almost a ye[illegible] before he went home to West Germany and died. Under Colorado's governmental im[illegible]munity law, toughened in 1986 and uphe[illegible] by the Colorado Supreme Court last mon[illegible] the state's total liability for all the victims combined couldn't exceed $400,000. Mr. Lang's medical bills alone exceeded $32[illegible] 000. (Mr. Lang's estate hasn't receiv[illegible] anything as yet from Colorado because the case is still being litigated.)

Many Colorado residents were appal[illegible] "I think we did need legal reform, but n[illegible] the pendulum has begun to swing back. [illegible] the person who needs compensation ca[illegible] get it," says Republican House Majo[illegible] Leader Scott McInnis, an early refo[illegible] supporter who now is backing off.

One bill he is backing this year would increase the potential liability of gove[illegible]ment entities. Another would create an [illegible]fice of consumer advocate to more agg[illegible]sively challenge insurance-industry rate requests. Continued legal reform also now faces a more skeptical legislature, sa[illegible] Republican House Speaker Chuck Ber[illegible]

Opposition is stiff for a bill the river rafting industry is pushing to protect itself against suits stemming from whitewa[illegible] accidents, including "getting lost or fail[illegible] to return." There is also little enthusiasm for a law auto insurers are pushin[illegible] [illegible]duce the minimum insurance covera[illegible] [illegible]quired in Colorado. Auto insurers are a[illegible] promoting a companion bill to limit accident victims' ability to sue over injuries.

Two years ago, identical auto-insura[illegible] proposals were under debate when Doro[illegible] Powers, the wife of the assistant Se[illegible] majority leader, showed up in the state capitol to lobby in opposition. Encased in a body cast to fuse her own fractured sp[illegible] from an auto accident, Mrs. Powers [illegible] years old, sat before a hearing committee and held up her hospital X-rays. "I never thought that this could happen to me," [illegible] said. "Now I know it can happen to [illegible] one of you, to anyone in this room, at any given time."

Not surprisingly, says Mr. McI[illegible], both bills died. "This was closer to ho[illegible]" he says, "Everybody on that committee knew her."

P. O. Box 900
East Helena, MT 59635

Gary A. Dupuis

G.A.R.D., Inc.

(406) 227-6566 Office
(406) 227-7452 FAX

A. Rene Dupuis

SENATE JUDICIARY
NO. 6
1-12-93
SB 64

January 12, 1993

Senator Bill Yellowtail, Chairman
Senate Judiciary Committee
Room 325
State Capital Building
Helena, Montana 59620

RE: SB 64

Dear Senator Yellowtail & Members

My name is Gary Dupuis and I am with G.A.R.D., Inc., a civil process service business. I am here today in opposition to SB 64, introduced by Senator Doherty. It is my opinion and the opinion of my industry that this bill would be a conflict of interest with the employee's of an Attorney who is bringing an action into a court of law. Service of process is done by a disinterested party, either the Sheriff's office or by a registered process server and this is what the affirmation the process server makes when he/she returns the original document back to the court. (*.....being first duly sworn upon oath, deposes and says that he/she is over the age of eighteen years of age and not a party or attorney for a party to the action to which this service of process relates.*)

In 1987, the Montana Legislature enacted MCA 25-1-1101, the Registration of Process Servers/Levying Officers and that it required that certain persons be certified, registered and bonded in order to do business within the State of Montana. This process of obtaining proper licensing, registration and bonding would eliminate the ordinary person coming off of the street and going into business, serving papers and possibly levying on judgments from the various courts within Montana and not having any knowledge of how to even begin such a project. Along with the certification, registration and bonding there would be control from the Department of Professional Occupational Licensing. Doctors, Lawyers, Nurses, Barbers, Land Surveyors, etc. all have licenses of some sort in order to do business in their respective occupations.

Sincerely,

Gary A. Dupuis, President

SENATE JUDICIARY
EXHIBIT NO. 7
DATE 1-12-93
BILL NO. SB 64

January 11, 1993

GN ACCOUNT SERVICES
JIM R. NIXON
State Licensed Process Server &
Levying Officer
P.O. Box 50099
Billings, MT 59105
(406) 256-5389 or
855-1470 (Cellular Phone)

TO: LADIES & GENTLEMEN OF THE COMMITTEE FOR SENATE BILL 64:

Prior to 1987, some counties in Montana had Constables, and they, together with the Sheriff's Department Civil Servers, handled all service of process. Budget cuts in most counties caused a reduction in the Sheriff's staff and Constable's Offices.

In 1987, the Montana Legislature passed House Bill 639, which created the occupation of Registered Process Server and Levying Officer. The bill required all candidates for this occupation to be tested to determine their qualifications, and if they passed the test, to become licensed and to obtain bonding.

This statute , at the present time, also allows anyone over the age of eighteen (18) years to serve Summons and Complaints and up to 10 other services of process during one (1) calendar year without being registered or bonded.

To my knowledge, no one in the Court Clerk's offices keeps a record of how many services are made annually, or by whom they are made. Their only concern is that the original documents and the return of service is returned to the Court file.

Senate Bill 64 seeks, once again, to exempt employees of law firms and attorney's offices from the license and bonding requirements which are now required of the general public. In my mind, this proposal is prejudicial and discriminatory. It would allow a select few to circumvent a statutory requirement which the general public is obliged to adhere to.

This Bill was proposed before and was rejected. Why are they wasting this committee's valuable time?

There are other questions to be addressed before this Bill is passed. For instance - what sort of regulations would the law firm employees be bound by - or would they be free to serve, not only for their employer, but perhaps take it upon themselves to serve for other firms and individuals as well?

Would they be required to provide the Clerks of Court with proof of their affiliation with a particular law firm? Who would police any regulations in this regard?

If a select few are exempt from the statutory requirements, why should those of us who are presently in this occupation pay for licenses and bonding?

Finally, the question of liability arises. In certain instances, an untrained individual attempting to serve a party who is prone to violence would be taking a very great risk of bodily harm.

Most people have the mistaken impression that a process server merely "hands a document" to an individual. Let me assure you, there is a good deal more to this profession than the general public is aware of.

I strongly object to the passage of Senate Bill 64.

Jim R. Nixon
Licensed Process Server &
Levying Officer
DPS 92-79-01
Yellowstone County

NAME Richard Rowe

ADDRESS PO Box 5760 Msla. MT. 59806

HOME PHONE 251-4937 WORK PHONE 251-3846

REPRESENTING ASAP Services

APPEARING ON WHICH PROPOSAL? SB #64

DO YOU: SUPPORT ______ OPPOSE X AMEND X

COMMENTS:

WITNESS STATEMENT

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

F11

DATE 1-12-93

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: SB 64, SB68, SB 46

Name	Representing	Bill No.	Support	Oppose
Gary A. Dupuis	GARD Inc	64		X
Russell B Hill	Mont Trial Lawyers	68		X
"	"	64	X	
Garth Jacobson	Sec of State	46	✓	
Geralyn Driscoll	DOR	46		
Steve Bahls	U of M Law School	46	✓	
Dan Ritter	MT Chamber	46	✓	
Brett Dahl	Dept of Admin	68	✓	
Bill Cranalia	Dept of Admin	68	✓	
Don Waldron	MREA	68	✓	
Dennis Flick	City of Billings	68	✓	
Bruce W. Moerer	MSBA	SB68	X	
Randy Rowe	ASAP SVS.	SB64		X
Richard Rowe	ASAP SVC.	SB64		X

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

F10