MINUTES

MONTANA HOUSE OF REPRESENTATIVES
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON BUSINESS & LABOR

Call to Order: By **CHAIRMAN BRUCE T. SIMON**, on January 30, 1995, at 10:00 AM.

ROLL CALL

Members Present:

Rep. Bruce T. Simon, Chairman (R)
Rep. Norm Mills, Vice Chairman (Majority) (R)
Rep. Robert J. "Bob" Pavlovich, Vice Chairman (Minority) (D)
Rep. Vicki Cocchiarella (D)
Rep. Charles R. Devaney (R)
Rep. Jon Ellingson (D)
Rep. Alvin A. Ellis, Jr. (R)
Rep. David Ewer (D)
Rep. Rose Forbes (R)
Rep. Jack R. Herron (R)
Rep. Bob Keenan (R)
Rep. Don Larson (D)
Rep. Rod Marshall (R)
Rep. Jeanette S. McKee (R)
Rep. Karl Ohs (R)
Rep. Paul Sliter (R)
Rep. Carley Tuss (D)
Rep. Joe Barnett (R)

Members Excused: None.

Members Absent: None.

Staff Present: Stephen Maly, Legislative Council
Alberta Strachan, Committee Secretary

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

Committee Business Summary:
Hearing: HB 234
Executive Action: None.

HEARING ON HB 234

Opening Statement by Sponsor:

REP. CHASE HIBBARD, HD 54, Lewis and Clark County said this bill was an act requiring certain loan and credit agreements to be in writing in order to be enforceable.

Proponents' Testimony:

John Cadby, Montana Bankers Association presented a photocopy of the states in the nation who by 1990 had adopted a bill like this one. **EXHIBIT 1** Montana and Wyoming, states west of the Mississippi, have not adopted this model legislation. It appears to be that of a uniform commercial code. If there are commercial transactions everyone plays by the same rules. It is merely a hardening of the rules when an individual is in court they are not precluded from using oral representation to prove fraud or if there was a mistake. All of the real estate transactions must be in writing. The lines of credit are excluded. It is just good business too, and a good rule which everyone should follow and it conforms with the uniform policies of other states.

Ward Shanahan, Montana League of Savings Institutions said this clarification of the law is necessary in order to prevent confusion in the law relating to loans and credit agreements. This act merely bars oral loans or credit agreements and prevents them from being modified by recollections of oral statements after they have been made. It is good public policy. **EXHIBIT 2**

Bruce Gerlock, President, Montana Independent Bankers Association/Senior Vice President, First Security Bank of Bozeman said the association of Montana community bankers is very much concerned over a recent court ruling that stated written loan agreements do not necessarily govern the relationship between a lender and a borrower. The writing contained in one document is the one absolute source to which parties to a loan agreement may turn should a dispute or problem arise. A promissory note, a security agreement, a deed or trust, a personal guarantee are some of the tools of the trade used by lenders when granting loans to businesses whether they be corporations, partnerships or proprietorships. These documents outline and stipulate the terms and conditions of the approved loan. They include dollar amounts, interest rate, term and collateral. They also include boiler plate language that protects as well as informs the lender and borrower as to what may or may not happen should a default occur. These documents are in writing and they are not verbal agreements. Once signed by the borrower he or she acknowledges the understanding and acceptance of the terms and conditions outlined in the loan agreement.

He also said he found it difficult to believe that courts would ever hear cases that involve disputes between lenders and borrowers based upon verbal or oral representations. To reverse a written loan agreement in favor of verbal agreements certainly inhibits commercial banks and other lenders from making loans. Local economy suffers and businesses cannot get the capital needed to fund growth or sustain operations. When dealing with business matters agreements have to be in writing. It is the job of bankers not to confuse the borrower when explaining the loan agreement. It is also the borrowers' responsibility to understand the business loan agreement before signing it.

Linda Reed, Governor's Office stated there was a time when loan transactions were based upon a word and handshake. Certainly those times have ended. When economic conditions force desperate people to default bankrupts for their own difficulties. Attempts to buy more time to make payments, discounted settlements or obtain debt forgiveness led to the initiation of lawsuits based upon alleged verbal representations. The result was the expenditure of vast sums of money both by the lending institution and the borrowers.

Don Hutchinson, Banking and Financial Division, Department of Commerce said their division is the primary regulator of statechartered financial institutions in Montana. Either borrowers or lenders could go outside written loan agreements to assert oral understanding. This could have a negative effect on a financial institutions' loan classifications in the safety and soundness examination process. The customer loan files and written agreements therein provide the only objective means of determining an institution's loan portfolio exposure.

Mike Dalton, President, Mountain West Bank said this bill is necessary to improve upon what now exists. In the 1980s there was a threat of lawsuits and it affected the way bankers began to do their business. Some banks would require two bank officers to discuss loans with customers, and the terms and conditions of a commercial loan transaction.

John Alke, Montana Liability Coalition supported this bill.

David Owen, Chamber of Commerce supported this bill.

Steve Turkiewicz, Montana Automobile Association supported this bill.

Bob Stephens, Dutton State Bank supported this bill.

George Bennett, Attorney, Montana Bankers Association said this legislation was put together by the American Bar Association committee who were experts looking at the 31 state statutes and took the best. Starting with Minnesota in 1985, there were 31 states adopting legislation. That committee looked at the problems that arose under those statutes and this is a model act that avoids the problems other states have had. It is probably going to be argued the liability crisis has subsided and that is true. The feeding frenzy that developed during the 1980s has subsided. Upon reviewing the Supreme Court cases from 1989 - 1994, 14 cases were identified where this statute would have been involved. It is still necessary. Disputes should be avoided because disputes are disruptive. In looking at those Supreme Court cases one only looks at the tip of the iceberg. People do not see the cases that are not going to court, cases which have been settled at the trial level, etc. There is still much need for this bill. Any lawyer worth his salt tries to avoid disputes. Getting the parties' agreement in writing is the

solution. It is then the obligation of the lawyer to see that those disputes, if they arise, are settled quickly, fairly and inexpensively. This will go a long way to move Montana out of the liability backwash in this area and into the mainstream.

Opponents' Testimony:

Russell Hill, Montana Trial Lawyers Association provided written testimony which stated this bill would insulate one special class of Montana citizens--banks--from accountability in their dealings with all other Montanans. **EXHIBIT 3**

David Paoli, Attorney, Consumers of the State said this is not a consumer- oriented bill. This is a bank protection bill. These people don't have the bargaining power when they go and talk to the banks. They are on the "weak end of the stick" that a bank controls. The great equalizer is 12 people sitting in a jury box. This bill is not good for farmers and ranchers in Montana.

Michael Cotter, Attorney said this is certainly a bank protection bill. It does not help the small businessman, a farmer or a rancher. This bill is designed to provide a safety net for the banking industry. There are, in place here in Montana, laws that control contracts.

Jim Peterson, Montana Stockgrowers Association said they agreed agreements should be in writing. In the agricultural world many things are done on oral representation.

Questions From Committee Members and Responses:

REP. ALVIN ELLIS said he was surprised about the testimony of the Montana Stockgrowers Association representative and would like to know if he was directed to do so by the association. He mentioned he had attended the last convention and asked what was the basis of the opposition. **Mr. Peterson** said there was no action taken at the convention but had been directed by the board to look at the bills and try to represent the members as best as possible. The opposition lies with some reservation. It is opposed only because there should be an allowance for oral representation. They agree with the concept presented. **REP. ELLIS** reiterated the same question and asked for a definite answer. **Mr. Peterson** said it was a judgment call between **Mr. Bloomquist** (MSA) and himself. **REP. ELLIS** asked what a bank's assets have to do with whether this is a bad bill or not. **Mr. Hill** said when it is acknowledged in the real world, the disparity of sophistication in bargains are among parties to a financial transaction and help shape it. In all of these transactions, it is the bank that drafts the contract and explains to the borrower what the contract means.

REP. DON LARSON questioned why the home base of banking in the U.S. is in the large eastern states. **Mr. Hill** said he did not know.

REP. JEANETTE MCKEE asked for a response to the ambiguity of the language. **Mr. Bennett** said the concern was with the language "family household and person". This model act was drafted by a task force which took the language out of truth and lending where there is credit created by a sale that is excluded. The seller may be creating a loan situation. **REP. MCKEE** asked if this would lead to more litigation. **Mr. Bennett** said he did not believe so. This statute is narrowly fit into the rules on evidence which extends to the transactions which are covered under the subsection 2. There is going to be some leveling out.

REP. ROD MARSHALL said the FDIC requires contractual agreements among all parties for any loan over $25,000. **Mr. Gerlock** said there would be no loan agreement without written documentation.

REP. BOB PAVLOVICH questioned if the amendment had been reviewed. **REP. HIBBARD** said he had not seen the amendment.

REP. ELLIS said enactment of this legislation will lead to the customer being wrong and the institution being right and questioned further where this appears in the bill. **Mr. Hill** said no line in the bill uses those words. The proponents will acknowledge this is the reason they want the bill. The clear impact of the bill is to provide when there is a dispute between a lender and a borrower. In that situation this bill will operate to prejudice and disadvantage the borrower and not the lender. **REP. ELLIS** then said what is down in writing prejudices the case. **Mr. Hill** said he was saying the inability to refer outside the writing in special limited circumstances prejudices the borrower. **REP. ELLIS** said in his testimony it was referred to fourteen cases in Montana and wondered if the Huntley case was of these fourteen cases. **Mr. Bennett** said he began his research in 1989.

TAPE 1, SIDE B

REP. JON ELLINGSON said there is a failure to comply with subsection 1. He then gave a scenario of a transaction. Does not this provision preclude a borrower from going into court by saying "when he signed this the loan officer I trusted explained to me that they would never take the home place." **Mr. Bennett** said the banker has been asked to interpret the written contract and mis-states what is in that contract. This bill does not affect fraud. That is always a claim in which there can be parole evidence or evidence of what was said and not what was written. If the banker mis-represents and knowingly makes a false statement or if the party can show all of the other elements of fraud then, yes, that would change the situation. If there was simply an innocent statement made, a negligent statement made, there could be no proof of that. The parties should get that in writing.

REP. ELLINGSON said if the banker makes the negligent mis-statement and the borrower relies upon it, the borrower in

subsequent litigation cannot go back and say "my loan officer told me that this would not happen". That is precluded by sub-section (f). **Mr. Bennett** said that was absent fraud, and absent a false statement and is denying that is perjury.

REP. ELLINGSON said if a loan officer remembered making the mis-statement and acknowledged making the mis-statement that would have no impact and would not revive the right of the borrower to go to court and say the loan officer made this mis-statement and acknowledges it. **Mr. Bennett** said if the bank is willing to acknowledge that was the agreement then the bank would honor it. There would be no dispute. If the bank officer denies it, yes this statute would preclude evidence. This is an evidentiary situation.

REP. ELLINGSON then stated if a loan officer acknowledged that he had made the mis-representation and the bank officers and the lawyers for the bank said it would not count under this bill. They could hide behind this bill and say the borrower cannot raise the fact of that mis-representation. **Mr. Bennett** said technically they could.

REP. KARL OHS asked with the exceptions of this bill, what is being accomplished here. **Mr. Bennet** said this bill was adding to the parole evidence rules and the statute of fraud on certain narrowly defined situations. Everything else stays in place. Trial lawyers are coming into court with theory of bad faith, fiduciary obligations, equitable promissory notes and really proving these oral statements in a context where it totally destroys the validity of the writing. This legislation becomes effective only to agreements made after October 1, 1995.

REP. DAVID EWER questioned the cases before the Supreme Court which numbered 14. How many of these outcomes were alternately termed in favor of the plaintiff which would have been the borrower and how many favored the defendant which would have been the bank? **Mr. Bennett** said the cases went for the lender. These disputes went to the Supreme Court, cost a lot of money and could have been avoided. These disputes would not have developed. **REP. EWER** then said he would acknowledge that plaintiffs won sometimes and the defendants won sometimes and by this bill there would be no plaintiffs or defendants because the potential defendant would have been in every case. That is what the bill is trying to do. **Mr. Bennett** said he was trying to see the liability crisis was over. There were still a lot of disputes between borrowers and lenders and while 14 cases may not be many, there is still a lot of litigation going on which could have been avoided. These disputes would not have arisen.

REP. EWER said the relationship between creditor and borrower is very complicated. It is not just a question of borrowing money for a car loan. There was borrowing for ranches and trying to have a business perpetuate to heirs. People will get into a loan situation and performance is deteriorating and the borrower will

ask for an extension and ultimately the bank pulled the plug because the borrower did not do what was agreed upon. It is a complicated human relationship and sometimes there is a legitimate charge. There is a lack of bad faith and not a meeting of minds. "Would not this bill preclude that? Don't people have some right to make these challenges in court?" **Mr. Bennett** said this bill excludes consumer loans and business loans under $25,000. The borrowers in a business context are so unsophisticated that if they have a material obligation that they want to impose upon the lender they can get a scrap of paper signed by the bank or its agent covering that. All one needs to do is get this agreement in writing. If a borrower is negotiating that is what should be done. It is to avoid the encouraging of perjured testimony, failed memories, etc. It does not take very much to get it in writing.

REP. EWER said Mr. Bennett had said it does not take very much and asked if the banking industry is going to take the initiative to alert its customers to get everything in writing. **Mr. Bennett** said banks were not going to put up signs saying "you better get it in writing because we are crooks." They already tell their customers to read the document very carefully and have your lawyer read it. **REP. EWER** said he was not implying this.

REP. LARSON asked if the language could be negated in 28-2-904 and 28-2-905 and do away with it. **Mr. Bennett** said what that language says is if there is a conflict between the statutes there must be a conflict. There must be something contained in this statute. **REP. LARSON** asked why the bill was needed. **Mr. Bennett** said the statute which is being referred to is in the books forever.

CHAIRMAN BRUCE SIMON asked how many transactions per year would be estimated. This particular bill would affect loans over $25,000. How many transactions would occur over one year. **Mr. Hutchinson** said 1,000 transactions over $25,000 would be a high figure.

CHAIRMAN SIMON asked what the 5 "C's" were. **Mr. Gerlock** said they were character, credit, capacity, collateral and conditions. **CHAIRMAN SIMON** said if one were speaking of capacity one has enough income to pay off the debt. Collateral is the kind of thing a person would pledge in the event they would not pay the loan off. What does credit mean in that context? **Mr. Gerlock** said credit is the credit history of the borrower. If this were referring to a consumer it would be the personal credit history or if a business it would be a business history. **CHAIRMAN SIMON** said this bill seems to preclude character. **Mr. Gerlock** said he would disagree. There is confusion on the issue of consumer issues or business issues. These are not consumer loans where character is essential on any credit transaction. The topic is business or the credit history of the business and the cash flow of that business which has been evidenced by tax returns, financial statements, etc. that demonstrates the ability to

service the debt. The credit of a business is easily tracked either through a reporting agency such as other financial institutions or outside credit bureaus. **CHAIRMAN SIMON** stated in looking at the overall picture, if a person arrived at the bank who had done business with the bank for many years and had always made their payments fully on time and the bank knew they had considerable net worth. The borrowers stated they wanted to borrow $30,000 for a particular purpose. It has been fairly common over the years that a bank might, judging by what they know to be the capacity of that person in regard to sufficient earning power, without any collateral, will loan that person money. **Mr. Gerlock** said this was correct.

CHAIRMAN SIMON then said that was an important ingredient in the overall idea of looking at transactions. He then reiterated his experience in the business transactions he had made. Is it common for a bank to meet with business customers to decide how a business was running compared to other businesses. **Mr. Gerlock** said this was still common. **CHAIRMAN SIMON** said then the officer of the bank, in looking at this financial material, considering the ratios in comparison to other national ratio would be essentially giving the borrower some financial advice. **Mr. Gerlock** said the banker would supply a comparison of data that is available to lenders. Regarding the ratio analysis from an outside peer group there is a recognized journal called Robert Morris Associates which is a source of information which would be shared with the borrower.

CHAIRMAN SIMON said there would be some counselling. **Mr. Gerlock** said yes. **CHAIRMAN SIMON** then questioned the documentation sought when acquiring a commercial loan and what other type of documentation would be required for a pretty substantial loan. **Mr. Gerlock** said it depended upon the collateral.

CHAIRMAN SIMON asked whose lawyer writes up the documents for a loan. **Mr. Gerlock** said most of the forms which are generated through a bank are from a national source which are with Bankers Systems or CFI. **CHAIRMAN SIMON** said all of the documentation which is provided to him are from the financial institution and it is the lawyers who have reviewed all of these documents very precisely and decide if these are the forms to use. They are written by the banks. The documents were then presented to the borrower's attorney. He asked if there was some concern by the borrower's attorney, could the borrower return to the bank and request changes in the document. **Mr. Gerlock** said he could not answer for all banks. After legal review in his bank there have been some changes that have been suggested, modifications made and in the promissory note instrument there are positive and negative covenants with every loan agreement. Those are certainly negotiable.

CHAIRMAN SIMON asked for explanation of lines 1-8 on page 2. **Mr. Gerlock** said a borrower cannot not adhere to the terms of the promissory note. **CHAIRMAN SIMON** said that was a lot of

"legalese" the way that portion is written. He asked if someone explained in detail what the language meant, would he feel comfortable with that. **Mr. Gerlock** said his bank summarized that statement very accurately by saying a borrower must adhere to the terms of the contract meaning interest payments, monthly payments, collateral requirements and if not, there is a chance for default. There is a remedy for that default which is listed on the promissory note.

CHAIRMAN SIMON said that is talked about in some state laws. As **REP. ELLIS** indicated, a borrower might be presented with documents which are several pages long, front and back on legal size paper, small print and he is expected to read that and sign it which acknowledges it has been read, it is understood, but in fact, the chance of that borrower being able to read this document and really understanding what is being signed is relatively slim. **Mr. Gerlock** said that is not the case and is a very rare. Most borrowers, especially businesses that have a stake and investment in business, are pretty knowledgeable about documents they sign. This is not only for loans but other business related matters. **CHAIRMAN SIMON** then asked if **Mr. Gerlock** could supply the committee with samples of some of the various loan documents. **Mr. Gerlock** said yes.

CHAIRMAN SIMON said earlier when he had responded to a question it was indicated the transaction should be written down on a scrap of paper. He said he could not imagine where there would be some scribbled note on a piece of paper. Wouldn't a bank want all of this documentation on their forms, written by their people? **Mr. Bennett** said his statement of "you could get a scrap of paper" and have the party charged sign it and state whatever he was stating, is the minimum requirement. The task force that drafted this legislation looked at whether they should have both parties sign, whether it should be dated, whether it should be notarized, was the minimum required. He said he would agree with the Chairman. In most situations, there is going to be a closing. The loan documents have all been signed and the borrower is going to indicate there was an item not covered. The bank will then have someone type up an additional document and the bank officer will sign it and the situation is then a valid obligation of the bank. It can be done very simply. It could be done by FAX and it does not take the formality that is generally found in a loan agreement.

CHAIRMAN SIMON said in talking with **Mr. Gerlock,** with his experience, it is fairly common to develop a relationship with a loan officer and talk about how things are going in the business. They review financial data that had been submitted to the bank. They, in turn, receive the bank's current thinking. There is a relationship and friendship developed on a business level. That relationship might extend toward the golf course which might also be a personal relationship. **Mr. Bennett** said certainly. Even if there is not a friendship many of these negotiations go on for a long time and the parties get to know each other. **CHAIRMAN SIMON**

then said, given this personal relationship that developed over a period of time, when presented with documents by "my friend," the person whom he had grown to trust then says don't worry about the content of the documents, these are just standard forms, sign them, etc. Would that be the case? **Mr. Bennett** said bankers are a "slice of life" and a good banker will tell the borrower to take the document to a lawyer, look it over and he won't say don't read this because it will give the borrower a headache.

CHAIRMAN SIMON said he agreed. Bankers are a "slice of life." Everything with a financial institution should be in writing because that is good business practice. There isn't anyone in this room who would question that, given today's climate. If this bill is passed, suddenly what is going to control that bank officer from saying they can get a deficiency judgment, but they are never going to do that. There is more than enough collateral and your home place is not in jeopardy at all. You are fine, don't worry about it. The banker promises he won't take the ranch. What is to prevent that bank officer from doing precisely that and being exempt from being drawn into court when he does that. **Mr. Bennett** said what had been described is fraud. That banker has made a false statement knowingly when he has induced the borrower. That is not covered by this statute. Something the banker had innocently said out on the golf course that may have been misinterpreted.

CHAIRMAN SIMON said no lender and no borrower ever starts on a course thinking he will end up in default. Every borrower makes a deal they will be able to make the payments, everything is going to be fine and nobody assumes there will be a problem when they start out or they would not make the deal to begin with. The problems arise when somebody gets into trouble and upon returning to the bank it is stated to not have worried. Things change so dramatically in the market place. The borrower would then be precluded from raising that defense then even if there were witnesses who would testify that in fact that statement was made. **Mr. Bennett** said if he were a rancher and wanted the lender to agree to a deal, all that is required is "a scrap of paper" signed by the banker saying a deed in lieu of foreclosure would be accepted. If he were dealing with a banker and that was his requirement he would get it. Listening to the opponents talk about people in Montana being rubes and unsophisticated and not knowing what they are doing is an insult to the business people in Montana.

CHAIRMAN SIMON said **Mr. Bennett** had still not gotten back to saying what is to prevent that loan officer from misleading an innocently-assured borrower. That is an innocent thing and not fraud. They did not mean to defraud the person at that time. They really meant what they said at that time. But markets change. So, it isn't fraud. It is an innocent statement. But, that person who borrowed the money relied on that statement. **Mr. Bennett** said in speaking hypothetically, the statute of fraud is to prevent fraud both ways. Perjured testimony by the borrower

under distress oftentimes remembers things that may not have happened or they remember them out of context. All the borrower may remember is that the banker will do a specific thing. Not "if" you do this. The bankers are trying to get the business borrowers. If there is a significant term or factor they get it in writing and do not rely on alleged oral commitments because the charge there was an oral agreement. It is so easy to make and so hard to disprove.

CHAIRMAN SIMON said the charge of oral representation is hard to disprove but it is also hard to prove and asked if that is not the case. **Mr. Bennett** said in the real world if a distressed borrower is up against a bank what happens if the jury goes tilt. **CHAIRMAN SIMON** said there had been, by your count, about 14 cases in the past five or six years. There are 75,000 transactions per year and 14 cases in the past five years, that is less than three per year. It actually ended up going through this process and many of those were ultimately decided in the favor of the bank. "So, isn't this really a solution looking for a problem rather than the other way around?" **Mr. Bennett** said the number of cases that made it to the Supreme Court don't tell one of the disputes and the hiring of lawyers and the expenses which went into resolving those disputes that had gone to court. If they did go to court they did not go to the Supreme Court. In Montana, from 1980-90 lawyers have doubled. 62.5% of the lawyers that are practicing today were admitted in the last 15 years. A lot of the best talent is going into the legal profession when they should be going into engineering and architecture and other things. Disputes don't produce anything good. The trial lawyers take 1/3 or 1/2 of the recovery even if you win, you lose. Disputes are not good for the economy.

CHAIRMAN SIMON there was something in the bill which he had rarely seen and that is subsection (4), page 2, line 24. He asked what sort of conflicts are envisioned if this is passed and would this conflict with other state laws? Usually things are compatible. This almost comes out and tells us we are going to have conflicts between law and so this must take precedence over preceding law. **Mr. Bennett** said this type of language is in a lot of statutes. First, there would need to be a conflict between this law that is enacted and some other statute. Part performance is taking a contract out from the statute of limitations. This would be the rule of law which would be reviewed, not to some other statute or some other Supreme Court decision. The reason this is put in is because they don't know what other conflicts might be, but they are saying if there is a conflict this statute will control and not some other statute or case.

CHAIRMAN SIMON said all of the previous case law that has been developed on other cases and on other statutes that might be in the law are basically thrown out by this statement so that it reverts back to the beginning in interpreting this particular section. All the interpretations that took place on those other

sections could then be ignored. **Mr. Bennett** said this section has never been interpreted in Montana and if there is a conflict this would control what statute. **CHAIRMAN SIMON** said 75,000 loans a year, with two or three cases in the Supreme Court a year, hardly spells a crisis. The exception is 100% for financial institutions only. All other commercial transactions and oral representations are allowed. If oral representations are such an evil thing in spite of acontract, why didn't the banks come in with a proposal to eliminate all oral representations in all commercial transactions. "Why is it that just banks need this special exemption? It is portrayed as some sort of a big crisis but the numbers don't purport that evidence?"

Mr. Bennett said the lender liability crisis in Montana was well documented. In 1986 the legislature had an interim sub-committee on the liability crisis. The best evidence of a crisis was all of these states adopted this type of statute to end this type of dispute. This is the history of the law. There really is a need. The inclusion is as broad as the problem. There are many third-party beneficiaries. The previous legislation brought out an opposition from people who did not want to be included.

REP. JOE BARNETT said if a person were a good business person and having consulted an attorney for his review of a loan agreement and it was decided between them it was not good, would it not be a poor businessman who would make that credit decision against the advice of his attorney. **Mr. Bennett** said yes.

CHAIRMAN SIMON said if a businessman came into the bank and said there was a real problem with a section of the loan and the bank officer said not to be concerned because it was standard language and that will never be enforced. Based on that representation from that officer, the document was signed. Has that condition changed because of the oral representation of the bank officer. **Mr. Bennett** said a case of fraud and inducement could be proven if the banker made a false statement.

REP. MILLS said a banker had every right to require everything he wanted and what does this bill do to protect a bank that they don't already have. **Mr. Bennett** said it protects lender and borrower against surprises coming in as evidence.

Closing by Sponsor:

The sponsor closed.

ADJOURNMENT

Adjournment: 12:15 PM

BRUCE T. SIMON, Chairman

ALBERTA STRACHAN, Secretary

BTS/ajs

HOUSE OF REPRESENTATIVES

BUSINESS AND LABOR COMMITTEE

ROLL CALL DATE 1-20-95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bruce Simon, Chairman	X		
Rep. Norm Mills, Vice Chair, Maj.	X		
Rep. Bob Pavlovich, Vice Chair, Min.	X		
Rep. Joe Barnett	X		
Rep. Vicki Cocchiarella	X		
Rep. Charles Devaney	X		
Rep. Jon Ellingson	X		
Rep. Alvin Ellis, Jr.	X		
Rep. David Ewer	X		
Rep. Rose Forbes	X		
Rep. Jack Herron	X		
Rep. Bob Keenan	X		
Rep. Don Larson	X		
Rep. Rod Marshall	X		
Rep. Jeanette McKee	X		
Rep. Karl Ohs	X		
Rep. Paul Sliter	X		
Rep. Carley Tuss	X		

Lender Liability News Part 2

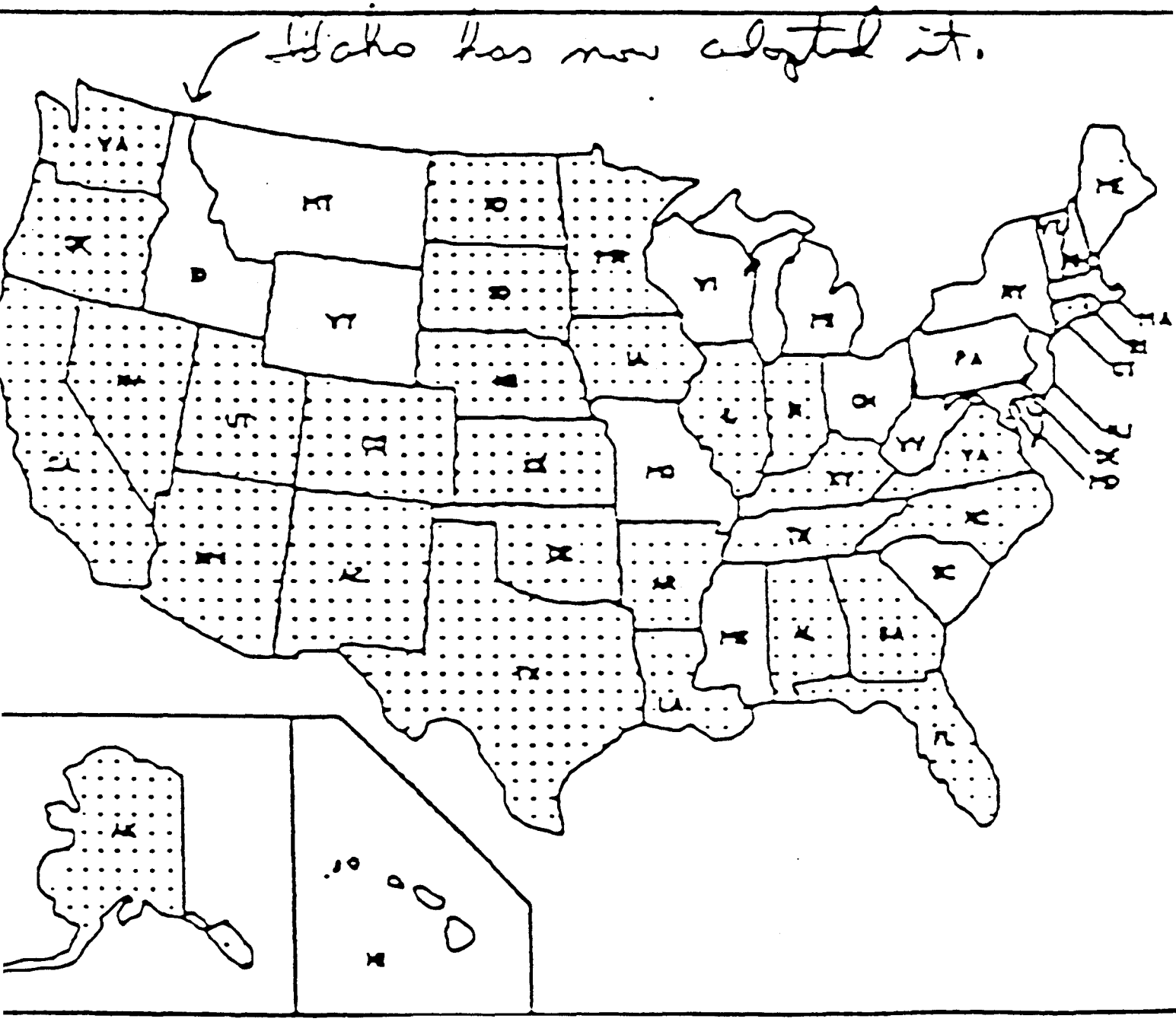
EXHIBIT 1
DATE 1-30-95
HB 234

Volume 3, Number 1 June 13, 1990

LENDER LIABILITY LIMITATION AMENDMENTS TO STATE STATUTES OF FRAUDS*

By: John L. Culhane, Jr.** and Dean C. Gramlich***

States with Lender Liability Limitation Laws



0898-7645/90/$0+.50

EXHIBIT 2
DATE 1-30-95
HB 234

MEMORANDUM

TO: The Members of the House Business & Labor Committee

FROM: Ward A. Shanahan, 33 South Last Chance Gulch, Helena, Montana (406) 442-8560, representing the Montana League of Savings Institutions.

DATE: January 30, 1995

RE: House Bill 234 - An Act Requiring Certain Loan and Credit Agreements to be in Writing

For the record my name is Ward Shanahan, I am a lawyer and registered lobbyist for MLSI, the Montana League of Savings Institutions. Our organization supports the passage of HB 234. This clarification of the law is necessary in order to prevent confusion in the law relating to loans and credit agreements.

This Act merely adds a provision to the Montana Statute of Frauds, Section 28-2-903, which specifically requires loans and credit agreements to be in writing to be binding. This provision will protect both parties to a credit transaction and eliminate the possibility of a misunderstanding as to whether oral agreements or commitments might alter or amend a transaction for which a large amount of money has been borrowed or committed.

A written contract could still be modified by a court if it was "ambiguous" and didn't clearly describe what it meant to say, or it could be set aside by a court if there was fraud, mutual mistake between the parties, or if one party was a minor, who lacked the legal capacity to make a binding contract, or the consent of one of the parties was obtained by "undue influence" which could include a person subject to improper pressure such as an aged or infirm person who might be incapable of understanding clearly what the writing really meant or the effect of signing it.

This act merely bars oral loans or credit agreements and prevents them from being modified by "recollections of oral statements" after they've been made. It's good public policy!

WE URGE THE COMMITTEE TO GIVE HB 234 A "DO PASS" RECOMMENDATION.

Respectfully submitted,

Ward A. Shanahan
MLSI

WAS\01964was

EXHIBIT 3
DATE 1-30-95
HB 234

Montana Trial Lawyers ASSOCIATION

Russell B. Hill, Executive Director
#1 N. Last Chance Gulch
Helena, Montana 59601
Tel: (406) 443-3124
Fax: (406) 443-7850

January 30, 1995

Rep. Bruce Simon, Chair
House Business and Labor Committee
Room 104, State Capitol
Helena, MT 59620

RE: HB 234

Mr. Chair, Members of the Committee:

Thank you for this opportunity to express MTLA's opposition to House Bill 234, which would insulate one special class of Montana citizens--banks--from accountability in their dealings with all other Montanans.

Background. In essence, HB 234 declares that banks are trustworthy--*and their Montana customers aren't.* Yet there seems to be no basis for such a blanket preference:

- No demonstrated "lender liability crisis" in Montana;
- No substantial number of lawsuits against Montana lenders based on oral representations;
- Certainly no evidence that Montana lenders lose more than their tiny share of lawsuits based on oral representations;
- No evidence that Montana lenders need special protection from their Montana customers (Norwest, for example, ~~is~~ owns assets worth more than $54 *billion*; U.S. banks posted record profits last year); and
- No evidence that Montana lenders deserve special protection from their Montana customers (for example, less than 7 percent of the money entrusted to Norwest by Montanans is used for loans to Montanans).

At best, HB 234 simply does for banks what they can *already* do for themselves--completely reduce their agreements to writing. But at worst, HB 234 blithely commits Montana to follow the lead of other states which have surrendered the precious rights of

their own business and agricultural citizens to huge, often unresponsive financial corporations.

House Bill 234. This bill, which amends Sec. 28-2-903, MCA, does not fill a void in Montana law. The two Montana statutes immediately following Sec. 28-2-903, MCA, *already protect lenders from groundless allegations.*

> First, Sec. 28-2-904, MCA, guarantees that an agreement which has been reduced to writing "supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."
>
> Second, Sec. 28-2-905, MCA, guarantees that, "Whenever the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms." Only under certain strictly limited circumstances can the parties to a written contract rely on oral representations about that contract.

HB 234, however, gives huge corporate lenders ***a license to mislead Montanan citizens.*** And regardless of how many lenders intentionally take advantage of that license, more Montanans will be victimized by careless misrepresentations. Specifically:

- HB 234 will not reduce disputes or disagreements between lenders and borrowers. HB 234 will only reduce fair resolutions of those disputes. In fact, by removing crucial incentives for banks to be careful about what they say to their Montana customers, HB 234 will increase disputes and disagreements.
- By using the undefined and incredibly broad phrase "personal, family, or household purposes" at page 2, line 23, *HB 234 invites more, not less, litigation.* MTLA believes that the phrase limits the "writing" requirement of HB 234 to large corporations and similar business entities which are genuinely immune to "personal" considerations; by the same token, sole proprietorships, partnerships, personal businesses, personal landholdings, and even closely-held corporations come within the "personal, family, or household purposes" clause of HB 234.
- HB 234, by focusing only on "writings," ignores all other types of evidence which just as reliably reflect the intentions of parties to a contract. No matter how many independent witnesses heard a banker's oral representations, no matter how precise or accurate their notes may be, no matter if they even captured the banker's oral representations on video or audio tape, nothing matters but the "writing."
- By precluding actions based on negligent misrepresentation (page 2, line 16) and the fiduciary relationship between a bank and its customer (page 2, line 12), ***HB 234 gives lenders undeniable carte blanche to carelessly misrepresent the meaning or consequences of written contract.*** Customers who place special trust in their banks, such as elderly Montanans, second- or third- or fourth-generation farmers and ranchers, long-time customers, etc., will either hire attorneys or risk their most precious assets under HB 234.
- Importantly, HB 234 abolishes the fundamental protections of

EXHIBIT 3
DATE 1-30-95
HB 234

"promissory or equitable estoppel" (page 2, line 13) which now guarantee that a statute designed to prevent fraud cannot be used to perpetrate fraud. Equitable estoppel, for instance, would otherwise allow a court to intervene if a lender uses technical compliance with HB 234 to exploit or abuse its customers.

- HB 234, by requiring that a "writing" be both signed by the lender and received by the customer (page 2, lines 6-8), completely disregards such reliable evidence as a loan officer's comment sheets or notes in the bank's own loan files. Likewise, HB 234 would completely ignore repeated written references or correspondence by a borrower confirming oral representations by the lender--in other words, *the bank can allow such a misunderstanding to continue without fear of accountability.*
- By making "course of dealing" and "performance" (page 2, lines 10 and 11) completely irrelevant to loan and credit agreements, ***HB 234 elevates paper over people*** and ignores the real-life relationships between lenders and borrowers which also determine their responsibilities to each other.

Proposed "Put it ALL in Writing" amendment. Since HB 234, the so-called "Put it in Writing" bill, would preclude consideration of all oral representations regarding loan or credit agreements, MTLA suggests that *such oral representations no longer be allowed.* If the proponents of HB 234 insist that nothing but the written agreement matters, then they cannot also insist that lenders need to make oral representations without fear of accountability. Consequently, MTLA proposes adding a new subsection (2)(f) on page 2, following line 23:

> "(f) any case in which the person seeking to maintain the action or defense has made oral representations about the writing."

Obviously, if the proponents of HB 234 insist that real-world lenders and their customers must frequently discuss and explain written agreements orally, then those proponents can hardly complain about being held accountable for their explanations.

Thank you again for this opportunity to express MTLA's opposition to House Bill 234. If I can provide additional information or assistance to the Committee, please allow me to do so.

Respectfully,

Russell B. Hill
Executive Director

U.S. banks report record profits

WASHINGTON (AP) — The once-teetering banking industry is reporting record profits. Despite a cloud or two, a federal official says, the picture has never looked brighter.

Bank earnings were at an all-time high of $11.8 billion in the third quarter and profits are headed toward another record for the year, the Federal Deposit Insurance Corp. said recently.

"The commercial banking industry has never been in better shape," FDIC Chairman Ricki Tigert told a news conference. "We see nothing in these figures that suggests any change in the positive outlook any time soon."

The nation's 10,700 commercial banks made more loans at higher interest rates and also benefited from a drop in bad loans and the lowest loan losses in nearly a decade.

Meanwhile, the industry's capital, which acts as a cushion against loss, grew by $6.8 billion in the July-September quarter for the best showing of the year. Capitalization is at its highest level in 30 years.

The only concerns, Tigert said, are that banks will lower loan underwriting standards and will be become too active in risky derivatives markets.

"It is our job to worry even in good times," she said.

Tigert noted that there have been scattered reports of banks lowering loan standards but said FDIC examiners have found no evidence of systemic problems.

Earlier this week, she announced that the FDIC has hired a market research firm to use testers to find out whether banks are giving customers enough warning that mutual funds are not federally insured.

Bank earnings for the third quarter are $300 million above the previous $11.5 billion record set in the same quarter last year. The latest earnings also are 5.4 percent higher than the $11.2 billion mark of the second quarter this year.

The FDIC said banks are on target to break last year's record of $43.4 billion in profits even if fourth quarter earnings fail to keep pace with the first nine months of this year.

Seven commercial banks failed in the third quarter, bringing the total for the first nine months of 1994 to 11. That contrasts with 36 failures during the first three quarters last year.

Two years ago, there were hundreds of bank failures and many warned of an impending crisis. Economy growth and a sustained period of lower interest rates are credited for the turnaround.

Loans grew by $60.2 billion in the third quarter and 96 percent of banks showed a profit, the FDIC said.

The number of banks on the FDIC's problem list fell to 293, the lowest total in 12 years. That was down from 338 troubled institutions in the second quarter.

Banks charged off $2.4 billion in loans in the third quarter, the smallest amount since the first quarter of 1985. They also reduced provisions for future loan losses to $2.6 billion, the smallest since the first quarter of 1984.

Tigert also noted that the savings and loan industry continues to recover from its financial debacle of the 1980s, although at a slower pace than commercial banks.

The Office of Thrift Supervision reported Monday that S&Ls earned $1.52 billion in the July-September quarter compared to $1.24 billion the previous three months.

Great Falls Tribune, December 21, 1994

Power of attorney to execute mortgage, 71-1-102.

Mortgage of real property, Title 71, ch. 1, part 2.

28-2-904. Effect of written contract on oral agreements. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.

History: En. Sec. 2186, Civ. C. 1895; re-en. Sec. 5018, Rev. C. 1907; re-en. Sec. 7520, R.C.M. 1921; Cal. Civ. C. Sec. 1625; Field Civ. C. Sec. 795; re-en. Sec. 7520, R.C.M. 1935; R.C.M. 1947, 13-607.

Cross-References

Consideration of circumstances surrounding execution, 1-4-102.

Final written expression — parol or extrinsic evidence, 30-2-202.

28-2-905. When extrinsic evidence concerning a written agreement may be considered. (1) Whenever the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms. Therefore, there can be between the parties and their representatives or successors in interest no evidence of the terms of the agreement other than the contents of the writing except in the following cases:

(a) when a mistake or imperfection of the writing is put in issue by the pleadings;

(b) when the validity of the agreement is the fact in dispute.

(2) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as described in 1-4-102, or other evidence to explain an extrinsic ambiguity or to establish illegality or fraud.

(3) The term "agreement", for the purposes of this section, includes deeds and wills as well as contracts between parties.

History: En. Sec. 610, p. 198, L. 1877; re-en. Sec. 610, 1st Div. Rev. Stat. 1879; re-en. Sec. 628, 1st Div. Comp. Stat. 1887; re-en. Sec. 3132, C. Civ. Proc. 1895; re-en. Sec. 7873, Rev. C. 1907; re-en. Sec. 10517, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1856; re-en. Sec. 10517, R.C.M. 1935; R.C.M. 1947, 93-401-13; amd. Sec. 22, Ch. 117, L. 1979.

Cross-References

Consideration of circumstances surrounding execution, 1-4-102.

Fraud, mistake, condition of the mind, Rule 9(b), M.R.Civ.P. (see Title 25, ch. 20).

Uncertainty to be resolved against party causing it, 28-3-206.

Interpretation of terms that are ambiguous or were intended in a different sense by different parties, 28-3-306.

Reference to circumstances permissible, 28-3-402.

Final written expression — parol or extrinsic evidence, 30-2-202.

28-2-906. When written contract takes effect. A contract in writing takes effect upon its delivery to the party in whose favor it is made or to his agent.

History: En. Sec. 2187, Civ. C. 1895; re-en. Sec. 5019, Rev. C. 1907; re-en. Sec. 7521, R.C.M. 1921; Cal. Civ. C. Sec. 1626; Field Civ. C. Sec. 796; re-en. Sec. 7521, R.C.M. 1935; R.C.M. 1947, 13-608.

Cross-References

Formation in general — U.C.C. — sales, 30-2-204.

Offer and acceptance in formation of contract, 30-2-206.

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

Business + Labor DATE 1-30-95

BILL NO. HB 234 SPONSOR(S)

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
Joral Cadby	MT Bankers Assoc	✓	
George Bennett	Mont. Bankers Assn	✓	
Russell B Hill	Mont Trial Lawyers		✓
Michara W. Cotter	MTLA		✓
Bruce Gulick	Mt. Independent Bankers	X	
Tom Hopgood	Mt. Independent Bankers Assn.	✓	
Maureen Cleary-Schwinden	Women In Farm Eco.		
Don Hutchinson	Banking Division DOC	✓	
David Owen	MT Chamber of Commerce Dutton St Bank	✓	
Bob Stephens		✓	
John Alke	Mont. Liability Coalition	✓	
Linda Reed	Gov's Office	—	
David R. Paoli	MTLA		✓

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

Jerry Driscoll MCSI ✓ ✓

Jim Nathe MSGA

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

Business & Labor DATE 1-31-95

BILL NO. HB234 SPONSOR(S) _____

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
Dave Turkiewicz	MT Auto Dealers Assn	HB234 ✓	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.