MINUTES

MONTANA HOUSE OF REPRESENTATIVES
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BOB CLARK**, on March 6, 1995, at 8:00 AM.

ROLL CALL

Members Present:

Rep. Robert C. Clark, Chairman (R)
Rep. Shiell Anderson, Vice Chairman (Majority) (R)
Rep. Diana E. Wyatt, Vice Chairman (Minority) (D)
Rep. Chris Ahner (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Bill Carey (D)
Rep. Aubyn A. Curtiss (R)
Rep. Duane Grimes (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Daniel W. McGee (R)
Rep. Brad Molnar (R)
Rep. Debbie Shea (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)
Rep. Cliff Trexler (R)

Members Excused: NONE

Members Absent: NONE

Staff Present: John MacMaster, Legislative Council
Joanne Gunderson, Committee Secretary

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

Committee Business Summary:

Hearing: SB 340, SB 229, SB 402, HB 517
Executive Action: NONE

{Tape: 1; Side: A}

HEARING ON SB 340

Opening Statement by Sponsor:

SEN. BRUCE CRIPPEN, SD 10, said SB 340 would amend the Montana Revised Limited Partnership Act. It contained the option for allowing partners to select a limited liability partnership (LLP). He described the difference between the limited liability partnership and a limited liability company (LLC). The second is a corporation while the first is simply a general partnership which elects to come under the law of a limited liability partnership. He said that section 8 on page 5 was the heart of the bill which set forth the limits of liability and nonliability of partners for any debts or obligations which are chargeable to the limited liability partnership for another partner. They are liable to the extent of their assets within that organization as they would be in a corporation. The bill would prevent the ability to pierce through the partnership to go after the personal assets of a limited partner.

Proponents' Testimony:

David Dietrich, State's Trust Subcommittee, State Bar of Montana, registered his support of this proposed act. He felt it was important to Montana's ability to expand its competitiveness for business growth with surrounding states. He proposed some amendments. He described the benefits of a limited liability partnership. **EXHIBIT 1**

Garth Jacobson, Secretary of State's Office, rose in support of SB 340. He said he had been involved in the corporate revisions and in the limited liability company development. This bill was a continuation of the whole process to provide viable alternatives for various Montana businesses. The limited liability partnership would provide a good alternative for small businesses and would be a good entity to assist in the economic development of the state because of its simplicity. The proposed amendments would provide further clarity.

Rod Sager, Unemployment Division Administrator, Department of Labor and Industry, was in support of SB 340 and presented an amendment which would insert, "that all partners are liable jointly and severally for employment taxes, amounts due and owing the uninsured employers' fund, the underinsured employers' fund and as provided by law, penalties and interests."

Jim Tutwiler, Montana Chamber of Commerce, supported SB 340. He said it was not a special interest bill nor would it provide special protection that would promote acts of irresponsibility. He felt it would promote business development.

Robert White, Bozeman Chamber of Commerce, urged passage of SB 340.

David Johnson, Legislative Committee of the Montana Society of CPA's, felt this was a very pro-business bill and urged support.

Charles Brooks, Billings Chamber of Commerce, made the point that it was a pro-business bill without promoting special interests.

Opponents' Testimony:

None

Questions From Committee Members and Responses:

REP. DEB KOTTEL asked for help in clarifying the difference between limited partnerships and limited liability partnerships.

Mr. Dietrich said it should not be confused with a limited partnership but did not know how to clarify the differences.

REP. KOTTEL asked how the limited liability partnership would be disclosed to the public.

Mr. Dietrich said that there would be a central registry at the Secretary of State's Office in the assumed business name of the limited liability partnership. Those dealing with such an entity could call the Secretary of State's Office for the information. Otherwise, they could discover it from the name, since it will require LLP or PLLP in the name. The third way would be through the names of the partners from the Secretary of State's Office.

REP. KOTTEL asked if PLLP was Professional Limited Liability Partnership and the answer was in the affirmative and that it is an optional title.

REP. KOTTEL asked if any other states which had adopted LLP's had the federal government demand that they be recognized as securities as they are under limited partnerships.

Mr. Dietrich said he did not know the answer to that. He said it was a securities issue, but conceivably it could be sold as a security just as a partnership interest. In the event of a sale, those interests as a security would be subject to both state law and federal law registration requirements.

REP. AUBYN CURTISS asked if the amendment by the Department of Labor and Industry meant that past tax liability upon this partnership arrangement would make the other person responsible for what was owing when they came into the working relationship.

Mr. Sager understood that basically it meant that if the partnership has other employees and they have liability or

employment taxes, there is no exemption. They are jointly and severally liable for those taxes.

REP. DANIEL MC GEE asked if the sponsor was comfortable with the labor department amendments.

SEN. CRIPPEN had not looked at them in detail, but if HB's 100 and 200 proceeded as normal, they would be fine. As long as they were limited to employment taxes, he felt it would be fine. He did not think one partner should be liable for the income taxes of another.

REP. MC GEE asked the sponsor to explain how it would work in a situation where two companies which do the same kind of business occasionally work together. And he asked if they once work together, did that become a permanent arrangement.

SEN. CRIPPEN described the options concerning managing the business.

{Tape: 1; Side: A; Approx. Counter: 33.8; Comments: .}

REP. MC GEE described how he would interpret the labor department amendments. He asked if it was saying that each partner as well as the partnership would be liable for the withholding of unemployment from their own individual employees, not just the partnership employees.

Mr. Sager said he did not believe so. The amendment would go in the section of the bill which dealt with the LLP responsibilities. It was intended to clarify that there is no intent to not make the partners of the LLP liable for any employment taxes that that partnership may owe for its employees.

REP. MC GEE suggested amending the language to specify a little clearer degree because it did not stipulate that it doesn't apply to the individual employees which are not part of the partnership.

Mr. Sager said he would not object to that.

REP. JOAN HURDLE asked how to distinguish between an employee of either partner or a joint employee.

SEN. CRIPPEN said that on the surface the employee may represent himself or herself to be an employee of the partnership. The same problem exists with a limited partnership and is discovered through the process of examining each individual situation.

REP. HURDLE asked if it would not be distinguished in the process of paying the unemployment taxes.

SEN. CRIPPEN said it would to the extent that employee works for that partnership.

REP. WILLIAM BOHARSKI said it seemed inconsistent that with the amendments the partner would be protected if one of the employees of the company tried to find the partnership liable while if the partnership did not pay taxes, the government could pierce the veil. He asked why they would protect the government, while not protecting everyone else.

SEN. CRIPPEN said one is an internal situation with a liability which was created in the course of the business. He said that the case of a tort was different. Public policy is in place that says the business is responsible for the payment of the taxes.

REP. BOHARSKI asked if the limited liability partnership veil can be pierced to come after the stockholders in that corporation for the taxes of that corporation.

Mr. Jacobson said there is a two-part test under common law in piercing the corporate veil analysis. If the entity is an alter ego of the persons, the first part of the test would be passed. The second item to look at would be if the organization were under-capitalized. If an LLP were created and then creditors were defrauded, the environment would have been created for piercing the liability veil. It is a common law theory which has not been tested in Montana. It would be possible to use common law theory the same as for piercing a corporate veil, but he did not know to what extent it would happen. He felt it would be very fact specific.

REP. BOHARSKI asked if the language was parallel between an LLP and an LLC as far as piercing the entity to go after the individual for things like taxes.

Mr. Jacobson said there were no preferred creditors for corporations or for LLC's and in the proposed amendments there would be a preferred creditor status for the unemployment insurance and possibly for workers compensation in being able to go after the partners individually. From that standpoint, what is being proposed is different from current law. Under HB's 100 and 200 that exception is created in that there is language which would make the corporation have a responsible party for the payroll taxes as well as the unemployment insurance and workers compensation payments. If the same logic is followed as in those two bills, this would be consistent.

REP. BOHARSKI asked if they were being identically consistent between piercing the veil in going after a partner in an LLP and piercing the veil in an LLC for both torts and taxes.

Mr. Dietrich said it is a common law concept, used in the corporation; i.e., a limited liability company or a limited liability partnership which is set up for a sham purpose--as an alter ego--set up without insurance--there are no assets ever in the corporation, LLC or LLP. Generally speaking in common law, there is an ability by a plaintiff to pierce the liability veil.

In narrow statutory exceptions such as proposed by the department there are exceptions from the liability veil in as much as it relates to unemployment insurance and unpaid workers compensation premiums. HB's 100 and 200 attempt to do that with member-managed limited liability companies and corporations with respect to one person. With the language in this proposed amendment the department is attempting to except that and impose joint and several liability among all the partners of a LLP and so it is a statutory exception to the liability veil.

REP. BOHARSKI gave the example of having two entities; one being a limited liability partnership and one is a limited liability corporation. There are members to the corporation and partners to the partnership. If they both own the same kind of business. In each situation, if an employee of the two entities commits the same act creating a liability, he wanted to know if legally there was any difference in handling the liability in terms of a member of the corporation as opposed to being a partner of the partnership.

Mr. Dietrich said they were the same.

REP. BOHARSKI asked if they were the same as far as taxes.

Mr. Dietrich said that the logic was the same. The original proposal adopted by the Senate was that a coordinating instruction be put on HB's 100 and 200 to include limited liability partnerships. If SB 340 were to pass, those amendments would be deemed effective as regarded HB's 100 and 200. The exceptions to the liability veil are identical except that they were dealing with a full blown common law partnership which is converted to a limited liability partnership and would be imposing joint and several liability on all the partners for the unpaid unemployment insurance. That liability exists now as to general partnerships, he said. There is not that kind of threat in terms of a corporation. It might be there for a member-managed LLC.

REP. KOTTEL stated that a principal is liable for the tortuous and contractual acts of their agent within the scope of the agency.

Mr. Dietrich said he would accept that as true.

REP. KOTTEL further stated that under Montana law partners were principal and agents to one another. That was also affirmed.

REP. KOTTEL stated that one reason there is joint and several liability is the concept of principal and agencies to one another. Again, the answer was in the affirmative.

CHAIRMAN CLARK relinquished the chair to **VICE CHAIR SHIELL ANDERSON.**

REP. KOTTEL stated that Montana law also recognizes imputed knowledge and so that one partner is imputed to have the knowledge of the other partner in terms of their own tortuous and contractual relationships and that is another reason there is joint and several liability.

Mr. Dietrich said he would accept that, but was not familiar with that concept.

REP. KOTTEL asked if this legislation would eliminate both of those concepts in total. Or, she asked, if knowledge can be proved of the other's actions or one partner specifically gave an outline of the other partner to act as their agent under principal agency law, would there still be liability.

Mr. Dietrich said that there would still be liability. If one partner acts in unison with another partner and that partner is said to be under the supervision or control or acting jointly with that partner -- for example, in a legal malpractice claim, the two partners' assets are potentially individually exposed to the claim of the person who was harmed. The assets of the partnership are subject to the claim and then their personal assets are exposed. The remaining partners who did not have anything to do with the file in question would not have exposure of their personal assets to creditors' claims.

REP. KOTTEL asked why this would be used rather than a subchapter S corporation.

Mr. Dietrich said that subchapter S corporations are not preferred as professional corporations. The partnership is a preferred entity for pass-through taxation.

REP. KOTTEL summarized that the best benefits of limited liability under corporate law and the benefits of pass-through tax write off under partnership law are being put together under one entity.

Mr. Dietrich said that was exactly right and that it is also familiar. An existing five-person partnership can be registered under LLP or PLLP with the Secretary of State's Office and that is a limited liability partnership without forming a complex operating agreement in forming a limited liability company.

REP. KOTTEL stated that there is a limit of the number of shareholders for a subchapter S. She asked if there is any limit in the number of partners in a limited liability partnership.

Mr. Dietrich answered, "No."

REP. DUANE GRIMES said that when the limited liability corporation was created, he understood that it was a very amenable easy function for a partnership involvement. He asked

if the LLC was functioning as it was intended to function and if it was popular and being used.

Mr. Dietrich said that his experience was that it is being used. He said it is being used for start-up businesses very effectively. The reason the limited liability partnership act is attractive is because it is attractive for existing businesses which can convert to become LLP without having to be recreated as a limited liability company. The question is whether the business is new or existing. He said this is a natural follow-on act for the one created by the last legislature.

REP. HURDLE asked where the specific tax advantages were for an LLP under Montana tax codes.

Mr. Dietrich said they were no different from a partnership.

{Tape: 1; Side: B}

There was the avoidance of double taxation, the ability to dissolve without incurring inside gain of appreciated assets which were held in the corporation, and liquidation of a real estate venture which was formed as a limited liability partnership and limited liability company is easier than in corporations.

Closing by Sponsor:

SEN. CRIPPEN closed by summarizing why this legislation was needed. He said it would provide a way for existing companies to compete with companies starting to come into the state.

HEARING ON HB 517

Opening Statement by Sponsor:

REP. DEB KOTTEL, HD 45, said HB 517 dealt with prejudgment interest. She introduced the reasons for having prejudgment interest as being based on Judeo-Christian ethics that there should be some limitation in restitution for injury. From the moment of injury, the injured is owed compensation. As a practical matter, the injured does not receive the compensation until the case is settled or until there is a verdict after a trial. The compensation for that injury is available for the defendant's use under the current system and it can promote a delay in the settlement of the case as long as the interest earned on that money is more than the costs of delaying the case. From the point of view for the plaintiff it results in justice delayed being justice denied. The delay in collecting compensatory damages is a delay in justice. It forces many cases to go to trial and forces trials to be put off in continuances as a delaying technique because there is something to gain from not settling cases.

This bill would provide a compromise. It would not charge prejudgment interest from the date of the occurrence, but it would ask that prejudgment interest would come from the date of the filing of the complaint. It would run from the time of the filing of the complaint until a verdict would be reached. The bill would open up the areas of damages where interest can be assessed. She said it was extremely doubtful that the effect would be an increase in insurance rates and she explained why.

She said this would promote earlier settlement of cases. Further, it would result in a generation of revenue for the state. She said it was a user fee limited to complaints filed in courts of law. There would be arguments that it should go back to the plaintiff, she said. If it were viewed as a user fee, the plaintiff would not get the interest but the plaintiff would have to go to court to make their case and use the court system to settle the dispute and she argued that it made sense that the plaintiff should pay the user fee involved in using the court system. The user fee would be interest on the judgment that they now don't receive. The defendant who is using the court system should be the one paying the user fee which she believed was morally and ethically owed once a verdict was entered. The current statutory rate is 10% and is reflected in the bill.

When Montana owes a judgment, they would not owe the fee because 2-9-317, MCA, provides that no interest is paid if judgment is paid within two years. The state is exempt from paying itself. She believed it should be put into the general revenue fund and allow the courts to make specific appropriations.

{Tape: 1; Side: B; Approx. Counter: 19.7}

Proponents' Testimony:

Erik Thueson, Attorney, said he had brought this bill before the legislature two sessions ago and it was well received. He felt this was an important part of the tort reform package. As an attorney he agreed the judicial system needed reform. Beyond the delay costs for the individual plaintiff, he felt that what happens to other people in the court system needed to be considered. He said that delays in settlement affected other cases in terms of delay. He said it would work and would raise revenues. Frivolous defenses should also be addressed. He cited an Alaska Supreme Court case, "The award of prejudgment interest generally is desirable as a policy matter because it encourages early settlement and discourages the defendants from using the delay between injury and judgment to defeat a legitimate demand." Further it said, "They are also influenced by the policy consideration the failure to award prejudgment interest creates a substantial financial incentive for defendants to litigate even where liability is so clear and the jury award so predictable that they should settle."

Opponents' Testimony:

Jacqueline Lenmark, American Insurance Association, described what this would do to the defendant and why AIA would oppose the bill. She said Montana already has prejudgment interest set at 10% to plaintiffs for economic losses which have been made certain or can be calculated. She said this bill would not create a new right in that sense. She submitted that her survey showed that there was a greater number than 25 states which allow that. This bill would provide beyond what other states do in awarding the interest to the general fund by taking a certain kind of damage for which prejudgment interest is not available in Montana and making it available for this purpose.

She said this was not going to just affect insurance companies, but would require prejudgment interest to be paid from all kinds of defendants. With respect to insurance, it would affect all kinds of insurance. The purpose of insurance is to protect the individual and the individual's assets when a claim is made. She disagreed with the assertion that it would assess interest against the _____ (inaudible) of damages. She thought it was not true that in every lawsuit the noneconomic damages were greater than the economic damages though it is true in some instances. Prejudgment interest laws have been adopted in many states to compensate a plaintiff for a loss while that plaintiff is not able to use the money that the damages represent. It is not an appropriate purpose to create a windfall for the plaintiff or for any other agency by imposing the interest statutes. The purpose is not to compensate the plaintiff or any person for funds that they would not otherwise have had the use of.

She disagreed that this would create a more just situation when there is delay in a lawsuit and the implication that the delay is only the defendant's responsibility. She said that delay is caused often by circumstances beyond the defendant's or the other party's control as court congestion or dilatory tactics by the plaintiff. She said the bill did not take into consideration an offer of judgment. She said in those cases it was not fair to assess an additional charge against the defendant for that purpose.

She addressed the proposal that this was a user fee against both parties. Currently, plaintiffs do not have an entitlement to the prejudgment interest this bill would create. The fee would be assessed only against the defendant and if it is greater than the amount of insurance the defendant has, that interest would be assessed against the insured.

Ward Shanahan, Farmers Insurance Group, said that what is different about this bill from other state's legislation is that this bill would put the judicial process into the dispute on one side against the other. He explained how he thought that would happen. He said the current law gives the plaintiff interest on those things on which the plaintiff can show damage. The items

in the bill in section 2 involve the question of prejudice which are delicate to handle before a jury. The court would instruct the jury with respect to those things and he questioned whether there could be a fair trial since the judge would know that any interest calculated at the end of the jury verdict would enure to the state of Montana or the county. There would be a tendency to over-instruct on those particular issues because the court would have an interest in the outcome of the case. He also felt the fact that judges are elected could also produce an unfair trial settlement situation. He felt it was an encouragement to outrageous demands. He cited a personal example to substantiate his opinions on this legislation.

Greg VanHorssen, State Farm Insurance Company, opposed HB 517 because it would defy the common sense approach to interest on judgements. Interest should not accrue until the amount of damages is certain. From their perspective, the approach is flawed because it assumed that damages were the only thing at issue and that the damages can be calculated with certainty. It also assumed that delays are for economic purposes. He said that not all lawsuits are as simple as that and they are not initiated by defendants. He said that for the most part, delays are necessary and not artificially caused. He said that HB 517 sent a message that if a person decided to exercise their right to the litigation process, they could suffer a 10% tax for exercising that right even if the use of the jury is absolutely necessary to determine liability and causation of the damages.

He said this unique proposal including the interest going to the state general fund would create a potential conflict. He said that if juries knew that a large award could result in a substantial windfall to the general fund and perhaps lower or maintain taxes, it would be a message of concern. He said it would create a disincentive for the use of the court system. He suggested that there are probably better vehicles to address any funding shortfalls.

{Tape: 1; Side: b; Approx. Counter: 54.0}

Questions From Committee Members and Responses:

REP. MC GEE referred to lines 26 and 27 regarding the court advising the jury with regard to the claim and asked if that was current law.

REP. KOTTEL replied that it was current law and that the jury is informed that the court will determine the amount of prejudgment interest due, if any, on the judgment rendered. Subsection 1 would currently only allow prejudgment interest on those items which were ascertainable and definable. If these amendments were to pass, it would not be the jury making the decision, but the judge would determine what portion of the judgment was ascertainable under section 1 and the interest would be paid to

the plaintiff and what portion of the judgment would fall under section 5 which would be paid to the state.

REP. MC GEE addressed the argument that the 10% amount is a tax and asked if the language on line 14 which referred to current law is the same as the language on line 2, page 2 of the bill.

REP. KOTTEL said they were two different things. "Under current law, if I simply give notice to the defendant and in that notice I set out damages which can be made certain and later at the time of trial the judge agrees that the calculation of those damages were made certain, they I have the right of prejudgment interest from that date of notice, that is not necessarily the date of filing the complaint," she explained.

REP. CLIFF TREXLER asked if a settlement is made out of court, how it would affect the 10%.

REP. KOTTEL replied that it is not awarded because there has to be a verdict.

REP. TREXLER asked if there was any information regarding an amount of the various fees to losers which have been assessed through adoption of current legislation. He asked if that was pertinent to this legislation.

REP. KOTTEL said she did not believe it was pertinent and recounted the bills which had been passed or which had failed through this legislature dealing with assessment of court fees. She did not see this as a penalty for the losers, but as defendants paying because they technically owed it.

REP. TREXLER asked if it was a possibility that in the event that the judicial system were to be delayed because of excessive workloads in a case, that the amount could be exaggerated.

REP. KOTTEL said it was possible, but even if there were a 10-year delay because of the fault of a judge or of a plaintiff delaying an action, the defendant has that money in their pocket and hopefully earning interest on it thus benefitting from it. The plaintiff would not benefit from delay. This system rights that wrong.

REP. HURDLE asked for an explanation of how the user fee might be assessed against a plaintiff.

REP. KOTTEL answered that the other states which have prejudgment interest give it to the plaintiff. This bill does not give it to the plaintiff except that which is defined under section 1. The idea is that both pay the price under this bill for using the system.

REP. LOREN SOFT clarified that in all the other states which have prejudgment interest, the payment is made only to the plaintiffs.

{Tape: 2; Side: A}

REP. KOTTEL answered that that was correct.

REP. SOFT asked how the plaintiff benefits from delay.

Mr. VanHorssen said the plaintiff may or may not benefit from delay. As a defense attorney, he answered that he insists on moving litigation forward as quickly as possible because the categories of damage can either be substantiated or built upon with the passage of time. With the passage of time between the filing of the complaint and the jury verdict, the better the chances are that those figures will be higher. In that respect there could be some benefit in delay.

REP. BOHARSKI, in order to clarify opposition to the bill, asked if the defendant was required to pay interest on the economic damages from 30 days after settlement_____ (inaudible) the claim.

Mr. Shanahan said that was the economic portion of the damages.

REP. BOHARSKI asked if his opposition to the bill was that it would provide for charging interest on the nonidentifiable, noneconomic damages.

Mr. Shanahan said that was correct, that was the portion in which the state is interjected as a party to receive the interest on the items in subparagraph (2).

REP. BOHARSKI was beginning to feel that when a plaintiff has had the actual losses paid to them plus the interest and did not need that money, it was like a fine. He drew the analogy that if someone drives at 200 miles an hour and is fined substantially and why the judge might charge interest from the day of the issuance of the ticket to when the person appeared in court to pay the ticket. He asked if **Mr. Shanahan** saw a difference between the two.

Mr. Shanahan said there was a similarity except that one was a criminal matter and the other was a civil matter.

REP. BOHARSKI said he understood the difference between the criminal and civil matters, but his concern was that the person was already receiving interest from actual economic losses and he understood what the sponsor was attempting to do with the bill, but he felt that punitive damages were a fine. Just like he would have a problem with a fine on a ticket, he had a problem with a fine on _____ (inaudible).

REP. KOTTEL said that nothing in subsection (1) says that they pay the economic damages or that any portion of it is received prior to verdict. It just provided that those damages are ascertainable by calculation and interest would begin to run on

it. The person hadn't been made whole until the judgment came in. It was not all economic damages, but economic damages made by calculation. Many economic damages cannot be calculated until time of jury. She outlined those which can be calculated. The judge would determine which can be calculated at the time of the notice. On the list, only subsection (d) referred to punitives. Just because they are not economic, it did not mean it was not suffered. Pain and suffering are not punitive damages but they are real damages and should be compensated.

REP. BOHARSKI asked if those are real damages, why would the plaintiff want to give the money to the court.

REP. KOTTEL said they would not want to give the money to the court. But the point was that when the complaint was filed, the person used the state of Montana to settle the dispute though it could have been settled out of court. She said if state government is used to settle the dispute, then the government should be paid the 10% interest on those damages from the time of the filing of the complaint to the verdict. The defendant could have settled before that, and so the same would be true for them.

REP. BOHARSKI referred back to the nonpunitive and non-identifiable damages as being damages due the plaintiff and asked what **Mr. Shanahan's** opposing testimony would have been if those damages would have been given to the plaintiff.

Mr. Shanahan answered that it would have been slightly different. The reason that interest was not allotted in the past on those was that they had not been yet determined. Where the damages are easily determined, interest has been allowed. Pain and suffering, injury to reputation and financial standing, mental anguish and suffering, loss of way of life and loss of consortium are all issues that are nebulous and speculative. This bill created a problem for him in that if the court has an interest in collecting interest for the state, there can be a problem of an unfair trial for a defendant. Traditionally the plaintiff has not been entitled to receive interest on those until they have been determined by the jury. Then the judgment would begin to draw interest.

REP. BOHARSKI suggested that if the case were being tried five years after the occurrence of injury, then the jury could look at the actual losses in determining how much to award and evaluate what the future losses might be.

Mr. Shanahan said that was a correct assessment of what juries do.

REP. BOHARSKI stated that if this were filed against an insurance company which would have to pick up the fees, he wondered if the fees would actually be charged and if the jury would reduce the award and then the interest would make the award much less than in the other case. He asked if the bill were to pass and the

extra fees were to be charged to an insurance company, where that money would come from.

Mr. VanHorssen said the cost of doing that business and providing the product would be passed on to consumers. The fees would be mirrored in increase in premiums.

REP. BOHARSKI asked if that was a legitimate pass through under the insurance bill.

Mr. VanHorssen said he understood that it was.

REP. GRIMES asked if these issues were already considered under the noneconomic awards that juries may give so that in charging the fees it would be a double "hit."

Mr. Thueson replied, "No, sir." He said that to his knowledge the first subsection had never resulted in any interest going to the plaintiff. He had never seen a plaintiff receive any prejudgment interest under that first section.

REP. GRIMES said he wasn't talking about necessarily saying that "this much is interest, but the point that was being made was that in consideration of all the damage which had occurred to somebody, those are kind of considered whether they be actually described or not that that actually considers some of the same issues that the interest would be getting at."

Mr. Thueson answered, "No, I don't think so." He did not think they could look at fellow citizens and say that they don't follow the law. Prejudgment interest is not an instruction of law given to juries and they don't award it. As far as future damages, they are told that all future damages have to be reasonably certain and they are also told that no damages can be speculative. Unless there is the assumption that they award interest when they are not told to award interest, he did not think they could say that they do that. In respect to economic losses they are told that they must be reduced to present value taking into account the future growth of money and wages.

REP. GRIMES said it seemed there were two lines of rationale being used. One was that this would somehow eliminate the dis-incentive for stretching frivolous motions out in the court system and the other was that this was a fee. He asked if **Mr. Thueson** felt that most of the problems in the court system were caused by defendants purposefully extending the cases because of this issue.

Mr. Thueson did not think he could honestly say that the major reason for delay was frivolous motions, etc. He said that it was a factor in the delay in the court system. No one should profit by delay.

REP. GRIMES asked if the defendant doesn't know how much will be awarded in a noneconomic case, how they could profit from the delay.

Mr. Thueson answered that they set a reserve to cover economic and noneconomic damages which is invested until it is paid. He believed that in fairness legitimate damages any citizen was entitled to should be subject to interest from the day of the injury.

REP. GRIMES referred to page 1 where it was stated that interest would accrue on damages awarded by a verdict. He asked if damages awarded by a verdict were the same as damages received by the plaintiff.

REP. KOTTEL replied that damages received by the plaintiff in settlement have not been awarded by verdict.

REP. GRIMES asked if a cap were applied to that award would the interest be on the cap or on the award.

REP. KOTTEL said it only made sense to her that it would be only interest awarded on what the plaintiff would actually receive and the cap would also cap the interest.

{Tape: 2; Side: A; Approx. Counter: 27}

Closing by Sponsor:

REP. KOTTEL closed by summarizing the points made in the question and answer period.

{Tape: 2; Side: A; Approx. Counter: 33.2}

HEARING ON SB 402

Opening Statement by Sponsor:

SEN. DOROTHY ECK, SD 15, introduced SB 402 which had been named the Montana Medical Support Reform Act. This bill intended to provide access to medical care for children by assuring wherever possible that the parents in a separation or divorce will make payments for the child's health care and that they will not become the responsibility of the Medicaid system. This comprehensive bill was designed to address many sections of law to provide a system whereby a medical support order is a part of every child support order. It would not rule out the use of Medicaid, but it would not allow parents who have insurance or the means for it to rely on Medicaid to pay for their child's health care. She said that there would be some clarifying amendments.

Proponents' Testimony:

Mary Ann Wellbank, Administrator, Child Support Enforcement Division, Department of Social and Rehabilitation Services (SRS), went through each of the parts of the bill in detail to provide understanding to the committee about how it would work. She said that the bill addressed providing the state's children with adequate insurance coverage without adding to the costs of Medicaid, providing health care providers with consistent guidance as to how to deal with divided families and provided courts with the means to address medical support without unnecessary expense or delay.

The federal government mandated the passage of the Omnibus Budget Reconciliation Act (OBRA) in 1993 to assure medical support for the nation's children, she said. With SB 402 they saw an opportunity to incorporate the provisions of OBRA while making it work for Montana. She described the process and entities involved in gathering the information for drafting the bill.

{Tape: 2; Side: A; Approx. Counter: 52}

Mary Alice Cook, Montana Advocates for Children, strongly supported the bill.

Opponents' Testimony:

None

Questions From Committee Members and Responses:

REP. BILL TASH asked where savings would result.

Ms. Wellbank said they would result from having children who were on Medicaid go off Medicaid because they were now covered by the parents.

REP. TASH asked if there was a difference in the way fees were assessed through SRS.

Ms. Wellbank said there weren't any fees in the bill. The fiscal note related to the fact that there are some children now receiving Medicaid benefits whose parents can well-afford to cover them, but perhaps the mother, without child support from the father, is eligible for Medicaid. Some divorce decrees provide that if a child is eligible for Medicaid, the father doesn't need to provide insurance coverage. The bill would eliminate that provision.

REP. ELLEN BERGMAN asked why had it just now been decided that these parents can afford to pay.

Ms. Wellbank said that all along they are required to pay, but this bill would set certain provisions to give the custodial parent more access to the insurance. Previously the obligated parent was obligated to enroll the child, but the custodial parent could never get reimbursement. It also would provide that Medicaid is not the primary insurer.

REP. BERGMAN asked if she thought because the court decided the parents need to have their own insurance that they will.

Ms. Wellbank said the Representative was right that responsibility cannot be legislated but that this would require the court to take positive action and to be sure there was a medical insurance order where before there may not have been.

REP. MC GEE did not see included in the definitions sections about a plan administrator while the text of the bill included a plan administrator. He asked what a plan administrator would be.

Ms. Wellbank said that it was a term for the insurance industry and it would be the entity which would determine whether benefits are paid under the plan and would make the payments. For instance, Blue Cross/Blue Shield acts as the administrator for the state insurance plan.

CHAIRMAN CLARK resumed the chair.

REP. MC GEE asked if the plan administrator could be the employer.

Ms. Wellbank said it normally would not be the employer unless it was a large employer which administered its own plan.

REP. MC GEE referred to section 13 through subsection (4) and his understanding that it was required by OBRA.

Ms. Wellbank said she was not sure whether 4(a) or (b) were required by OBRA. She said 4(c) was not.

REP. MC GEE asked if section 21 on page 12 of the bill was required by OBRA.

Ms. Wellbank said it was not but the state felt they needed some means of enforcement. She said the discharge clause 4(a) in section 13 was not required by OBRA nor was 4(b).

REP. KOTTEL discussed line 13 under subsection 4(a) asked if it was her opinion even if it were eliminated, current Montana law already covered that provision.

Ms. Wellbank said it could be stricken for that reason.

{Tape: 2; Side: B}

REP. HURDLE asked for a description of OBRA.

Ms. Wellbank described OBRA.

REP. BOHARSKI discussed sections 16, 17 and 18 as appearing to be new mandated benefits under Montana insurance law. He did not understand what they would provide and asked how they would amend the insurance code.

Ms. Wellbank answered that 16 and 17 just referenced back to the insurance code and would not expand or limit the provisions of the insurance code. Section 18 provided that a plan cannot discriminate against a child or refuse to enroll a child for certain reasons.

REP. BOHARSKI asked if to her knowledge there were any health plans in the state which currently discriminated for any of the listed reasons.

Ms. Wellbank replied there were none to her knowledge, but these were mandatory provisions of OBRA.

REP. SOFT reflected on the testimony that the savings would be between $40,000 and $50,000 per year.

Ms. Wellbank confirmed that that was general fund savings for the first two years and then biennium after that. She said they did not know what the long-term savings would be, but that it could be more.

REP. SOFT said the fiscal note showed that they would have to expend about $120,000 to do it and wanted to know where the savings would come from.

Ms. Wellbank said there were two different divisions involved. The Child Support Enforcement Division would need to add some people for the increase in hearings and also to work with the insurers to determine what benefits were available. But it would save the other division (Medicaid) money.

REP. SOFT and **Ms. Wellbank** continued to work through the effect of the bill in savings to SRS. The net impact considered the cost to the one division with the savings to the other division.

REP. BRAD MOLNAR asked if there was a provision for an uninsurable youth.

Ms. Wellbank said it did not mandate that children who are not covered currently for pre-existing conditions be covered. For example, if paternity is established a year following birth, it would not require the insurer to cover that child if it had a pre-existing condition which would not be covered.

REP. MOLNAR asked about the provision concerning joint custody.

Ms. Wellbank said it basically set forth certain provisions whereby the obligated parent would pay child support, but the custodial parent might have a better insurance plan available. The bill contemplated that the custodial parent could get insurance if that happened. In a split custody situation, the judge or administrator would take those facts into account. She could not envision the obligation switching back and forth for each period of custody. One parent would be required to obtain and maintain the insurance.

REP. MOLNAR pointed out a $100 minimum in lieu of insurance on page 26, line 6.

Ms. Wellbank said there is a provision in OBRA which requires parents to pay even up to $50 to reimburse Medicaid if they do not have coverage available but can afford the $50 payment per month. The money would go into the general fund to offset Medicaid. The judge can order anything that is reasonable. She described section 6 and under section 7 where the $50 per month was discussed.

REP. MOLNAR asked if the fiscal note took into consideration the lack of the $100 or $50. He was concerned that they were generating a lot of work to make $40,000 or $50,000.

Peggy Probasco, SRS, said they were talking about a $100 penalty being replaced with a $50 payment which would actually go to Medicaid to help reimburse them. There was also a penalty section in this bill in addition to that. Currently, they could charge up to $200 for people who fail to enroll their children when they can enroll them. This would provide for the ability to make them pay toward Medicaid, but also for a penalty if they have insurance available but do not secure it. It also would provide the ability to go to the employer or insurer to enroll the child. This would provide more savings in that if they don't have insurance available, they could get the $50 back to Medicaid which is not the penalty. The penalty would be an additional amount collected.

REP. MOLNAR asked if the income from these provisions was in the fiscal note.

Ms. Probasco said she believed it was.

REP. ANDERSON asked if they were spending state dollars to save federal dollars.

Ms. Wellbank said they were spending federal dollars and general fund to save general fund. Ultimately it would save state general fund.

REP. ANDERSON asked if the ongoing $81,000 and $39,000 were paid according to the ratios showed on the fiscal note to fund the positions.

Ms. Wellbank said that right now the Child Support Enforcement Division does not use general fund, so it would all be state special revenue and federal funds considered; 66% federal and 34% state special.

REP. ANDERSON said he did not believe the savings came out to that ratio.

Ms. Wellbank said that Medicaid was funded differently from child support. She said the $50 was not reflected in the fiscal note because they could not pinpoint what that would be or the amount of outstanding court orders there currently are.

REP. MC GEE redirected the attention to section 13, page 10, line 14 and asked as an employer what their course of action would be in discrimination.

Ms. Wellbank said the employer may not discriminate simply if the intent were because the person had a medical support order.

REP. MC GEE said it read that the employer could not take any disciplinary action against an obligated parent who might be uncooperative.

Ms. Wellbank said the section was not required by OBRA and she had no strong feeling that it needed to be included.

REP. SOFT, Ms. Wellbank and **Terry Frisch** returned to the fiscal note and discussed his enumerated questions to estimate the annual cost and savings and their calculations in reaching the figures.

{Tape: 2; Side: B; Approx. Counter: 27.3}

REP. BOHARSKI asked what the funding source was for the state special fund.

Ms. Wellbank said state special revenue was what the division collects from receiving federal incentives on the amount of AFDC collections plus any child support assigned to the state as a condition of AFDC that is collected.

REP. BOHARSKI asked for comments on sections 16, 17 and 18 of the bill.

Mr. Frisch discussed those sections to the best of his understanding.

REP. BOHARSKI proposed an example to attempt to get an answer to the question that involved a child with a pre-existing condition where the court would decide that a parent who had not previously carried them on their insurance should now provide the insurance. He asked if the pre-existing condition clause under the new insuring parent's insurance be waived.

Mr. Frisch answered that a plan which did not provide for enrollment of people with pre-existing conditions would not have to take the child.

REP. MOLNAR asked if it was a new mandate on insurance companies on page 11, section 16.

Ms. Probasco said it was not a new mandate. OBRA requires sections relating to newborns and adopted children. They did not want to expand the coverage insurance companies are required to provide children in the state, so they referred to the existing insurance code. She clarified the process and the insurance code.

REP. MOLNAR said he was reading it that if there is a health benefit plan now and it did not include a provision for newborn children but was a small risk policy, that it must be reissued with that provision included.

Ms. Probasco clarified that when there is a policy which has been legally sold in the state that did not cover newborn children, this section would not require that coverage. The only thing that this statute would do is to expand the class of people who have to be covered.

REP. MOLNAR asked what the cost to insurer and insured was to make those premiums with the expansion of class.

Ms. Probasco said she did not know. Those insurers who worked with them during the drafting of the bill seemed to have adjusted to cover those provision.

REP. MOLNAR asked if she would assume that it would be greater than the $50,000 savings.

Ms. Probasco said she did not know.

REP. SOFT continued to question the fiscal note and asked for a new fiscal note which would separate the state and the federal dollars.

SEN. ECK thought it was a good issue to address and said she would ask for that.

REP. MC GEE referred to section 13 on the bottom of page 9 and asked for clarification.

Ms. Wellbank said the Consumer Credit Protection Act sets forth certain percentages to be withheld for debts from a paycheck. It would range from 30% to 65% depending upon the debt and circumstances. This was saying that an employer who provides medical insurance could be required to withhold the premium but if the premium coupled with the child support they are ordering

would exceed the set percentage, the employer should not withhold the premium.

REP. MC GEE asked how the employer would know.

Ms. Wellbank agreed that they would have to read the Consumer Credit Protection Act and said that any kind of garnishment would come under the same conditions. The employer could call the Child Support Enforcement Division for help in interpretation.

Closing by Sponsor:

SEN. ECK recognized this was a complex issue but very important.

{Tape: 2; Side: B; Approx. Counter: 46.3}

HEARING ON SB 229

Opening Statement by Sponsor:

SEN. DON HARGROVE, SD 16, remarked that one of the most feared and effective tools that a law enforcement official has in drug trafficking operations is the ability to seize assets used in those operations. He noted that in nine months in 1994, the fiscal note reflected $500,000 net realized to be put into various drug task force programs around the state. This bill would provide the opportunity to put the asset seizure portion into the criminal code.

Proponents' Testimony:

John Connor, Montana County Attorneys Association, said this bill addressed a situation which arose from a Ninth Circuit Court decision in September of 1994. In the past dealing with these cases by having a civil proceeding to seize the property used in drug trafficking following the criminal proceeding was deemed to be double jeopardy because the person was required to defend the act twice. This bill would provide for the combination of the two proceedings and bring Montana's law in line with the Ninth Circuit Court decision. He said that **Sheriff O'Reilly** representing the Montana Sheriff's and Peace Officer's Association supported the bill. He presented testimony from **Karen Townsend, Deputy County Attorney for Missoula County.** **EXHIBIT 2**

Marty Lambert, Montana County Attorneys Association, Chief Deputy Attorney Gallatin County, gave a practical application of the decision of the ninth circuit opinion and how this legislation would relieve the situation. He outlined the various provisions of the bill.

{Tape: 2; Side: B; Approx. Counter: 58.9}

CHAIRMAN CLARK relinquished the chair to **VICE CHAIR DIANA WYATT.**

Tom Adomo, Department of Justice, Law Enforcement Services Division, supported the bill.

Opponents' Testimony:

None

Questions From Committee Members and Responses:

REP. ANDERSON proposed some examples to determine how the procedure would differ from current practice and to determine what the breadth of the seizure allowed them to do.

Mr. Lambert said the U. S. Supreme Court held that real property cannot be seized pending the outcome of the forfeiture case without a prior hearing.

{Tape: 3; Side: A; Comments: Part of the answer was lost in changing the tape.}

He said that a seizure could not be made as part of the investigation. It is possible that there could be a forfeiture though he was not aware that it had ever been sought in Montana. Unless it could be shown that the whole house was purchased with money from drug transactions or that the person had been growing marijuana and selling it out of the house for some significant period of time, he did not believe any county attorney would seek forfeiture.

REP. ANDERSON said it seemed as if a literal reading of this bill meant that a county attorney could do it.

Mr. Lambert said he could now under a civil proceeding.

REP. ANDERSON said then they were not expanding the ability of law enforcement to seize property which is used in drug offense, but that this was just making it constitutional.

Mr. Lambert answered, "No, you're not. As a matter of fact, now you're having to prove beyond a reasonable doubt under this bill that the property was used for those purposes." Currently under the civil proceeding, there is a burden to show probable cause and the claimant would have to show that it was not drug related. Enacting this bill would provide a significantly greater burden for the prosecution to show that the property should be forfeited under this act.

REP. KOTTEL asked if there would still be civil forfeiture after this bill passed.

Mr. Lambert answered, "Yes."

REP. KOTTEL asked what the reason was for having both civil forfeiture and criminal forfeiture.

Mr. Lambert said there were cases where they would want to proceed with just a civil case and he gave examples such as someone who would present a significant health risk in incarceration, someone very young and their first criminal offense, someone advanced in age or a valuable informant.

REP. KOTTEL asked if they can promote forfeiture for mere possession of a dangerous drug.

Mr. Lambert said that can now be done. This bill would not provide for that but would require one of the three crimes or conspiracy--sale, possession with intent to sell, conspiracy to sell or sale within school property.

REP. KOTTEL asked if there was any limit in the level of the amount of drugs. The answer was no.

REP. KOTTEL asked if this bill distinguished between marijuana versus cocaine versus heroin. The answer was no and that was consistent with the criminal code except that penalties were different.

REP. KOTTEL discussed dual sovereignty and asked if double jeopardy applied.

Mr. Lambert said that double jeopardy did not apply. It is the separate sovereigns doctrine.

REP. KOTTEL said that she had heard that one reason for the problems with the criminal forfeiture statute was that it set up entrepreneurial police departments. Local police departments would go through records looking for cases where there had been no conviction at the federal level, they would attempt to go after it again to raise money for the law enforcement agency.

Mr. Lambert said that was true and that is an abuse of power and should not be permitted. He knew of no one in Montana who does that.

REP. HURDLE asked if the proceeds of the items seized goes to the task force and what happens to those things which are seized and asked how it affects the annual budget.

Mr. Lambert in the specific case he cited, said the proceeds either went to Gallatin County or the six-member task force with 50% to the state of Montana in the Attorney General forfeiture fund. He said the money in Gallatin County had varied between $10,000 to $20,000 per year and was earmarked for payment of matching funds for salaries for officers which had been funded for the drug task force which is under a federal grant.

REP. HURDLE asked if he was saying that there was a three-way split of everything that is forfeited.

Mr. Lambert said that was not always the case. In that case there was a state agency involved. When that happens they split 50/50 with the state agency. When it is resolved with the task force, 100% goes to the task force. It depends upon how many agencies are involved.

REP. HURDLE asked who makes the determination of the split percentages.

Mr. Lambert said there was a specific written agreement with the task force. In joint federal operations there are guidelines which determine how the percentages are figured out.

REP. HURDLE, in reference to previous testimony that there are sometimes abuses of power, asked if he was telling the committee that they would not abuse the power and to trust their judgment while asking for that same power.

Mr. Lambert said that was the power that they already have. He stood by the record that any county attorney has with regard to those particular cases.

Closing by Sponsor:

REP. HARGROVE closed by saying this was an important bill. He said that because of the relative isolation of Montanans they may have a problem knowing how important and big narcotics operations are in involvement in their lives. He said that the assets which are confiscated in these cases are used to keep the agencies going which are used in law enforcement in drug cases. The person who is arrested may be fairly inconsequential in the whole drug organization which has a large number of assets to use in fighting the court cases, for setting bribes, etc. Seizing the assets takes away their ability to operate, intimidate and cost the people of Montana through their programs.

Motion: **REP. MC GEE MOVED TO ADJOURN.**

{Comments: This set of minutes is complete on three 60-minute tapes.}

ADJOURNMENT

Adjournment: The meeting was adjourned at 12:20 PM.

Bob Clark
BOB CLARK, Chairman

Joanne Gunderson
JOANNE GUNDERSON, Secretary

BC/jg

HOUSE OF REPRESENTATIVES

Judiciary

ROLL CALL DATE 3/6/95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Clark, Chairman	✓		
Rep. Shiell Anderson, Vice Chair, Majority	✓		
Rep. Diana Wyatt, Vice Chairman, Minority	✓ 8:15	~~✓~~	
Rep. Chris Ahner	✓		
Rep. Ellen Bergman	✓		
Rep. Bill Boharski	✓		
Rep. Bill Carey	✓ 11:00		~~✓~~
Rep. Aubyn Curtiss	✓		
Rep. Duane Grimes	✓ 8:10	~~✓~~	
Rep. Joan Hurdle	✓		
Rep. Deb Kottel	✓		
Rep. Linda McCulloch	✓		
Rep. Daniel McGee	✓		
Rep. Brad Molnar	✓		
Rep. Debbie Shea	✓ 8:20	~~✓~~	
Rep. Liz Smith	✓ 8:15	~~✓~~	
Rep. Loren Soft	✓		
Rep. Bill Tash	✓ 8:10	~~✓~~	
Rep. Cliff Trexler	✓		

EXHIBIT 1
DATE 3/6/95
SB 340

Amendments to Senate Bill No. 340
Third Reading Copy (blue)

Requested by Senator Crippen
For the Committee on Judiciary

Prepared by Valencia Lane
March 4, 1995

1. Title, line 6.
Following: "30-13-206,"
Insert: "30-13-209,"

2. Page 2, line 19.
Insert: "**Section 4.** Section 30-13-209, MCA, is amended to read:
"**30-13-209. Amendment.** An amendment to registration of an assumed business name shall be filed with the secretary of state within ~~60 days~~ 1 year after any one of the following events occurs:
(1) there is a change in the name or identity of the person or persons transacting or having interest in the business for which the name is registered;
(2) there is a change in the identity of the county or counties in which the name is or is intended to be used;
(3) a person having an interest in the business with a registered assumed business name withdraws from the business or dies; or
(4) the registrant wishes to change the name of a registered assumed business name.""
{*Internal References to 30-13-209: None.*}

3. Page 3, line 23.
Strike: "17"
Insert: "18"

4. Page 4, line 22.
Strike: "17"
Insert: "18"

5. Page 4, line 28.
Strike: "20"
Insert: "21"

6. Page 5, line 8.
Following: "partner"
Insert: "of the limited liability partnership"

7. Page 5, line 11.
Strike: "17"
Insert: "18"

8. Page 7, line 3.
Following: line 2
Insert: "(a) the partner is personally liable for the liability of the partnership under 35-10-307 or 35-10-629; and

Strike: "as the last words or letters of its name"

18. Page 14, line 4.
Strike: "17"
Insert: "18"

19. Page 14, lines 12 and 14.
Strike: "17 through 20"
Insert: "18 through 21"

CONWOR
EXHIBIT 2
DATE 3/6/95
SB 229

TESTIMONY IN SUPPORT OF SB 229
PRESENTED BY KAREN S. TOWNSEND
DEPUTY COUNTY ATTORNEY FOR MISSOULA COUNTY

My name is Karen S. Townsend and I am a deputy county attorney for Missoula County. I have worked as a deputy county attorney for Missoula County, an Assistant Attorney General assigned to the County Prosecutor Services Bureau, and a Director of Training for the National College of District Attorneys since my graduation from the University of Montana Law School in June, 1976. Since July 1, 1990, when I returned to the Missoula County Attorney's Office from Texas, I have prosecuted almost all of the drug cases in Missoula County and have also been responsible for handling all of the drug forfeiture actions which were filed in connection with those criminal prosecutions.

I have been convinced, both in my work in Missoula and in my contacts with the National College of District Attorneys, that drug forfeiture is a powerful tool which can be used in combatting the distribution of illegal drugs. Since 1990, our office has made use of the forfeiture statutes to secure for the Missoula City Police Department or the Missoula County Sheriff's Department or the Montana Narcotics Investigation Bureau assets from drug offenders. We have secured cash, personal property including vehicles, guns, and other forms of personal property. These agencies, in return have made use of their forfeiture fund to help our office acquire equipment that all of us can use in trial presentation, have made their funds available to fund training for some of the lawyers, and have contributed to the budget in our office to support prosecution for drug offenses.

Last fall, the 9th Circuit Court of Appeals reached a decision in a civil

forfeiture case in which they held that in federal court, US Attorney's offices could not proceed separately on a criminal prosecution and a separate civil forfeiture action seeking to forfeit property associated with the criminal conduct because to do so would be a violation of double jeopardy. They further held that in order to pursue forfeiture, the US Attorneys would have to proceed by means of criminal forfeiture, which is permitted under their laws, thus having one action which accused a person of a crime and also sought forfeiture of any relevant property. Although that decision is being challenged by the federal government, and there may be a reversal by the entire 9th Circuit, or by the United States Supreme Court, at this point, the law in the 9th circuit suggests that we may no longer be able to proceed in Montana in separate actions for criminal prosecution and civil forfeiture. In fact, I am currently briefing the question in the Fourth Judicial District where a defendant was convicted in federal court of drug offenses based on a county investigation, and where we filed civil forfeiture against guns, property and cash. The defendant is claiming that our forfeiture action is barred by the double jeopardy clause based on the 9th Circuit decision.

If the 9th Circuit decision is accepted by our Supreme Court, unless SB 229 is passed, prosecutors in Montana will be forced to make an election between proceeding on a criminal conviction or on forfeiture of assets. This bill will not require the prosecutor to proceed this way, since there may be cases in which the prosecutor simply does wish to elect one way or the other. Then, the current forfeiture proceedings can be followed. This bill will allow us to do both in one proceeding, which, under current law, we cannot do. I truly believe that the ability

EXHIBIT 2
DATE 3-6-95
SB 229

to combine criminal convictions with forfeiture of the profits from distribution of drugs acts as a deterrent in the fight against illegal drugs. Without this bill, one of our weapons could be taken away.

This bill does not take away any rights from persons, but in fact provides additional protections for persons whose property is sought. The burden of proof becomes beyond a reasonable doubt instead of preponderance of the evidence, and the Defendant is entitled to a jury trial on the issue of forfeiture, something not permitted under current Montana forfeiture laws.

I would ask the committee for support of this bill, because, by inaction, we are in danger of losing the ability to forfeit property which either facilitates the distribution of illegal drugs, or is acquired by means of distribution of illegal drugs.

Karen S. Townsend

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE 3/6/95

BILL NO. SB340 SPONSOR(S) SEN. CRIPPEN

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
Charles R. Brooks	Billings Chamber	✓	
David Dietz	State Bar of MT / KPMG	✓	
[illegible]	MT Society of CPAS		
Jim Tutwiler	MT Chamber		
Robert White	Bozeman Chamber	✓	
ROD SAGER	DEPT. LABOR & INDUSTRY	✓	

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

HR:1993
wp:vissbcom.man
CS-14

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE 2/21/95

BILL NO. HB 517 SPONSOR(S) Rep. Kottel

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
Erik Thuesen, Clancy	Self	✓	
Leard Strahan	Farmers Insurance Grp		✓
Ron Ashbaker	State Farm Ins		✓
Jacqueline Lenmark	Am. Ins. Assn		✓

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CS-14

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE 3/6/95

BILL NO. SB 402 SPONSOR(S) SEN. ECK

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
M. A. Willard	SRS-CSED	✓	
Peggy Probasco	SRS-CSED	✓	
Mary Alice Cook	Adv. for MTS Children	✓	
Kate Clarkson	MT Womens Lobby	✓	

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CS-14

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE 3/6/95

BILL NO. SB329 SPONSOR(S) SEN. HARGROVE

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
Marty Lambert 615 S. 16th, Bozeman	MT County Attys Assn Gallatin County Attorney	X	
John Connor	MT County Attys Assn	X	
Cary Rapp	MHP	X	
Chuck O'Reilly	Mt Sheriffs & Peace Officers Assn	X	

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

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