

MINUTES

MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By CHAIRMAN BRUCE D. CRIPPEN, on January 15, 1997, at 10:00 a.m., in the Senate Judiciary Chambers, Room 325, of the State Capitol, Helena, MT.

ROLL CALL

Members Present:

Sen. Bruce D. Crippen, Chairman (R)
Sen. Lorents Grosfield, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Sharon Estrada (R)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Walter L. McNutt (R)

Members Excused: None

Members Absent: None

Staff Present: Valencia Lane, Legislative Services Division
Jody Bird, Committee Secretary

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

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 44, posted January 9, 1997
SB 135, posted January 8, 1997

Executive Action: SB 6, SB 16, SB 103, SB 135

HEARING ON SB 135

SENATOR AL BISHOP acted as Chairman during the hearing on SB 135.

Sponsor: SENATOR BRUCE D. CRIPPEN, SD 10, Billings

Proponents: None

Opponents: Russell Hill, Montana Trial Lawyers Association

Opening Statement by Sponsor: SENATOR BRUCE D. CRIPPEN, SD 10, Billings. This is a Code Commissioner bill eliminating special notice of arbitration provision required for contracts, having an immediate effective date. Language has been stricken on page 2, lines 2-4. Page 1, lines 8-10, state that notice is not necessary. These changes were recommended by Legislative Services.

Opponents' Testimony: Russell Hill, Montana Trial Lawyers Association (MTLA). There is a distinction between whether Federal law in certain circumstances preempts Montana law. Montanans need to understand the significance of what they're signing.

Questions From Committee Members and Responses: SENATOR STEVE DOHERTY. Was the ruling on page 1, lines 8-9, a securities case, or did the U.S. Supreme Court strike this entire section as it applies in Montana law? SENATOR CRIPPEN. I haven't looked at 27-5-114(4), MCA, so I don't know if it has general application, but the opinion was that it would apply in all cases.

SENATOR DOHERTY. If there is any wiggle room in this decision, would it be your interest to limit this to the findings in Doctor's Associations, Inc. v Casarotto or to apply it generally. SENATOR CRIPPEN. I may want to take a look at this, but I don't see a problem with having notice eliminated.

SENATOR DOHERTY. Are you willing to read this section of law? SENATOR CRIPPEN. During SENATOR HOLDEN's bill hearing the Code Commissioner staff will be present, and we can ask them.

Closing by Sponsor: None

HEARING ON SB 44

Sponsor: SENATOR RIC HOLDEN, SD 1, Glendive

Proponents: Roger McGlenn, Executive Director, Independent Insurance Agents
Robert Phillips, Missoula Attorney
Jacqueline Lenmark, American Insurance Association
Ron Ashabraner, State Farm Insurance Companies
Dwight Eastman, Farmers Insurance Group Companies
Lorna Frank-Karn, Montana Farm Bureau and Mountain West Insurance Company

Opponents: Russell Hill, Montana Trial Lawyers Association
Tom Bolin, Attorney, Great Falls, and member of MTLA

Opening Statement by Sponsor: SENATOR RIC HOLDEN, SD 1, Glendive. The bill is designed to clarify auto liability limits and how they apply across Montana. Sections 33-23-203 and 204, MCA, are currently confusing to the public, to attorneys, insurers, and the courts. "Coverage" is stricken, and "coverages" inserted to

cover all types of policies. A Supreme Court decision from Justice Karla Gray states current statutes don't mesh well under any analysis. The bill has an immediate effective date, and applicability date.

Proponents' Testimony: Roger McGlenn, Executive Director, Independent Insurance Agents. HB 284, passed in 1981, was codified at 33-23-204, MCA. SB 66 was passed in 1983 to remedy the earlier bill. SB 44 is the latest remedy to stacking coverages. I believe the intent is clear, and ask that the Committee give the bill a do pass recommendation.

Robert Phillips, Missoula Attorney. I represent insurance companies in auto accident cases. I tracked Montana litigation in state and federal courts in Montana. There was a recent decision re Farmers Alliance v Coleman at the end of 1996. In 1979, the Montana Supreme Court decided Chaffee, however, the Montana Legislative, in 1981, effectively reversed the Chaffee decision.

The Supreme Court has limited 33-23-203, MCA, every time, and has held that it didn't apply retroactively (1985), and that it doesn't apply to inter-policy stacking. SB 44 will solve that problem, as the Courts held that the statute didn't apply to underinsured motorist coverage, and that stacking, therefore, did not apply. The Supreme Court recently decided stacking does not apply to medical insurance coverage.

The policy language of insurance policies would prohibit this kind of stacking now. There is no theoretical difference between inter- or intra-policy stacking. In Bennett (1989), if more than one premium is paid, there should be more than one coverage stacked, i.e., one coverage for each risk.

The drafting of SB 44 is well done, and is a good idea. I urge the Committee to support the bill.

Jacqueline Lenmark, American Insurance Association (approximately 250 insurers). The bill solves problems for our clients and we urge a do pass recommendation.

Ron Ashabraner, State Farm Insurance Companies. I have two observations: 1) premiums are based on loss experience; 2) multiple vehicle owners will benefit, and single vehicle owners will pay more. It is estimated that 10-15 percent of vehicles are uninsured, and another 15-40 percent are underinsured. I believe the bill will control the cost of premiums in Montana.

Dwight Eastman, Farmers Insurance Group Companies, (96,000 insureds). In the Pocatello, ID region, premiums are one-third less than in Montana, as those states don't have stacking. Rates could be increased to cover exposure, but I would rather have lower rates without stacking. I ask that the Committee give SB 44 a do pass recommendation.

Lorna Frank-Karn, Montana Farm Bureau and Mountain West Insurance Company, (formed in the 1960s). I ask that the Committee support SB 44.

Joe Lawther, Farmers Insurance Group (Independent Contractors), Billings. I hope the Committee will support SB 44 to see coverage become more affordable and, thus, prevent increases in uninsured motorist coverages.

*{Tape: 1; Side: A; Approx. Time Count: 30.3, 10:30 a.m.;
Comments: None.}*

Opponents' Testimony: Russell Hill, Montana Trial Lawyers Association (MTLA), (EXHIBIT #1). The bill doesn't say the Legislature can't do this. It is important to correct the impression that the Supreme Court has, over the past fifteen years, defied the intent of the Legislature and created confusion.

In 1982, distinctions were important. The insurance industry has refused to acknowledge the concerns of the Legislature over stacking. Statements that insurance premiums should reflect risk, and that insurance premiums should reflect payout, are actually two different things.

It is easier to change Montana law than for insurance companies to change their own forms and procedures [already allowed by Montana law]. Additional coverage may be on other drivers, but not for the policy owner. When people get hurt, medical bills must be paid. If they have underinsured coverage, that can pay, or medical insurance can pay, or the state or federal government can pay.

*{Tape: 1; Side: A; Approx. Time Count: 34.4, 10:39 a.m.;
Comments: None..}*

Russell Hill, Montana Trial Lawyers Association (MTLA), (EXHIBIT #2). The bill doesn't say the Legislature can't do this. It is important to correct the impression that the Supreme Court has, over the past fifteen years, defied the intent of the Legislature and created confusion.

In 1982, distinctions were important. The insurance industry has refused to acknowledge the concerns of the Legislature over stacking. Statements that insurance premiums should reflect risk, and that insurance premiums should reflect payout, are actually two different things.

It is easier to change Montana law than for insurance companies to change their own forms and procedures [already allowed by Montana law]. Additional coverage may be on other drivers, but not for the policy owner. When people get hurt, medical bills must be paid. If they have underinsured coverage, that can pay,

or medical insurance can pay, or the state or federal government can pay.

I've been in Montana for thirty years. I didn't see continuing expansion of these coverages. As stacking began, I felt we could ride with the tide, but now the tide is out. A number of insureds have cancelled underinsured and uninsured motorist coverage lately because they can't afford it. I believe these costs will get higher if SB 44 doesn't pass.

Uninsured coverage is mandated coverage. Underinsured is not mandated, and the insured signs a waiver when he or she declines this coverage. It is a contractual issue, the insured's decision or a third party decision.

Tom Bolin, Attorney, Great Falls, and member of MTLA. A disproportionate number of accidents in Montana involved uninsured motorists at no benefit to the Montana consumer. I urge rejection of this bill.

{Tape: 1; Side: B; Approx. Time Count: 00, 10:44 a.m.; Comments: None.}

Questions From Committee Members and Responses: SENATOR RANEY

JABS: Why are premiums going up rapidly, and how will they decrease? **Jacqueline Lenmark** deferred to Mr. Ashabraner of State Farm Insurance. **Ron Ashabraner.** Premiums are based on loss exposure. Premiums for underinsured and uninsured the past few years have been relatively consistent the past few years. State Farm was one of the first companies in Montana to offer uninsured coverage, but has experienced millions of dollars in losses because of this decision.

SENATOR STEVE DOHERTY. Which can't be stacked, underinsured or uninsured? **Robert Phillips.** There has been no case yet, but the Supreme Court said the recent case of Holman in which a Billings Federal Court ruled on stacking of uninsured coverage, would probably be reversed.

SENATOR DOHERTY. I would like a Supreme Court that doesn't legislate. If implemented retroactively, would that be legislative? I disagree with the Supreme Court in Holman concerning stacking. Do you have studies available? **Dwight Eastman.** I will get this information together and provide it to you in a couple of days.

SENATOR DOHERTY. I want information on Montana, Idaho, Wyoming, North and South Dakota and the percent of difference. **Dwight Eastman.** I could get Utah statistics.

SENATOR DOHERTY. I want this information for the same coverages, and for it to show how you can be sure the difference are due to stacking in Montana. **Dwight Eastman.** I believe I said the cost

per claim is higher in Montana, and not the cost per insured. I would need to clarify exact figures for the Committee.

SENATOR DOHERTY. I want to know if Montanans are paying more or less, and how the factors work. Who drafted SB 44? **Robert Phillips.** I don't know, but it is well drafted.

SENATOR SUE BARTLETT. Would you please explain to me what happens with stacking? **Robert Phillips.** Using the example of uninsured motorist coverage on two cars, if stacked they would also be able to collect on the second car sitting at home in the garage, on which they have been paying a separate premium.

SENATOR BARTLETT. Is this the rationale the Supreme Court used regarding people claiming for more than one vehicle in this instance? **Robert Phillips.** There is no legal restriction on stacking. The Supreme Court believes if one is paying a separate premium, he or she should be able to collect on the separate coverages, i.e., that separate coverage should be available for separate premiums paid. What we are talking about is someone with \$500,000 in, and only \$125,000 in coverage, in which instance they can stack the coverages to obtain more to help meet the expenses.

{Tape: 1; Side: B; Approx. Time Count: 15.0; Comments: None.}

John Morrison, Helena attorney. There is also medical pay coverage for involvement in accidents which are not the insured's fault. If the insured can stack \$5000 each on 2 cars for medical costs, he or she can then meet costs \$10,000. If either policy covers the insured or other drivers, the insurance follows the driver. So, if an insured has two separate premiums on two separate vehicles, and is in the just described situation, the insurance should follow the driver.

SENATOR LORENTS GROSFIELD. I am asking about cost-shifting. Is as simple as this and, if so, why isn't BCBS opposing this bill?

Jacqueline Lenmark. The example given is not an accurate reflection on the situation. It is not a given that costs would shift if stacking is not allowed. I believe the bill was drafted by Peter Haubein of the Crowley firm in Billings, but am not certain.

{Tape: 1; Side: B; Approx. Time Count: 19.0, 11:05 a.m.; Comments: None.}

SENATOR GROSFIELD. I agree with Ms. Lenmark's response. **Ron Ashabraner.** I haven't seen uninsured motorist coverage go up much in twenty years. We are a mutual company and have seen a return to policy-holders of 17-18 percent. I would anticipate a return premium through dividends, but if this is done too often, we would probably see premiums come down instead. These premiums have nothing to do with the type of vehicle one drives.

{Tape: 1; Side B; Approx. Time Count: 21.6, 11:08 a.m.; Comments: None.}

SENATOR DOHERTY. Could you comment on Mr. Hill's statement that insurance company could already prohibit stacking in Montana if they change their forms? **Robert Phillips.** If statute doesn't cover this situation, some think they could go back to pre-statute law, and the Supreme Court specifically said it is not ruling on that issue now.

{Tape: 1; Side: B; Approx. Time Count: 25.8; Comments: None.}

SENATOR BARTLETT. What about coverage extended and stacked? **Ron Ashabraner.** Under uninsured coverage anyone who is a resident of the household has coverage in any insured or an uninsured vehicle, or as a pedestrian, as well as anyone driving that auto. This thing is pyramiding. Under uninsured coverage, that extends to members of the household and users of its vehicles. Most payment is made for pain and suffering to the injured, and to the trial attorneys.

SENATOR JABS. Most people think they need both underinsured and liability coverage.

CHAIRMAN CRIPPEN. In the Chaffee decision, if the insured had an internal policy and \$1 Million liability coverage paid as a separate premium on each vehicle, and is involved in an auto accident and is injured, would you, as a trial lawyer, agree that coverage could be \$2 million (the total for each vehicle covered)? **Russell Hill.** I don't think so.

{Tape: 1; Side: B; Approx. Time Count: 31; Comments: None.}

CHAIRMAN CRIPPEN. We didn't have this section of law in 1979. What if medical is not restricted to car A or car B, and the insured didn't have underinsured motorist coverage, but had some uninsured motorist coverage? **Russell Hill.** I can't answer as specifically as you would like.

CHAIRMAN CRIPPEN. Coming from 1981 in the example I gave, did the State make it a matter of public policy that you could not stack car A & car B liability coverage? **Russell Hill.** My gut instinct is yes.

CHAIRMAN CRIPPEN. This an issue of clarifying the intent of the 1981 Legislature, and not one of stacking. We had only liability, medical, and uninsured coverage then. **Robert Phillips.** The 1981 Legislature said limits under any one policy with regard to liability can't be stacked, so I believe the Chairman is absolutely right.

CHAIRMAN CRIPPEN. Underinsured coverage is a liability coverage? **Robert Phillips.** Yes.

{Tape: 2; Side: A; Approx. Time Count: 00.; Comments: None.}

CHAIRMAN CRIPPEN. Then what about the person who is liable? Are they then allowed underinsured coverage to the maximum available? **Robert Phillips.** That is correct, if it is all tied to payment of the premium.

CHAIRMAN CRIPPEN. If there were a third vehicle covered, with \$25,000 medical, would stacking be \$75,000. **Russell Hill.** I am absolutely willing to say this committee has the ability to declare its intent.

CHAIRMAN CRIPPEN. Would you look at the premiums on three separate vehicles and want to stack them, as a trial lawyer? or as an insured? **Russell Hill.** I don't believe that kind of argument would succeed. I believe the Supreme Court has always acceded to the needs of the public.

Closing by Sponsor: **SENATOR HOLDEN. (EXHIBITS #2, #3).** Certain people can't afford these rising insurance costs. This is an opportunity to actually decrease premiums.

EXECUTIVE ACTION ON SB 135

Motion: **VICE CHAIRMAN GROSFIELD MADE A MOTION THAT SB 135 DO PASS.**

Discussion: **SENATOR DOHERTY.** I don't see how you could get federal notice for Montana consumers, and so I'm going to support the bill.

Vote: **VICE CHAIRMAN GROSFIELD'S MOTION CARRIED CARRIED UNANIMOUSLY.**

EXECUTIVE ACTION ON SB 6

Amendments: **SENATOR HALLIGAN's amendments.**

Motion/Vote: **SENATOR DOHERTY MADE A MOTION TO ADOPT SENATOR HALLIGAN'S AMENDMENTS TO SB 6. THE MOTION CARRIED 10-0.**

Motion: **SENATOR DOHERTY MADE A MOTION THAT SB 6 DO PASS AS AMENDED. THE MOTION CARRIED UNANIMOUSLY.**

EXECUTIVE ACTION ON SB 16

Motion: **SENATOR DOHERTY MADE A MOTION THAT SB 16 DO PASS.**

Discussion: **SENATOR BISHOP** had questions for **SENATOR HALLIGAN**, who was not present to answer. **SENATOR DOHERTY** withdrew his motion.

No further action was taken on SB 16 this date.

EXECUTIVE ACTION ON SB 103

Motion: SENATOR GROSFIELD MADE A MOTION THAT SB 103 DO PASS.

Discussion: (EXHIBIT #4) SENATOR DOHERTY. I don't have a problem with limiting liability for Montanan's when they're on federal duty, but an article in today's paper warned people within a six square mile of Helena about unexploded shells.

I spoke with Lt. Col. McCabe, of the Montana Army National Guard about the Farris Doctrine. There is a case in Great Falls where an off-duty policewoman was attacked by dogs on Malmstrom Air Force Base, but she could not sue for recovery because of the Farris Doctrine.

From a Montana perspective, if they're on federal duty, the feds should probably be taking care of this. In spite of this, I will vote for the bill.

CHAIRMAN CRIPPEN. I believe this is a valid point.

SENATOR BARTLETT. We may need to clarify as to when the National Guard is actually acting in federal or state capacity. CHAIRMAN CRIPPEN. Ninety percent of the time, the National Guard is acting under federal mandate, but there is still a gray area at times. SENATOR DOHERTY. This is prospective only and not retroactive, and it is not the intent of the Legislature that it be retroactive (page 2, line 11, Sec. 3).

SENATOR BISHOP. On lines 24-26, is this claim incorrect?

SENATOR DOHERTY. I believe it is, as active-duty personnel can't make claims against the federal government.

{Tape: 2; Side: A; Approx. Time Count: 11:51 a.m.; Comments: None.}

CHAIRMAN CRIPPEN. If we take this clause out, then we go on record as saying we really don't think they have this coverage.

SENATOR DOHERTY. I would like to investigate this, and maybe offer an amendment on the floor.

SENATOR BISHOP. I will vote for the bill, but something ought to be done on this.

Motion/Vote: SENATOR GROSFIELD'S MOTION THAT SB 103 DO PASS CARRIED UNANIMOUSLY.

{Tape: 2; Side: A; Approx. Time Count: 11:56 a.m.; Comments: None.}

EXECUTIVE ACTION ON SB 106

Discussion: SENATOR DOHERTY. I had concerns about PBX testing and other testimony. I have copies of findings of fact from Judge McKittrick, and will make copies for the Committee.

Action on SB 106 was passed for the day.

EXECUTIVE ACTION ON SB 16

Motion: SENATOR HALLIGAN MADE A MOTION THAT SB 16 DO PASS.

Discussion: SENATOR BISHOP. Why not have disclosure of all assets? SENATOR HALLIGAN. This is all assets, however they're acquired, both prior to and during the marriage. That is the law now, but most people don't realize it.

{Tape: 2; Side: A; Approx. Time Count: 38.2; Comments: None.}

SENATOR ESTRADA. Could there be a problem with gas or oil royalties when a party doesn't know about them? SENATOR HALLIGAN. I'm aware that people forget these, and made provision for that.

SENATOR ESTRADA. Would future or inherited ranch income be included? SENATOR HALLIGAN. Future ranch income would be included, future inherited income would not be. For example, if you were given a 100,000 acre ranch, and hadn't been on the property for many years, and had never received income from it, you would still have an interest which would need to be valued. A judge would have the option to remove that information from the case if it was inadvertently undisclosed (in good faith). In bad faith cases, there would be sanctions.

Vote: SENATOR HALLIGAN'S MOTION THAT SB 16 DO PASS CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATOR ESTRADA WHO VOTED NO.

EXECUTIVE ACTION ON SB 32

Amendments: sb003201.avl (EXHIBIT #5)

Motion: SENATOR HALLIGAN MADE A MOTION THAT AMENDMENTS SB003201.AVL BE ADOPTED.

Discussion: SENATOR BARTLETT. I have a note from the hearing concerning the authority of the District Clerk of Court to issue a TPO. SENATOR HALLIGAN. We need to visit about this as a ministerial act of the Clerk of District Court. I'm going to withdraw my motion and ask that the Committee pass on SB 32 for the day.

No further action was taken on SB 32 this date.

EXECUTIVE ACTION ON SB 33

Amendments: sb003301.avl

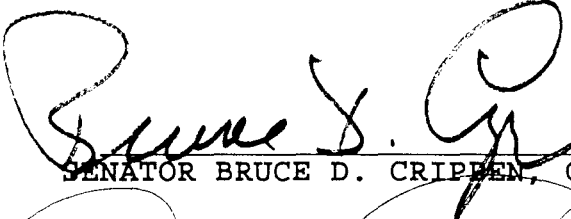
Motion/Vote: SENATOR HALLIGAN MADE A MOTION TO ADOPT THE AMENDMENTS TO SB 33. THE MOTION CARRIED UNANIMOUSLY.

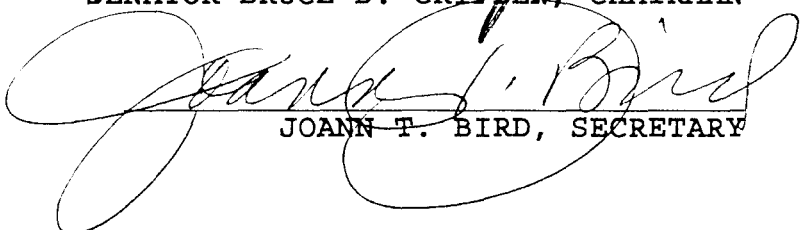
Motion/Vote: SENATOR HALLIGAN MADE A MOTION THAT SB 33 DO PASS AS AMENDED. THE MOTION CARRIED UNANIMOUSLY.

CHAIRMAN CRIPPEN advised the Committee that Senator Jenkins would have an amendment to SB 31.

ADJOURNMENT

Adjournment: 12:12 pm


SENATOR BRUCE D. CRIPPEN, CHAIRMAN


JOANN T. BIRD, SECRETARY

BDC/jtb