

Benefit

Fuchs House BILL NO. *408*

INTRODUCED BY

Keenan ORR *Sliter* *Wm E Boharski* *GRINDE* *Rehbein* *Harp* *Chas* *Fox* *Merca* *Barnett* *Mills*

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE FOR PAYMENT BY THE STATE OF COSTS AND ATTORNEY FEES OF SMALL BUSINESSES THAT PREVAIL AGAINST THE STATE IN CERTAIN COURT AND ADMINISTRATIVE PROCEEDINGS; AND PROVIDING AN APPLICABILITY DATE"

Storall *Rehbein* *Harold* *Storall*

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Findings and purposes.** The legislature finds that small businesses are deterred from challenging or defending against unreasonable state actions by the expense of vindicating their rights. The legislature further finds that because of the greater legal and financial resources of the state, the standard for the award of attorney fees and expenses against the state should be different from the standard applicable to a private litigant. The purposes of [sections 1 through 6] are to allow eligible small businesses to recover reasonable litigation expenses from the state in civil court actions and certain administrative hearings and to promote reasonable regulatory and enforcement activities in the state.

NEW SECTION. **Section 2. Definitions.** As used in [sections 1 through 6], the following definitions apply:

- (1) "Administrative hearing" means an adversary or contested proceeding or hearing in which the state is represented by counsel, but does not include:
 - (a) proceedings not involving the business regulatory function of the state;
 - (b) proceedings to establish or fix a rate;
 - (c) proceedings involving eminent domain or condemnation; and
 - (d) proceedings in which the state is only a nominal party.
- (2) "Business regulatory function of the state" means state laws and administrative rules regulating business and commerce.
- (3) "Fees and expenses" includes:
 - (a) the reasonable expenses of expert witnesses;
 - (b) the reasonable cost of any study analysis, engineering report, test, or project;

1 (c) discovery costs found by a hearing officer or court to be necessary for the preparation of the
2 small business's case; and

3 (d) reasonable attorney fees.

4 (4) "Hearing officer" means the deciding official who presided at an adversary or contested case
5 hearing, whether the official is designated as an administrative law judge, hearing officer, examiner, referee,
6 or otherwise.

7 (5) "Position of the state" means both the litigation stance taken by the state in a civil action or
8 agency administrative hearing and the action or policy of the state that gave rise to the civil action or
9 administrative hearing.

10 (6) "Prevailing" means obtaining a favorable judgment in a civil judicial action or administrative
11 hearing or reaching a settlement of a civil judicial action or administrative hearing on terms that are
12 favorable to a small business.

13 (7) (a) "Small business" means a commercial or business entity, including a sole proprietorship or
14 a partnership, with a net worth of less than \$3 million and fewer than 250 employees.

15 (b) The term does not include an entity that is a subsidiary or affiliate of another entity that is not
16 a small business.

17 (8) "State" means the state of Montana, its agencies, commissions, boards, and departments, and
18 its officers and employees acting in the scope and course of their employment.

19 (9) "Substantially justified" means reasonable in both law and fact.

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21 **NEW SECTION. Section 3. Award of fees and expenses in court cases.** (1) In addition to any costs
22 awarded as prescribed by statute, a court shall award to a prevailing small business reasonable fees and
23 expenses incurred by the small business in:

24 (a) a civil action brought by or against the state and involving the business regulatory function of
25 the state, unless the state shows and the court finds that the position of the state was substantially
26 justified; and

27 (b) a judicial proceeding to review an administrative hearing decision of the state, unless the court
28 finds that the position of the state is substantially justified. The court shall include reasonable fees and
29 expenses incurred during the administrative hearing unless the court finds that the position of the state is
30 substantially justified.

1 (2) Fees and expenses awarded under this section are in addition to costs and attorney fees
2 awarded under any other statute, but a prevailing small business may not be reimbursed under 25-10-711,
3 this section, or any other section more than once for any cost, expense, or attorney fee.

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5 NEW SECTION. **Section 4. Award of fees and expenses in administrative hearings.** (1) If the state
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7 expenses incurred by the small business in connection with the hearing, unless the hearing officer finds that
8 the position of the state was substantially justified.

9 (2) A prevailing small business that is dissatisfied with the fee determination may appeal it to the
10 proper court.

11 (3) The attorney general shall adopt a model rule establishing specific procedures for the
12 submission and consideration of applications for an award of reasonable fees and expenses under
13 subsection (1).

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22 favorable to the prevailing small business as the relief ultimately obtained.

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24 NEW SECTION. **Section 6. Payment of awards -- report to the legislature.** (1) An award of
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27 self-insurance pool maintained by state agencies, commissions, boards, and departments. If insurance is
28 not available to pay an award, the award may be paid by an appropriation made to the agency, commission,
29 board, or department at the next regular session of the legislature.

30 (2) Each agency, commission, board, or department that pays an award or awards shall report to

1 the legislature during the first week of the next regular session on the number, nature, and amount of the
2 award or awards, the claim involved in each, and other relevant information that may aid the legislature in
3 evaluating the scope and impact of [sections 1 through 6].

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5 NEW SECTION. **Section 7. Applicability.** [This act] applies to actions and hearings that begin after
6 [the effective date of this act].

7

-END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for HB0408, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:

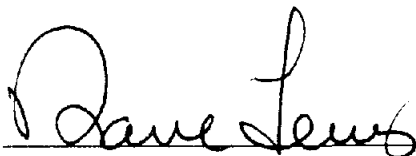
An act to provide for payment by the state of costs and attorney fees of small businesses that prevail against the state in certain court and administrative proceedings.

ASSUMPTIONS:

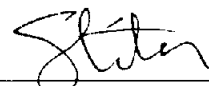
1. There is no historical data or other basis upon which to estimate fiscal impact.
2. Instances in which the courts find that a regulatory action of the state was substantially unjustifiable would, presumably, be uncommon but would probably occur from time to time.

FISCAL IMPACT:

Unknown.

 2-8-95

DAVE LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning



PAUL SLITER, PRIMARY SPONSOR DATE

Fiscal Note for HB0408, as introduced

HB 408

APPROVED BY COMMITTEE
ON BUSINESS AND LABOR

HOUSE BILL NO. 408

INTRODUCED BY SLITER, BOHARSKI, GRINDE, S. SMITH, FUCHS, BENEDICT, KEENAN, ORR, HARP,
OHS, FORBES, MERCER, BARNETT, MILLS, LARSON, REHBEIN, STOVALL, DEBRUYCKER, HIBBARD,
ELLIS, SOMERVILLE

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NEW SECTION. Section 1. Findings and purposes. The legislature finds that small businesses are
deterred from challenging or defending against unreasonable state actions by the expense of vindicating
their rights. The legislature further finds that because of the greater legal and financial resources of the
state, the standard for the award of attorney fees and expenses against the state should be different from
the standard applicable to a private litigant. The purposes of [sections 1 through 6] are to allow eligible
small businesses to recover reasonable litigation expenses from the state in civil court actions and certain
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NEW SECTION. Section 2. Definitions. As used in [sections 1 through 6], the following definitions
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- (a) proceedings not involving the business regulatory function of the state;
- (b) proceedings to establish or fix a rate;
- (c) proceedings involving eminent domain or condemnation; and
- (d) proceedings in which the state is only a nominal party.

(2) "Business regulatory function of the state" means state laws and administrative rules regulating
business and commerce. THE TERM DOES NOT INCLUDE FUNCTIONS PERFORMED BY A CRIMINAL
JUSTICE AGENCY.

1 (3) "Fees and expenses" includes:

2 (a) the reasonable expenses of expert witnesses;

3 (b) the reasonable cost of any study analysis, engineering report, test, or project;

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5 small business's case; and

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9 or otherwise.

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11 agency administrative hearing and the action or policy of the state that gave rise to the civil action or
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14 hearing ~~or reaching a settlement of a civil judicial action or administrative hearing on terms that are~~
15 ~~favorable to a small business.~~ ON A PREPONDERANCE OF THE SUBSTANTIVE ISSUES IN THE
16 PROCEEDING.

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18 a partnership, with ~~a net worth of less than \$3 million and~~ fewer than ~~250~~ 100 employees.

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20 a small business.

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22 its officers and employees acting in the scope and course of their employment.

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9 evaluating the scope and impact of [sections 1 through 6].

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11 **NEW SECTION. Section 7. Applicability.** [This act] applies to actions and hearings that begin after
12 [the effective date of this act].

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2 INTRODUCED BY SLITER, BOHARSKI, GRINDE, S. SMITH, FUCHS, BENEDICT, KEENAN, ORR, HARP,
3 OHS, FORBES, MERCER, BARNETT, MILLS, LARSON, REHBEIN, STOVALL, DEBRUYCKER, HIBBARD,
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OFFICE OF THE GOVERNOR

STATE OF MONTANA



MARC RACICOT
GOVERNOR

STATE CAPITOL
HELENA, MONTANA 59620-0801

March 25, 1995

The Honorable John Mercer
Speaker of the House
State Capitol
Helena MT 59620

The Honorable Bob Brown
President of the Senate
State Capitol
Helena MT 59620

Dear Speaker Mercer and President Brown:

In accordance with the power vested in me as Governor by the Constitution and laws of the State of Montana, I hereby veto House Bill 408, "AN ACT TO PROVIDE FOR PAYMENT BY THE STATE OF COSTS AND ATTORNEY FEES OF SMALL BUSINESSES THAT PREVAIL AGAINST THE STATE IN CERTAIN COURT AND ADMINISTRATIVE PROCEEDINGS; AND PROVIDING AN APPLICABILITY DATE" for the following reasons.

House Bill 408 provides for the award of fees and expenses (including expert witness expenses, costs of engineering reports, tests or projects, discovery costs and attorneys' fees) to small businesses (fewer than 100 employees) that prevail in a court case or administrative hearing involving the business regulatory functions of the State. The award must be made unless the position of the State in the legal or administrative proceeding is "well-grounded in fact and warranted by existing law or a good faith argument for the extension or modification of existing law."

I agree with the policy behind the bill -- that if the State unjustifiably involves a party in an administrative or legal process it should pay the legal expenses of that party (small business or otherwise). However, existing law already contains adequate remedies for such unfairness.

Section 25-10-711, MCA, entitles a prevailing party that opposes a state agency in any civil action to legal costs and attorneys' fees if the court finds the claim or defense of the agency was frivolous or pursued in bad faith. In addition, Rule 11 of the Montana Rules of Civil Procedure provides that documents filed with a court must be well-grounded in fact and warranted by existing law or a good

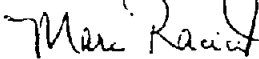
faith argument for a change in that law -- the same language used in House Bill 408. If Rule 11 is violated the court is required to impose an appropriate sanction that may include legal expenses and attorneys' fees.

Aside from the protections already in the law that make the bill unnecessary, I believe House Bill 408 is unwarranted for other reasons. Although the intent of the legislation may be to cut down on litigation with the State, this bill will in my view invite even more lawsuits. As an example, there will be additional litigation to interpret the definition of "prevailing" found in section 1. If there are two substantive issues and the State prevails on one, which party is the "prevailing" party? And section 4 provides for appeal of the size of the fee awarded.

Moreover, the bill applies to one segment of society (small businesses) and covers one type of government regulation (business and commercial regulation). If there are rights to be vindicated with respect to unjustifiable regulation by the State, they should not be grounded upon arbitrary classifications. They should cover all segments of society, not just small businesses, and they should apply to all agency regulation, not just commercial regulation.

I am unaware of any legal or administrative actions brought by a state agency that could not meet the definition of "substantially justified" as that phrase is defined in section 1 of the bill. Perhaps that is why I cannot recall hearing of any case where the protections of section 25-10-711, MCA, or Rule 11 have been triggered. Nevertheless, those protections are already in the law, and I believe they obviate any need for passage of House Bill 408, which will precipitate more litigation, interfere with the functions assigned by law to professional and occupational licensing boards, and require additional and unnecessary administrative rulemaking by the Attorney General.

Sincerely,



MARC RACICOT
Governor