MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on March 18, 2003 at 9:00 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:
Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

Members Excused: None.

Members Absent: None.

Staff Present: Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch

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

Committee Business Summary:
Hearing & Date Posted: HB 17, HB 536, HB 390, HB 289, 3/12/2003
Executive Action: HB 199, HB 40

EXECUTIVE ACTION ON HB 199

Motion: **SEN. BRENT CROMLEY** moved that **HB 199 BE CONCURRED IN.**

Substitute Motion: **SEN. CROMLEY** moved that **HB 199 BE AMENDED, HB019902.ajm, EXHIBIT(jus57a01).**

Discussion:

CHAIRMAN DUANE GRIMES commented the amendment provided the fee would be paid to the court if the defendant pleaded guilty or was convicted.

Vote: The motion carried unanimously.

Substitute Motion: **SEN. DAN MCGEE** moved that **HB 199 BE AMENDED, HB019902.avl, EXHIBIT(jus57a02).**

Discussion:

Ms. Lane explained the amendment was a coordination instruction to coordinate with HB 215. House Bills 199 and 215 both amend 61-5-216 and it would have been difficult to codify the bills without a coordination instruction.

Vote: The motion carried unanimously.

Motion/Vote: **SEN. JEFF MANGAN** moved that **HB 199 BE CONCURRED IN AS AMENDED. The motion carried unanimously.**

EXECUTIVE ACTION ON HB 40

Motion/Vote: **SEN. MCGEE** moved that the Committee **RECONSIDER ITS ACTION ON HB 40. The motion carried unanimously.**

Motion: **SEN. MCGEE** moved that **HB 40 BE CONCURRED IN.**

Substitute Motion: **SEN. MCGEE** moved that **HB 40 BE AMENDED, HB04001.avl, EXHIBIT(jus57a03).**

Discussion:

SEN. MCGEE stated the amendment addresses the issue when the traffic stop is under Title 61. Unless emergency circumstances exist or the officer has reasonable cause to fear for his safety or for the public's safety, the officer shall inform the person of the reason for the stop.

SEN. MIKE WHEAT asked **REP. BRAD NEWMAN** if he had an opinion about the amendment. **REP. NEWMAN** concurred with the amendment.

Vote: The motion carried unanimously.

Motion/Vote: **SEN. MCGEE** moved that **HB 40 BE CONCURRED IN AS AMENDED. The motion carried unanimously.**

HEARING ON HB 17

Sponsor: **REP. BRAD NEWMAN, HD 38, BUTTE**

Proponents: **John Connor, Department of Justice**
Verner Bertelsen, Montana Senior Citizens Association
Pat Harper, AARP - Montana
Anita Roessmann, Montana Advocacy Program
George Corn, Ravalli County Attorney and Montana County Attorneys Association
Bob Pyfer, Montana Credit Union Network
Karren Erdie, Billings Chapter for the Prevention of Elder Abuse

Opponents: None

Opening Statement by Sponsor:

REP. BRAD NEWMAN, HD 38, BUTTE, introduced HB 17. This bill was designed to make Montana's abuse of the elderly and developmentally disabled statute consistent with the rest of the Montana criminal code when the issue of property crime is addressed. On page 3, lines 5-13 of the bill propose that when someone takes advantage of an elderly person or a developmentally disabled person and the amount of money involved exceeds $1,000, that offense will be treated as a felony. Property crimes in excess of $1,000 are treated as a felony in Title 45. He noted the situation concerning the elderly woman in the Deer Lodge area. Someone had taken advantage of her and this ended up costing her several million dollars. The offender was facing felony theft and other charges. At the end of the list there was a misdemeanor abuse of the elderly. He received phone calls regarding why the offender was charged with a misdemeanor. This bill sends a clear message that the abuse of the elderly or the financial exploitation of someone with developmental disabilities will be treated as severely as ordinary theft or forgery cases.

Proponents' Testimony:

John Connor, Department of Justice, remarked the bill was requested by the Attorney General's Office because they supervise the Medicaid Fraud Prosecution Unit. The statute of limitations is one year for a misdemeanor. This does not give an investigator and the subsequent prosecutor enough time to address the situation. A charge of felony theft can be made, but the defendant then does not have a record for what he or she actually did, which was to exploit the elder person. From a criminal justice standpoint, it is best to tag the person who committed the crime with the actual crime the person committed. He provided a handout that explained the basic concepts of the bill, **EXHIBIT(jus57a04).**

Verner Bertelsen, Montana Senior Citizens Association, claimed that an offender who abused a senior citizen should not be able to get away with a lesser crime than someone who abuses other people in society.

Pat Harper, AARP - Montana, noted they perform an annual fraud survey. It revealed that 39 percent of their members believe they have been a victim of swindle or fraud in the last 18 months. That is twice the national average. Approximately one in five believe they have been victimized through charity or donation fraud.

Anita Roessmann, Montana Advocacy Program, pointed out the bill makes a policy statement that abusing the people who are the most vulnerable in our communities is more heinous than abusing people who are more able to defend themselves. Under this law, prosecution will become more attractive to prosecutors. The Elderly and Developmentally Disabled Abuse Prevention Act is seldom used due to the contradiction which has been described.

George Corn, Ravalli County Attorney and Montana County Attorneys Association, stated as a prosecutor he needs to look at what can be presented to a jury with the prospect of having the jury come back with a guilty verdict. It is necessary to be realistic. Currently, most of these cases are tried under the theft statutes. It is difficult to get a conviction, even though the elder person has been financially exploited. Typically this happens through someone gaining their confidence. The latest case he dealt with involved $40,000 being removed from a checking account within a three month period.

Bob Pyfer, Montana Credit Union Network, commented financial exploitation of the elderly has been a concern for credit unions

for many years as they have seen suspected exploitation of their elderly members.

Karren Erdie, Billings Chapter for the Prevention of Elder Abuse, remarked that the biggest problem with the current law is that elder abuse is a misdemeanor. If this was changed to a felony, the law would much stronger and it would certainly help many people.

Opponents' Testimony:

None

Questions from Committee Members and Responses:

SEN. MANGAN asked why the House struck the language that would have made sexual abuse a felony. **REP. NEWMAN** believed the fiscal concerns were driving that point of view. In regard to physical abuse under the current law, the first offense is a misdemeanor and the second offense would be a felony. The amendment in the House Judiciary Committee would have made the first offense a felony in all cases. There were concerns raised on the House Floor in regard to fiscal impact.

CHAIRMAN GRIMES asked for further clarification of the words "interest in" on page 1, line 25. He questioned whether this would be implying an attempt to get at someone's money. **REP. NEWMAN** noted the amendment was added in the House Judiciary Committee to cover situations such as a joint account. A elderly or developmentally disabled person may hold the property jointly with another. The intent was to make it clear that the exploitation situation could still arise in those kinds of cases. A joint account holder has a right to deposit funds and remove funds. A situation may arise where the person is doing this in contravention of the other joint account holder's interest. It is not necessary to be the sole owner to be the victim of exploitation.

{Tape: 1; Side: B}

CHAIRMAN GRIMES asked **Mr. Connor** if he agreed with the amendment regarding interest and whether or not coordinating references should be made. **Mr. Connor** maintained the amendment regarding interest is a good idea. Prosecutors who are prosecuting theft cases involving the elderly oftentimes have trouble with the word "unauthorized", which appears in 45-6-301. They would prefer to leave the language as is.

SEN. WHEAT believed a prosecutor would have the same problem with the language "unreasonable use of" in the definition of exploitation. **Mr. Connor** claimed that was a problem in any criminal situation. The jury would need to rely upon their own common sense and understanding for implementation.

SEN. WHEAT understood the need for the bill is that there are ways of stealing from people that are difficult to fit under the theft statute. **Mr. Connor** affirmed this to be the case.

SEN. JERRY O'NEIL remarked that he has a friend who may be developmentally disabled and her father was approximately 68 years old. They have been brainstorming a business proposition. Since he has been friends with these people for a long time, he probably has undue influence on them. If $5,000 was needed for a business venture, they would probably come up with the money. If the idea didn't work, under the bill, he could be found guilty of exploitation of an elder person and a person with a developmental disability. **Mr. Connor** pointed out that he would not be prosecuted under those altruistic motives. There would need to be a criminal intent involved in the action taken. The language in the bill addresses the intent to deprive the person of the property by means of deception, duress, menace, fraud, undue influence or intimidation. The above-mentioned scenario would not fit.

Barb Harris, Assistant Attorney General, added the scenario described does not describe a criminal scenario. Many of the scenarios they see involve persons working with older people. They ingratiate themselves and become friends but they are not in the category of old friends or lifetime friends who are trying to assist them in a non-criminal sense.

CHAIRMAN GRIMES questioned the number and type of prosecutions that would take place as a result of the bill. **Ms. Harris** explained 40 percent of their workload involved some type of financial exploitation of elders. This statute would more specifically address the type of criminal behavior and if they had the option to charge the crime as a felony they would probably charge the majority of their cases under the statute addressed in the bill. This is a better fit and it tells the judge and the jury that this is the crime that happened and the crime that should be charged. Using the theft statute can become problematic because the notion of "unauthorized" can be difficult to prove. Some of the elderly people do in a sense authorize the taking of money, but it is usually pursuant to a deception or something that is addressed by the definition of exploitation. There is also the notion of the statute of limitations. Given these exploitation cases currently stand as misdemeanors, they do

not have the time and resources to address the situation within one year's time.

SEN. WHEAT referred to page 3, lines 13-15, and remarked his understanding was the language was designed to address the case of someone who was working for an elderly person and wrote checks for small amounts. The aggregate of all the checks written would amount to a felony charge. **Ms. Harris** noted this was very similar to theft with a common scheme or the same transaction.

Closing by Sponsor:

REP. NEWMAN closed on HB 17. He summarized this bill is intellectually honest and a good policy statement. Financial exploitation of someone in a weaker position than the offender should be treated the same as similar exploitation of anyone in our society. A mistake made in a business judgement does not rise to criminal intent. It may result in civil litigation to address how the money was expended and the duties of a trust, etc. This bill addresses someone who purposefully and knowingly exploits the elderly or the disabled.

HEARING ON HB 536

Sponsor: **REP. JOHN BRUEGGEMAN, HD 74, POLSON,**

Proponents: **Roger Halver, Montana Association of Realtors**
John Tabaracci, Attorney for Montana Association of Realtors

Opponents: **Travis Ahner, Montana Trial Lawyers Association**
Cindy Crismore, Deer Lodge
Lorraine Evans, Deer Lodge

Informational Witness: **Mark Hlebichuk, Industrial Hygiene Environmental and Safety Services**

Opening Statement by Sponsor:

REP. JOHN BRUEGGEMAN, HD 74, POLSON, introduced HB 536. He explained this bill was the Montana Mold Disclosure Act. It warns the buyer to consider the potential of mold. If the buyer is concerned about the presence of mold in a property, it suggests the buyer hire an inspector. It requires the seller to provide any prior mold inspection or test results. It provides that the seller, landlord, broker and property managers who comply with the disclosure requirements, are not liable in any action based on the presence or propensity for mold. In many parts of the nation, there are an increasing number of civil and

tort claims based on damages for mold. This bill will provide a positive incentive for people to make sure that the buyers are informed of the potential problem of mold and therefore are relieved of liability, if full disclosure has been made.

Proponents' Testimony:

Roger Halver, Montana Association of Realtors, provided a standard buy-sell agreement, **EXHIBIT(jus57a05).** This document is used in 90 percent of the real estate sales in the state. Page 3 includes 30 inspection contingencies. The last contingency is the mold contingency. Page 5 contains three disclosures: 1) Noxious weed disclosure; 2) Megan's Law disclosure; and 3) Radon Disclosure Statement. These disclosures are to protect and inform the buyer. A mold disclosure would be a fourth disclosure in the document.

John Tabaracci, Attorney for Montana Association of Realtors, spoke to the requirements of the Montana Mold Disclosure Act. The first requirement is a standard disclosure that will go to the buyer. It explains mold and lets the buyers know under what conditions the mold grows. It identifies the potential risks for exposure to mold and encourages the buyer of the property to have the property inspected for mold if this is an issue and concern for the buyer. It also suggests the buyer make the transaction contingent on his approval of the mold inspection results. Beyond the standard disclosure, the bill requires the seller of property to disclose and provide copies of any test results or inspections that the seller has had.

{Tape: 2; Side: A}

It also requires the seller to provide to the buyer any evidence or information concerning mitigation or treatment he has made to the mold. The benefit to the seller and the real estate agent who complies with this law is that it provides that they will not be liable in any action based on the presence or propensity for mold. This places the burden on the buyer. Mold is very prevalent and is not always readily observable. There are many kinds of mold and it is very difficult to distinguish between a mold that may be harmless and a mold that may present potential health problems. Molds affect people differently.

Opponents' Testimony:

Travis Ahner, Montana Trial Lawyers Association, provided a handout from an educational conference provided by the Montana State Fund, **EXHIBIT(jus57a06).** He also provided a handout from the Environmental Protection Agency, **EXHIBIT(jus57a07).** He

maintained serious health effects are related to mold. This bill will grant immunity for many health effects. A very compelling reason is necessary to provide immunity. The bill is problematic by making the requirement to test the burden of the buyer or the renter. It discourages sellers and landlords from testing for mold. If there has been a water problem and the seller is immune without testing for mold, he will not need to test for mold. If he is required to test, he would then need to provide the results. If the burden for testing was on the landlord, they would test one time. If the burden is placed on a renter, the renter would need to test for mold every time they moved. The bill does not define the standards for testing. It is necessary to define standards in regard to who can test and what needs to be done to properly test for mold prior to giving immunity. There is more litigation potential when circumstances involve a lot of gray area and questions. When information is provided up front, there would be fewer questions and less litigation. The radon statutes do not include landlords or renters. If someone is buying a home, this is a big investment for them. Placing the testing requirement on a renter places too much burden on the renter. Amendments should be added to make it clear that while sellers and real estate agents are immune from action regarding mold, the adverse facts requirements need to be set out more specifically in the bill.

Informational Witnesses:

Mark Hlebichuk, Industrial Hygiene Environmental and Safety Services, remarked that mold has hit Montana in the last couple of years. There are issues with controlling temperatures inside to outside which causes dew points inside the walls. There is a lack of control in certain building practices in Montana that controls the mold on structures. Mold is on wood when it is used to build a home. Control of water damage is important. Moisture is a key to control mold in a home. Mold has been around a long time but is an issue in Montana by a combination of maintenance and building practices, education, medical knowledge, etc. The IESO has come out with standards and protocols for testing that explain how to take a surface sample, an impaction sample, a carpet sample, etc. Most insurance companies will not cover mold damage. A clean up situation may cost a client up to $40,000.

Questions from Committee Members and Responses:

SEN. WHEAT asked the cost for a standard mold inspection in a house. **Mr. Hlebichuk** explained basic testing would cost approximately $350 to $700. A clean up process could range from $700 to $1,500.

SEN. WHEAT noted the burden was being placed on the buyer and the renter to do the testing. He questioned whether the owner of the property might be in the best position to know of any potential problems and also be the person in the best position to provide the testing if they believe a potential problem exists. **Mr. Tabaracci** claimed the seller or the real estate agent may see mold in the property. In no event does the seller know whether the mold is harmful or not. This is something that should be placed on the shoulders of the buyer. If the burden was placed on the seller or the landlord, the costs would ultimately end up going to the consumer.

SEN. WHEAT raised a concern that immunity was linked to the seller by doing absolutely nothing. If anything happened, the seller was free of responsibility. **Mr. Tabaracci** maintained the bill provided the buyer a disclosure concerning mold and the potential for mold. The buyer would be given information if the seller had the property tested. If these things are done, the seller, landlord, and real estate agent would have immunity.

SEN. WHEAT further raised a concern about immunity being granted to the real estate agent. The agent would not have anything to do with whether or not there was mold in the property. **Mr. Tabaracci** claimed issues of disclosure could come up. If a problem develops, the buyer may look to the real estate agent and say it was his responsibility to tell him about the terrible strain of mold in the house. The real estate agent is in no better position than the seller or any other consumer to identify whether a mold is harmful or not.

SEN. WHEAT questioned whether a buyer's real estate agent or a seller's real estate agent had a duty, statutorily or by common law, to test the property for mold. **Mr. Tabaracci** stated they did not.

{Tape: 2; Side: B}

SEN. WHEAT further questioned why they would be extended liability if they had no duty or obligation to perform the inspection. **Mr. Tabaracci** explained the immunity was for the questions in regard to disclosure.

SEN. WHEAT questioned the real estate agent's duty to disclose mold if they did not have a duty to inspect for mold. **Mr. Tabaracci** maintained real estate agents had a duty to disclose adverse material facts. If the real estate agent walked through a property and saw mold, they may have an obligation to disclose this. Even if the real estate agent saw mold, he or she would not know if the mold was a good or a bad mold. The burden of

identifying whether or not the mold is a problem which needs to be determined by someone qualified to do so.

SEN. MANGAN pointed out that several people in the audience had traveled to attend the hearing and wanted to make statements as witnesses.

CHAIRMAN GRIMES explained he would allow Committee members to ask questions of the witnesses who had not spoken earlier due to time constraints.

SEN. MANGAN asked the witnesses to provide additional information on the subject of mold.

Cindy Crismore explained that she has been exposed to mold. Since the last flooding of the building she works in, she has had severe headaches, severe sinus pressure, nausea, weight loss, loss of appetite, sore throat, and numerous sinus infections. She is currently taking four prescriptions to be able to go to work. The longer she is exposed to the mold, the worse the symptoms become. The employees have had to fight for any testing to be done in the building. She will need to quit her job to regain her health.

Lorraine Evans pointed out that she works with **Ms. Crismore** and has many of the same problems. State Fund has denied her claim the medication, which she needs to continue to work in a state building, is very expensive. Deer Lodge does not have many employment opportunities. She is forced to take medication to go to work or quit her job. She has had three surgeries in two years in regard to her stomach problems. The building she works in has had flooding on numerous occasions and is filled with mold. If landlords are not liable for this problem, the employees are the ones who suffer.

SEN. GARY PERRY questioned the legal responsibility of a seller if the seller is aware of the existence of a type of mold, no test has been performed, and the seller does not disclose what is known. **Mr. Halver** asked if the question related to the fact that the seller knew of the mold in the property but did not disclose it. **SEN. PERRY** affirmed and added that no official test would have been conducted.

Mr. Halver referred the question to **Mr. Tabaracci**. **Mr. Tabaracci** stated if the seller knew about the mold but had no testing and the proper disclosure was given, the seller would be immune from any claims for mold in the property. Even though the mold may be there, the seller probably will not know whether or not the mold is harmful.

SEN. PERRY questioned the items of interest during the inspection by a home inspector. **Mr. Halver** stated on page 3 of the buy-sell agreement under the inspection contingency, the language states it is the responsibility of the home buyer to check off any item listed. By checking the item pertaining to mold, an inspection would be triggered.

SEN. PERRY questioned whether the cost of the inspection would be the responsibility of the buyer. **Mr. Halver** stated it could be. Oftentimes a contingency agreement in a buy-sell agreement would be that the seller would cover certain expenses.

SEN. PERRY questioned whether real estate agents would be parties to a disclosure lawsuit and therefore would be included in the bill. **Mr. Tabaracci** affirmed this to be the case.

SEN. CROMLEY referred to page 3, lines 13 and 14 of the bill, and noted the language stated that a seller is not liable if he or she complies with (1) and (2). This would involve giving the statement regarding the mold. He provided a scenario of the effects of the bill. He may have a home and have noticed mold in the basement. He would not test for mold because he would then need to disclose this. Instead he would place sheet rock over the mold and then sell the home. If anyone asked him whether he had seen mold in his home, he could say no, even if he has felt some ill effects and that is the reason he has decided to place the home on the market. He gives the statement under (1) and there is no test under (2). In subsequent months the buyer finds there was mold in the house which was covered by sheet rock. He will be asked if he ever suspected mold and could say no. Under the bill, he would not be liable. **Mr. Tabaracci** agreed this to be the case.

SEN. O'NEIL asked whether the buyer or tenant who obtained an inspection could charge the seller or landlord for the inspection report. **Mr. Tabaracci** maintained the bill did not require for the tenant or the buyer to provide a copy of the inspection report to the seller or landlord. In the contingency section of the buy-sell agreement, there is an obligation for the buyer to provide a copy of the inspection report to the seller so the seller will be aware of the problem.

SEN. O'NEIL stated that after receiving an inspection report, he may decide not to rent the house but he could inform the landlord or the seller that he had an inspection report. The seller or the landlord cannot rent or sell the property until he or she has a copy of the inspection report. He could then sell this report to the landlord or seller. **Mr. Tabaracci** affirmed but added that the buy-sell agreement clearly obligates the buyer to provide a

copy of that report to the seller if he or she will exit the transaction as the result of that contingency, so the seller would have the information.

SEN. MANGAN noted the mold disclosure language in the bill was very broad and contained little substance. **REP. BRUEGGEMAN** explained that section of the bill was amended in the House Judiciary Committee because the original language had too much "fluff". The current language provides the reality of the situation. If there is a belief that mold may be present or people in the family have allergies, it is important for the buyer to have the property inspected.

SEN. MANGAN noted that the disclosure agreement did not state the immunity provision. **REP. BRUEGGEMAN** affirmed that was not in the bill.

SEN. MANGAN asked **Chris Christiaens, Montana Landlord Association,** for comments on the bill. **Mr. Christiaens** stated they did not take a position on the bill. The Montana Landlord Association provides training in regard to mold. The Montana State University provides testing for mold. They have stated that mold is everywhere. If a landlord is aware that mold is present in property, this should be disclosed to future tenants. It should not be allowed to continue to grow, once a problem has been identified.

SEN. MANGAN questioned whether there would be any statistics in regard to the number of times landlords hire professionals to inspect their premises for the presence of mold. **Mr. Christiaens** did not believe this was a regular practice. The state has been in a severe drought for the last five years so there have not been many situations which would warrant the inspections.

Closing by Sponsor:

REP. BRUEGGEMAN provided an article entitled, "Mold for Gold", **EXHIBIT(jus57a08).**

{Tape: 3; Side: A}

The deep underlying issue of the bill is tort reform. There is a buyer-beware issue in the bill. He recently bought a used vehicle. A mechanic inspected it and set out the potential problems. As the buyer, it was his responsibility to deal with the problems. There are an incredible number of tort claims due to mold. People need to be responsible for their purchases. If the realtor has responsibly stated that there is a potential problem and a contingency is placed into the buy-sell that there

is a mold inspection and the test be made known, the realtor should not be responsible later on if a problem erupts. This bill is about personal responsibility and presents a "buyer beware" issue.

HEARING ON HB 390

Sponsor: **REP. DAVE GALLIK, HD 52, HELENA**

Proponents: **Chris Tweeten, Attorney General's Office**

Opponents: **None**

Opening Statement by Sponsor:

REP. DAVE GALLIK, HD 52, HELENA, introduced HB 390, the civil false claims act. Since the days of the Civil War, this act was first known as a "Lincoln" law. The federal government put this law into effect due to fraudulent contractors stealing from the government during the Civil War. When the bill was drafted, he asked that it be fashioned after the federal statute and the California statute. The federal statute states that if someone is suspected of defrauding the government, the false claims statute comes into play. In the federal statute, the facts are submitted to the United States Attorney under seal. The House Judiciary Committee placed amendments on the bill. Providing this information under seal, would violate our privacy act. The relator, person suspecting the false claim, would first file this in court. The state agencies have reviewed this bill and certain exemptions have been provided. The Attorney General's Office would like to see some changes and he agrees with most of the changes. **Chris Tweeten, Attorney General's Office**, will explain the changes. There is a jurisdictional bar which includes public disclosure, administrative case or lawsuit, news report, and state employees. If a state employee believes that someone is defrauding their particular agency, they must bring it to the attention of the superiors in that agency who are responsible. If the agency chooses to take no action, the person would have the ability to bring a false claim by filing with the Attorney General's Office.

Proponents' Testimony:

Chris Tweeten, Attorney General's Office, noted page 1, line 23 of the bill defines governmental attorney. The amendment placed on the bill in the House Judiciary Committee could be clarified to provide guidance to private citizens in respect to where the information should be presented. The intent was to have the Attorney General's Office serve as a clearinghouse for any claim

involving fraud against any agency of the state of Montana including all boards, commissions, and elected officials. He suggested language to that effect be added to the definition. It is unclear as to whether or not the Board of Regents would be a unit of the university system. The intention of the sponsor was to recognize the autonomy of the university system and allow those claims to be presented to the Chief Legal Counsel for the university system with respect to any claim involving the Board of Regents or any unit of the university system over which the Regents have jurisdiction.

On page 3, line 9, it is not clear that the inability to file a claim refers only to claims under this section. He suggested that language be added to make it clear that the disability from filing a claim applies only to those actions that are brought under this statute.

The statute is designed to allow the Attorney General to make an election to bring a claim if it is brought to the Attorney General's attention and then provide the private citizen, who brought the information, the opportunity to participate in the case. It is unclear whether the introduction of the private citizen into the lawsuit is intended to be accomplished through the existing procedures for intervention into lawsuits or whether the intention is to create a new process. He suggested that the private citizen be required to move the court for intervention under the existing Rules of Civil Procedure.

In regard to Section 12, there is no broad-based and comprehensive whistle blower statute in state law which provides protections for government employees against retaliation on the job in the event that they provide information regarding violations of law. This subject needs attention. There is some protection built into existing law. The wrongful discharge statute protects workers from retaliation by their employers when they report violations of public policy by the employer. The need for this provision in this bill is somewhat tenuous because the bill has been clarified to state that claims brought against state employees are no longer within the scope of the bill. He questioned whether Section 12 was needed in the bill. It may be preferable to consider protection for whistle blowers in the context of a comprehensive whistle blower statute rather than in this bill.

Opponents' Testimony:

None

Questions from Committee Members and Responses:

SEN. PERRY asked whether a governmental entity, an officer or an employee of the government would be exempt from a civil suit. **Mr. Tweeten** stated that the law already contains numerous avenues by which governmental agencies and the government itself can take action against government employees who steal from their agencies. The House Judiciary Committee believed those avenues were adequate to provide government agencies the tools to deal with their employees when the employees engage in conduct that might give rise to a claim under this statute. It would not be good to provide opportunities to identify county and state employees persons did not like and use a statute to bury governmental agencies with a proliferation of supposed claims against those employees. This would involve a substantial time element.

SEN. PERRY asked whether another statute addressed state employee exemptions from lawsuits by private citizens, except where the state employee acted outside the law. Would this conflict with that statute. **Mr. Tweeten** explained there was a provision in state law, Title 2, chapter 9, which entitles a government employee to defense and indemnification by the agency that employees them. This would be for tort claims and civil rights claims that are brought against the employee arising out of the course and scope of the employees employment with the government agency. The obligation on the part of the agency would include paying for the defense as well as the damages. This obligation is contingent on three obligations on the part of the employee. The employee must cooperate in the defense and not engage in a settlement without the agency's authorization and approval. The employee's conduct must not be criminal or malicious. This bill would not conflict with the provision mentioned above.

{Tape: 3; Side: B}

SEN. PERRY questioned whether the language at the top of page 7 would invoke Rule 11. **Mr. Tweeten** believed the language would parallel Rule 11 but not overlap. In the context of claims brought under this statute, the court's discretion would be limited because the court is required to award attorneys fees and costs.

SEN. PERRY asked if the person would need to file an action to achieve the goal of having the attorney fees returned. Would the person also need to prove to the judge that the case was frivolous and brought solely for harassment purposes. **Mr. Tweeten** stated that ordinarily there would be a finding made by the court that one party is entitled to prevail. A judgment is

then entered to conclude the case. The awards of attorneys fees and costs would be included in the judgment.

Closing by Sponsor:

REP. GALLIK agreed with the Attorney General's proposed amendments. With regard to the elimination of Section 12, he believed it added protection to those caught between a fraudulent contractor working an inside deal with a state employee.

HEARING ON HB 289

Sponsor: **REP. BRAD NEWMAN, HD 38, BUTTE**

Proponents: **Julie Ippolito, Mothers Against Drunk Drivers (MADD)**
Jim Smith, Montana County Attorneys Association and the Montana Sheriffs and Peace Officers Association
George Corn, Ravalli County Attorney and Montana County Attorneys Association

Opponents: **None**

Opening Statement by Sponsor:

REP. BRAD NEWMAN, HD 38, BUTTE, introduced HB 289. He reported that this bill deals with blood alcohol concentration (BAC) level refusals. This legislature is considering a number of bills that increase the penalties on DUI drivers. Consideration is also being given to lowering the BAC level. In Montana, we have the implied consent law. Driving is a privilege, not a right. In exchange for this privilege, motorists have implicitly consented to giving a sample of their blood, breath, or urine for determination of whether or not they are under the influence as defined by code. When a motorist refuses to a BAC test, an administrative suspension occurs. The person loses his or her driver's license for six months. When faced with penalties, more and more motorists are refusing to give the evidence. In Butte, there is a 40 percent refusal rate. In Cascade County, there is a 50 percent refusal rate. The original intent of the bill was to treat BAC refusals as a separate criminal offense. Nine or ten states use this approach. Nevada simply takes a blood sample. The House Judiciary Committee was substantially opposed to this idea. The criminal context has been removed from the bill. The bill addresses BAC refusals on page 2, lines 16 and 17. The judge will instruct the jury that the jury may infer from the refusal that the person was under the influence. This is an inference, not a presumption. The inference is rebuttable.

In State v. Stranstrom, the Court held that an evidentiary presumption is not allowed. Inferences as to what evidence means is allowed. The defendant can bring evidence to controvert the question of whether or not they were under the influence.

Proponents' Testimony:

Julie Ippolito, Mothers Against Drunk Drivers (MADD), stated that Montana currently has a BAC test refusal rate in excess of 30 percent statewide. This is due to the fact that the sanctions for doing so are less than a DUI conviction. Under current law, the license is revoked for six months but the offender may request an administrative hearing in a court and obtain a driving permit. In order to avoid the problems of high test refusal rates, the penalties for refusal must be greater than a DUI conviction. To add to the problem, a review of refusal rates in several other states has shown that offenders who refuse an alcohol concentration test had higher recidivism rates and the probability that the offender would refuse increased with the number of prior DUI offenses.

Jim Smith, Montana County Attorneys Association and the Montana Sheriffs and Peace Officers Association, maintained the scientific evidence is the best information that can be introduced as evidence. A 30 to 50 percent refusal rate in the state tells us that this is a problem. DUI offenders know the game and that they are better off refusing to take a test.

George Corn, Ravalli County Attorney and Montana County Attorneys Association, remarked that the word is out about refusal to submit to a BAC test. Several years ago the Missoulian had a front page article on how to proceed if a person is stopped for a DUI offense. The defense attorneys tell their clients not to blow. As penalties are increased, the number of refusals have increased. They know the evidence can be used against them. Although this bill is a compromise, it will be a great help because it creates the presumption that someone is under the influence if they do not blow. Given the increasing sophistication of DUI drivers, this is important. The jury can infer that the person was under the influence.

Opponents' Testimony:

None

Questions from Committee Members and Responses:

CHAIRMAN GRIMES asked whether the amendments were all added in the House Judiciary Committee or whether amendments were added on

the House Floor. **REP. NEWMAN** explained the amendments were added by the House Judiciary Committee. He preferred that refusals be treated as a separate crime. If the penalties for BAC refusal are on a par with penalties for a DUI situation, the person would not have an incentive to ignore their responsibility under the implied consent law.

CHAIRMAN GRIMES questioned whether the original bill contained any technical, legal, or constitutional concerns. **REP. NEWMAN** explained the original bill was extensive. Several of the sections were problematic. They were willing to delete those sections. There was opposition on constitutional grounds.

SEN. CROMLEY asked whether there would be a constitutional problem with using the word "presumption" instead of "inference". **REP. NEWMAN** explained the bill was drafted to use the word "inference" because inferences are allowed in the criminal context and "presumptions" are not.

SEN. CROMLEY noted the fact that the defendant refused to take the test would be admissible. His understanding is that the jurors might infer from the refusal that the result may be negative but the court could not give an instruction to that effect. **REP. NEWMAN** explained in the model instructions currently given to the jury, the jury is told that it can consider a BAC refusal. The instruction continues to state that the refusal in and of itself is insufficient to establish a conviction. The jury gives the refusal whatever weight it wishes. The prosecution is allowed to present the fact at trial. Under this bill, the jury would be instructed that because of the refusal, the jury may infer that the person was under the influence. This basically would shift the burden to the defense to rebutt that inference.

SEN. CROMLEY questioned whether the defendant could be convicted on the inference alone. **REP. NEWMAN** claimed that was a remote possibility. It would ignore the suspicion, the reason for the stop, the odor, the speech mannerisms, etc. The officer must have a particular suspicion to stop the vehicle and probable cause to make the DUI request. The BAC refusal does not happen without other evidence.

SEN. CROMLEY further questioned the difference at trial in terms of the instruction given to the jury. **REP. NEWMAN** explained the current instruction is that the jury may consider the refusal. In and of itself, the refusal is not sufficient to establish a conviction. The new instruction would state the jury may infer from the refusal that the person was under the influence. Under the influence would be defined in a separate instruction. The

jury would also be instructed that the inference is rebuttable. The defense would need to offer some evidence or argument as to the question of DUI.

Closing by Sponsor:

REP. NEWMAN closed on HB 289. If the question of BAC refusals is not addressed by the Legislature, the impaired motorists will be given further incentive to refuse his or her obligation under the implied consent act.

ADJOURNMENT

Adjournment: 12:00 P.M.

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SEN. DUANE GRIMES, Chairman

_____
JUDY KEINTZ, Secretary

DG/JK

EXHIBIT(jus57aad)