SENATE JUDICIARY
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Bill No. HB 345

March 10, 2005

MEMO

TO: **Senate Judiciary Committee**
FROM: **Dave Gallik**
RE; 345 HB , Extension of Statute of Limitations for Fraudulent Transfer Claims

At the hearing on this bill I promised you this memo. It provides more detailed information and legal authority on the specific provisions of the bill which generated the bulk of your questions.

In two cases, the Montana Supreme Court held that the Uniform Fraudulent Transfer Act ("UFTA"), § 31-2-341, MCA, had a two year statute of limitations that is not tolled regardless of almost all, if not all, circumstances. ***Gulf Insurance Company and Security Insurance of Hartford v. Donald E. Clark et al.***, 2001 MT 45, and ***In re the Estate of Arthur Johnson.*** The statute of limitations in many other actions is longer than two years, for example, three years for a personal injury claim, five years for an oral contract claim, and eight for a written contract claim.

Therefore, under the current law, if a potential judgment debtor transfers assets, a complaint alleging fraudulent transfer must likely be filed in Court prior to obtaining a judgment in the claim against the potential debtor. Even more nonsensical, the claim must likely be filed prior to the time when the injury or contract claim must be filed. This not only will result in unnecessary lawsuits, fraud is a very serious allegation that under the current law must be made in court even if is later determined unwarranted. Consequently, a fraudulent transfer action should not be filed until a judgment has been obtained in the primary action.

In both of the above-cited cases, potential debtors transferred property in order to avoid a likely future judgment. Later, the debtors successfully raised the two year statute of limitations in § 31-2-341, MCA, claiming their property was protected against judgment creditors even if the property was transferred to avoid a legitimate debt. The Montana Supreme Court agreed with the debtors based upon amendments to the statute by the 1991 legislature. This was not the law prior to the 1991 amendments. (*See Murphy v. Atkinson* (1993), 262 Mont. 164, 169, 864 P.2d 273, 276, which held that the limitations period does not begin to run until the judgment is obtained).

The 1991 legislative history shows the UFTA was intended to protect creditors' rights. The legislature clearly intended to establish a limitations period consistent with then-existing law and with the limitation provisions governing fraud in general. Senate Bill 7, which adopted the UFTA in Montana, was sponsored by Senator Joe Mazurek in 1991. In his presentation and opening statement to the Senate Judiciary Committee, Senator Mazurek explained that ". . . the bill protects creditors against debtors who seek to conceal debt." LEGISLATIVE HISTORY OF SENATE BILL 7 (1991), SENATE JUDICIARY COMMITTEE HEARING NOTES, Jan. 22, 1991, p. 2. The Senator further noted that "section 10 changes the two-year statute of limitation on fraudulent transfers to four years. He added that the Committee may want to look at this because the proposed four-year statute of limitations could be a problem." *Id.*, p. 3. In response, Senator Towe commented that ". . . *he was concerned that the four year statute would be different from*

the state fraud limit of two years." *Id.* (emphasis added). Based on these concerns, the legislature changed the uniform act's four-year limitation provision to two years in Montana.

By adopting the shorter, two-year limitations period, the legislature clearly intended to make the UFTA comply with then-existing Montana law. Moreover, in adopting the UFTA, the Legislature's overriding purpose was to *protect* creditors, not diminish their remedies. This is evidenced by Senator Mazurek's comments at a subsequent hearing:

> ...the theme of the act is that citizens of society are only as good as their word as to the extent in which they honor their obligations. Obligations which are incurred should not be avoided by manipulation. ... *[T]he bill recognizes how important creditors are to society and attempts to assure availability by providing protection to creditors against debtors who seek to avoid their debts by the transfer of property.*

Id., SENATE JUDICIARY COMMITTEE HEARING NOTES, March 12, 1991, pp. 6- 7 (emphasis added).

I hope this assists your deliberations during executive action. Should you need urther information or explanations please let me know and it will be promptly provided to you. I appreciate your interest in this issue and willingness to take the time to fully understand the existing problem that this legislation addresses.