

House Bill 532

Testimony Outline: Brian L. Delaney, Associate Counsel, ALPS Corporation

Overview:

HB 532 involves amendment of two statutes, §§27-2-102 and 27-2-206, M.C.A. Both statutes are in the chapter of the Code entitled: Statutes of Limitations.

Brief Purpose of statutes of limitations: Some feel arbitrary, but: 1) encourage people to be diligent in protecting legal rights; 2) protect against legal matters dragging out endlessly; 3) promote allowing people to move on with their lives; 4) add degree of precision and certainty to the legal process; and 5) requiring timely pursuit of rights helps avoid problems of lost evidence, unavailable witnesses, etc.

§27-2-102 has to do with accrual of a cause of action—when the clock starts running for most statute of limitations purposes

- proposed amendment (Section 1) simply makes it more clear when that occurs—for everyone—all citizens of state of Montana

§27-2-206 is the legal malpractice statute of limitations—applies to attorneys only and has its own, unique and built-in accrual requirement.

- proposed amendment (Section 2) makes built-in accrual rule more clear, and cleans up errant judicial interpretation of the statute—returns the statute to what obviously intended by legislature when enacted
- Amendment to legal malpractice statute will not only restore the statute to being interpreted consistent with legislative intent, would create fair and consistent application of statute
- Both statutes are presently well drafted and seemingly clear. The need for amendment arises from interpretation of them by our Supreme Court in a fashion which is not supportable in terms of tying back to the intent of the legislature, i.e. judicial activism/legislating from the bench.

The 27-2-102(a) Amendment:

Present form: A claim legally matures so as to start the statute of limitations clock when all elements exist, and a lawsuit or action can be filed. Simple tort claim elements are duty, breach of duty, causation, and damages.

The problem: Due to judicial interpretation, the waters have been muddied regarding the element of damages. The statute only requires that damages exist. The case law has been trending toward a requirement that damages must be discovered, and even that they be relatively well defined. The tort S/L is 3 years. It becomes meaningless if the commencement date is delayed, potentially for years, if it is required the nature, extent, and scope of damages need to be known. For example, in *Ehrman v. Kaufman, et al.*, decided Dec. 30, 2010, a legal malpractice case, Ehrman was represented by Kaufman law firm in underlying transaction to acquire a dock easement right. He experienced significant problems with use and enjoyment of the right by July,

2004, and litigation with the individual interfering with the right ensued. In August, 2007, the District Court ruled against Ehrman. In the later suit against Kaufman, it was held on appeal the claim accrued in August, 2007, not in 2004, when there were not only strong indications the attorney's advice may have been wrong, but also when there were clear events causing damage to Ehrman in the form of loss of enjoyment of the right he thought he'd acquired.

The amendment: Simply makes it as clear as possible that any form of damages will satisfy the damages element, completing accrual and starting the limitations period. Will require that the courts more uniformly apply all limitations statutes by for practical purposes removing a confusing element of the analysis as to when they commence.

The 27-2-206 Amendment:

Present form: A legal malpractice claim legally matures, based on this specific statute, when a "plaintiff discovers or through the use of reasonable diligence should have discovered the act, error, or omission" of the lawyer. The accrual rules of §27-1-102(1) do not apply because the statute is itself clear as to accrual. Such specific statutes which trump application the §27-1-102(1) accrual rules are contemplated by §27-1-102(2).

The problem: For years and years, our Supreme Court applied the statute based on how the legislature drafted it. More recently, our Court has completely departed from honoring legislative intent, and created its own rules. In *Ehrman* and two preceding cases, the specific accrual rule set forth in the statute and endorsed in numerous decisions has been ignored in favor of strictly applying the accrual rules of §27-1-102(1)(a). There are three types of legally recognized accrual rules: the damage rule (accrual when damages occur), the occurrence rule (accrual when negligent act occurs), and the discovery rule (accrual when negligent act discovered or should have been). Our current statute is, unmistakably, a discovery rule statute. Our Supreme Court has, despite that, judicially enacted the most liberal and uncommon of the three, the damage rule. Most states use the discovery rule or the more stringent occurrence rule with some discovery rule like exceptions. Regionally, Washington uses the discovery rule; Wyoming an occurrence rule with discovery exceptions, and Idaho an occurrence rule. On top of that, our Court has in *Ehrman* now quite clearly judicially enacted an entirely new rule: that the statute should not commence to run during the course of a legal representation. That completely new development is not even arguably tied to statutory law. There is no reason to single out attorneys and treat them differently than all other citizens when it comes to accrual of a cause of action. If a claimant is aware or should be aware that an attorney made a mistake, consistent with the existing language of the statute, that should trigger the limitations clock. The Idaho statute specifically requires that such an ongoing relationship makes no difference.

The amendment: Addresses both problems and makes clear that the statute means what it says, nothing more. The amendatory language is intended to make clear that there an exception regarding the applicability of §27-1-102(1)(a), and that the amendment is, indeed, "providing otherwise by statute" consistent with §27-1-102(2). While those things have always been readily apparent, the amendment will make them crystal clear and prevent further judicial attempts at usurping legislative functions.