

# Montana Legal Services Association

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## MEMO

EXHIBIT 5  
DATE 3/17/15  
SB 372

To: House Judiciary Committee  
From: Amy Hall, attorney with MLSA *ah*  
RE: SB 372 – revising landlord-tenant property laws concerning unconscionability  
Primary sponsor: Mark Blasdel  
Date: March 17, 2015

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Good morning, Mr. Chairman and members of the Committee:

My name is Amy Hall. I am an attorney with Montana Legal Services Association, a nonprofit organization that provides civil legal assistance to Montanans living in poverty. I have provided legal representation to low-income renters throughout Montana for more than nine years.

I am here on behalf of MLSA to express concerns about SB 372. This bill is unnecessary and its effect would be to confound the existing statute.

As written, the added provision – subsection (2) of the bill – provides that a Court may not find unconscionable a rental agreement which imposes upon tenants the maintenance responsibilities listed in Section 70-24-321, MCA (and in 70-33-321, MCA, for mobile homeowners). Similarly, the bill's subsection (2) provides that a Court may not find unconscionable a rental agreement which imposes upon landlords the maintenance responsibilities listed in Section 70-24-303, MCA (and in 70-33-303, MCA, for lot-only landlords).

These proposed amendments are unnecessary. A court would not find unconscionable any provision in a rental agreement that was based upon obligations set out in existing state law, so there is nothing to be gained by amending the statute as proposed by this bill.

It is not necessary to amend existing law just because of a few instances in the past two years where justice court judges have ruled against landlords concerning unconscionability. When a court rules against a landlord and makes a finding of unconscionability, the landlord always has the option of appealing that decision to a higher court.

### Administrative Office

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The Montana Supreme Court has described the test for a finding of unconscionability under the existing statute (Section 70-24-404, MCA):

Unconscionability requires a two-fold determination: that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions.

*Crestview Apartments*, 2010 MT 164 ¶22, 357 Mont. 123, 236 P.3d 586.

Clearly, if a lease's contractual terms are based on state law, those contractual terms would not be unreasonably favorable to the drafter, and they would not be unconscionable.

However, if one were to read this proposed amendment more broadly, it could possibly lend legislative approval to the lease of an unscrupulous landlord. Suppose that a landlord's lease states specifically that the tenant must comply with the state law governing tenant's maintenance responsibilities under Section 70-24-321, MCA, or if a mobile home lot rental, Section 70-33-321, MCA, as referenced in this bill. Suppose that that same lease says that if a tenant violates one of those provisions in the law, then the tenant will be charged a \$500 fine in addition to paying the landlord's actual damages related to the violation. Suppose the tenant's child flushes a diaper down the toilet, which causes a sewage overflow in the rental, and the landlord pays a plumber \$200 to fix it. The flushing of the diaper could be considered a violation of Section 70-24-321(1)(e), MCA. If HB 372 is passed, an unscrupulous landlord could insist that the tenant pay the \$500 fine, as well as the \$200 actual damages (the actual damages are recoverable by the landlord under existing law). Under existing law, the tenant might have refused to pay the \$500 fine and a Court might agree that such a fine was unconscionable, or a violation of Section 28-2-721, MCA, (copy attached) which applies to contracts, and provides that every contract that specifies the amount of damage to be paid for a breach, set in anticipation of such breach, is void, unless, from the nature of the case, it would be impracticable or extremely difficult to set in advance the amount of actual damage. If SB 372 is passed, the landlord might be able to convince the Court that the \$500 fine was enforceable because it was related to the tenant's maintenance obligations under state law.

### **Conclusion**

The Montana statutes governing unconscionability in leases are working fine as they are, and do not need to be amended. The language of the amendment, on its face, simply restates the requirements of existing Montana law. Yet the wording could allow an unscrupulous landlord to use this amended law to collect unlawful fees and penalties against tenants – fees that could have been found unconscionable under existing law.

Thank you for your consideration.

# Montana Code Annotated 2014

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**28-2-721. When provision fixing liquidated damages valid.** (1) Every contract by which the amount of damage to be paid or other compensation to be made for a breach of an obligation is determined in anticipation thereof is to that extent void, except as expressly provided in subsection (2).

(2) The parties to a contract may agree therein upon an amount which shall be presumed to be an amount of damage sustained by a breach thereof when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

**History:** En. Secs. 2243, 2244, Civ. C. 1895; re-en. Secs. 5054, 5055, Rev. C. 1907; re-en. Secs. 7556, 7557, R.C.M. 1921; Cal. Civ. C. Secs. 1670, 1671; Field Civ. C. Secs. 830, 831; re-en. Secs. 7556, 7557, R.C.M. 1935; R.C.M. 1947, 13-804, 13-805.

*Provided by Montana Legislative Services*