MINUTES

MONTANA HOUSE OF REPRESENTATIVES
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON APPROPRIATIONS

Call to Order: By Chairman Bardanouve, on March 28, 1989, at 8:02 a.m.

ROLL CALL

Members Present: All

Members Excused: None

Members Absent: None

Staff Present: Dr. Peter Blouke

Announcements/Discussion: None

HEARING ON HOUSE BILL 699

"AN ACT PROVIDING FOR A PATIENT ASSURED COMPENSATION FUND ABOVE LOW PRIMARY LIMITS OF INSURANCE, FOR THE PAYMENT OF MEDICAL LIABILITY CLAIMS AGAINST PHYSICIANS WHO DELIVER BABIES; PROVIDING FOR THE RETURN OF DOLLAR SAVINGS TO ~~ORIGINAL CAPITALIZERS AND TO~~ PATIENTS WHO ARE INJURED IN THE MEDICAL SYSTEM; PROVIDING FOR AN OBSTETRICAL ADVISORY COMMITTEE TO MAKE RECOMMENDATIONS REGARDING OBSTETRICAL CARE; ~~PROVIDING FOR OBJECTIVE GUIDELINES FOR NONECONOMIC DAMAGES PROPORTIONATE TO THE SEVERITY OF INJURY OR THE LIFE EXPECTANCY OF THE INJURED PARTY;~~ PROVIDING FOR VOLUNTARY ENTRY INTO BINDING ARBITRATION FOR OBSTETRICAL CLAIMS WITHOUT REGARD TO NEGLIGENCE OF THE PHYSICIAN; PROVIDING FOR ADMINISTRATION BY THE MONTANA MEDICAL LEGAL PANEL UNDER THE REIMBURSED SUPERVISION OF THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; PROVIDING FOR CAPITALIZATION BY A ~~PREMIUM TAX ON CASUALTY CARRIERS~~ TEMPORARY LINE OF CREDIT FROM THE GENERAL FUND, WITH THE ADVANCED MONEY TO BE REPAID; AMENDING SECTIONS 27-6-105, 27-6-602, 9 33-10-102, AND 33-23-311, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

Presentation and Opening Statement by Sponsor:

Tape 1, side A, 000. Representative Addy, House District 94, Billings, and Chief Sponsor of House Bill 699 said this was an area with a big problem. He discussed the high rates for liability that is driving the obstetricians and family practitioners out of business and the merits of the bill in helping to solve this situation. He handed out an proposed AMENDMENT EXHIBIT 2, placing a severability clause in the bill. He said this had been discussed, but had not been added in the Judiciary committee.

Testifying Proponents and Who They Represent:

Gerald Neilly, Attorney and Lobbyist for the Montana Medical Association, Billings

Proponent Testimony:

(135) Mr. Neilly said they were the drafters of this piece of legislation. He said in 1988 in the rural areas of Montana (excluding the 7 major cities) there were 55 physicians delivering babies. He said they have been declining in the rural areas, and if nothing is done it will mean the closure of hospitals and large areas of Montana will continue not to have the availability of obstetrical services.

Testifying Opponents and Who They Represent:

Mike Sherwood, Legislative Counsel for the Montana Trial Lawyers Association
Jacqueline Terrell, American Insurance Association
Leonard Kaufman, Montana Representative of the Doctor's Company and member of the Obstetrical Company
Roger McGlenn, Executive Director, Independent Insurance Agents Association of Montana.

Opponent Testimony:

(274) Mr. Sherwood left testimony listed as EXHIBIT 1, which included a proposed amendment. He gave some statistics on awards for malpractice, said this bill sets up a fund that is established by the state of Montana in reaction to an insurance crisis because insurance rates appear to be high. He said this puts Montana in a position where it would have to pay the money and creates a risk that we may have an unfunded liability and cited Worker's Comp as an example of an unfunded liability.

(447) Ms. Terrell gave written testimony, EXHIBIT 2, and said she had some concerns about earlier statements. She said malpractice premium rates in Montana are based on other states like California, Florida, etc. She said one of the companies she represents is the St. Paul Company and they are the only private, for profit, carrier writing medical malpractice insurance in Montana. She said the other two major companies are non-profit, doctor owned companies. She said the St. Paul Company does not use the rates of Calif, etc., in setting it's rates for Montana. She said they focus on a national trend on the state in which it writes and then applies Montana experience only and comes up with a figure. She said Montana has the 35th lowest premiums of the 42 states the company writes.

(569) Leonard Kaufman, He said the Doctor's Company is a non-profit malpractice carrier, and feel they have a responsibility to their 750 physicians in Montana. He said

they insure approximately 70% of the physicians and with the Utah Medical, the other endorsed carrier of the Medical Society, they account for about 94% of all the physicians in Montana. He said he felt the greatest danger lay in unreported claims. He quoted from a report "Actuarial Considerations for the Formation of a Patients' Compensation Fund in Montana, attached as EXHIBIT 3. He also handed out EXHIBITS 4 AND 5, attached to the minutes, listing claims, and a rate comparison. He said perhaps a $10,000 subsidy to the doctors would be the most satisfactory way for the state to go, since that should be much less costly to the state.

Tape 1, side B,

Mr. McGlenn said the proponents had spoken of the possibility of the potential for reverting back to the original source of funding, if the one time interest free loan from the general fund was not acceptable to this committee. He said someone has to speak for the Montana Insurance consumer on this. He said in the original source of funding, that was another hidden sales tax on insurance. He said there is 2 3/4 % on all casualty insurance and up to 5 % on fire insurance in Montana. He said Montana is higher than the national average for the premium tax on insurance. He said companies don't pay this tax with insurance company money, they pay it with insurance consumer money, and if the original funding method goes back in the bill it will be one more sales tax on insurance in Montana.

Questions From Committee Members: (085) Representative Cody, addressing her question to Mr. Sherwood, said the committee had heard in testimony of Mr. Kaufman of what has happened in Nevada and the medical panel where a 6 member vote can be taken to the jury, and asked why someone had not came in with that type of legislation to address the problems in Montana, and asked how he would feel about it. Mr. Sherwood answered (105) that Nevada is not alone on that. He said he had not run it by the board so could not say. Rep. Cody said it makes common sense, and why haven't we addressed the fact that the panel has no teeth in our state and you can still take the case to court, no matter what the panel determines. Mr. Sherwood said he would assume that Nevada has limited that to a 6-0 decision because when the Montana Medical Malpractice Panel was attacked in court in '81, that was one of the issues peripherally addressed. We let doctor's who have an interest because their malpractice costs could go up, how can we let them make a decision. The answer by the court was, "it is not binding". He pointed out problems, in possible infringement on the jury by a group that was not necessarily neutral.

Representative Bardanouve said the House was in session, he would like to recess and asked if people could come back at noon. The meeting reconvened at 11:52 a.m. 135)

Representative Cody asked Chairman Bardanouve if this was an appropriation bill or a taxation bill. Representative Addy said this has been ruled a revenue bill because it had the 1.17 % premium tax in it at the time the ruling was made, and it still has revenue of $25 per birth in it. He said the bill needs to make transmittal by the 71st day.

(125) Representative Swysgood asked about the funding mechanism in the bill, and is also aware of the situation that is facing us. He said his concern is that the $6.4 million loan from the general fund -- he said you are taking the loan from the general fund and to come up with an actuarial soundness, you are showing it as an asset. He said in no other way in doing business, could a loan be considered an asset, it is always a liability. If it is a liability then that throws a problem on the actuarial soundness.

(148) Mr. Neilly said the monies that are deposited from the general revenue fund into the special account is a loan, however the repayment terms in section 10 do not mandate repayment making it an "if and when" the dollars exceed a certain amount. He said it is properly characterized as the surplus of an insurance carrier, which is the equivalent of an asset.

(173) Rep. Swysgood says, if what you are saying is in fact, then there is no guarantee anywhere in the bill that the loan would ever be repaid. Mr. Neilly answered that is correct, we could speak in terms of probabilities, but it is not guaranteed and is dependent upon the success of the entity.

(179) Rep. Swysgood said he was concerned about the ratio of premium to claims, and said Mr. Neilly's seems to be higher than the actual experience of other insurers, and would like to know the reasoning. (183) Mr. Neilly said the reasoning is that they have intentionally over funded the pool so that it will be highly solvent. The actuaries figures show the expected participation, the necessity of approximately 4.5 million dollars in surplus. He said they had assumed, for purposes of the pool, the participation by physicians, because it is impossible to know what the figure will actually be, but it is known it will be greater than the number of physicians in Montana that deliver babies. He said they have picked that capitalization figure through an exercise of caution, so the consequence of the pool is that even if every physician in the state that delivers babies were to participate, it would still be a greater amount of capital than needed. He said it is intentionally over capitalized, which with a repayment provision, is not a problem.

(177) Rep. Grinde said in testimony this morning the proponents said there were 55 physicians and later the opponents said 95, he said he would like the discrepancy addressed. Mr.

Neilly said t here are currently 55 family practitioners in rural areas that are delivering babies. He said, if you look at the state as a whole, our figures show a total of 87 when you count the urban areas, but excluding the 7 major cities, there are 55. Mr. Kaufman said (208), the purpose of the family practitioners delivering o.b. is to address those in the rural areas. He said the compensation fund takes it out of that realm and is talking about insuring 202 doctors. He said he felt it only fair to say the family practitioners doing O. B. are part of this compensation.

(217) Rep. Grinde asked Rep. Addy, if you take this $6.4 million, it is up front, and it is in the pool. He asked if this money would then be invested and interest be drawn on it? Rep. Addy said $100,000 of it will go into capitalizing the secondary pool, which is the $25 per birth, no fault, pool. The other $6.3 would go into the primary pool, which is the insurance pool and the accrual of interest from that money is part of what makes the system actuarialy sound. The interest free nature of funding is an important source of capital for this insurance pool.

(231) Rep. Grinde said, you will be taking this interest free loan from the state and capitalizing on it for this program. Rep. Addy said yes, Montana will get more control over insurance practices in this area and a lower medical malpractice for obstetricians which should translate into greater availability of those services.

(238) Rep. Kimberley said he felt this was a great bill, but was concerned about the possibility of an unfunded liability. Mr. Neilly answered that great care had been taken to eliminate that possibility. He said certain steps are done to do that. He said one step was to mandate $100,000 worth of insurance. He said they have to be insurable, and the bad doctors cannot participate in the pool because they are the ones who would not have the underlying coverage. Rep. Addy said a document was put on the desks on the floor, but was not passed out in committee, and the last sheet speaks to the 8 points in more detail.

Chairman Bardanouve said in earlier testimony it was stated several other states have this pool. He asked how the other states financed it and Mr. Neilly said it varies. Kansas used the general fund, some finance through assessments on health care providers and hospitals. He said the type of funding known as the joint underwriting association uses a combination of casualty carriers, and property carriers, primarily liability carriers.

(273) Chairman Bardanouve asked, if there was an unfunded liability, would Montana be liable it. Mr. Sherwood said the amendment proposed took this fund which does not pay any money to the insurance guarantee fund, but the insurance guarantee fund was on the line over the objection of the

insurance companies, if the fund went under. The problem is, if it looks like it is going under, you will have a lot of doctors saying, we are now going to lose our malpractice and they will probably be back saying they need more money to avoid the crisis or need some drastic reduction in benefits for babies and mothers to head off that crisis. He said the amendment proposed gets rid of the guaranteed fund. Rep. Bardanouve mentioned $31 million that has to be paid by the state in 30 years because of a guaranteed fund the state was responsible for, and Ms. Terrell said that was a life insurance company, and that guaranteed fund operates differently than the guaranteed fund for the property and casualty company.

(317) Rep. Spaeth asked if a dissolution of the fund happened, is there a chance we would have to come up with additional general fund, and was told by Mr. Kaufman that the biggest concern they have in the Doctor owned carriers, is the coverage when a doctor retires. He said this is a concern with prior acts. Mr. Neilly said the insurance guaranteed fund is not involved if the legislation Rep. Addy submitted this morning, since that takes the insurance guarantee fund out of it.

Representative Spaeth said the funding is $6.4 million out of the general fund that will have to be raised this biennium. If we go back to the 1.17 fee system and it is taken to court and found not an adequate way of funding, what would happen? Mr. Neilly said that would trigger the severability clause provisions in the proposed amendments and there would be a distribution of the assets and liabilities among the participants. Rep. Spaeth asked about taking it out of the coal trust and charging the rate of interest the coal trust generates. Rep. Addy said this is too little money (354), in his view, to justify that type of action.

Representative Cody asked Kay Foster as a member serving on the task force, how long they met. Ms. Foster said about a 9 month period. She said it was an outgrowth of another insurance subcommittee looking broadly at insurance. She said the task force looked only at obstetrical. Rep. Cody said, in the testimony that came out, it was stated the task force had not endorsed this legislation, why? Ms. Foster said when this was presented originally she had testified as a proponent since the task force had stated it was one option that ought to be very carefully considered by this legislature. She said they had questions on the constitutionality of some of the limits in it and the actuarialy soundness. She said this bill has changed so dramatically that the task force had not made a recommendation on the changes.

Representative Swysgood asked, on the funding of $6.4 loan which is interest free, I ask why isn't it even a modest interest loan. He wondered why no interest. Rep. Addy said, if you

take $6.4 million and apply a 10% rate, it would be $640,000 to be paid back in a year. He said in looking at the first year's premium at the rates for this loan and that is $739,000. He said by requiring a rate of 10% on the principal you would be basically doubling the rates (425).

Representative Swysgood said the actuarial assumptions made for the original bill, are they still valid now with all the amendments? Mr. Neilly said except for 1, section 22 of the original bill, having to do with the limits on damages, page 30 of the bill, was stricken . He referred to 2-1 of the actuarial impact of that particular provisions, and that is the only change in the bill that affects the actuarial assumptions, and amounts to 1/2 of 2%, or 1% impact on the actuarial assumptions of the pool.

Rep. Grinde (451), asked Ms. Terrell to relate to the committee the information she had given him. Ms. Terrell (463) said when the bill was first being considered by the Governor's task force, a draft of the bill was sent to the American College of Obstetricians and Gynecologists. The OBGYN are the only specialty arm of American Physicians that has a section devoted specifically to analyze court liability and the problems that come with malpractice insurance. He said the American College analyzed the bill and provided the task force with a report on the version they saw. They raised many questions, and did not endorse it. She said they have been studying the tort problem for about 10 years. She said she would leave a report with the committee.

Rep. Grinde asked Rep. Addy what do the doctors pay for malpractice now, and how much coverage do they carry? Rep. Addy said the coverage is an individual matter. Rep. Grinde asked, if this bill were to pass, what percentage of the previous cost would this be, and Rep. Addy said the figure he had heard was 25% . Mr. Neilly said 25% savings to the $100,000 level, is 50% of the current cost.

Rep. Grinde said, first we are trying to help the people who need medical care out there and the physicians. We will help them through the state money. He asked if the physicians are going to pass on the savings to the patient. Rep. Addy said the idea is to make the malpractice rates affordable to people who would like to practice in rural areas. Mr. Neilly said section 10 of the bill mandates excess savings of the pool to go to pay back the loan, and the other half to fund the voluntary arbitration pool. He said once the loan is paid off all of the savings are mandated to go back to this arbitration pool. That way savings are passed through to the patient.

Representative Peck said he was concerned about the revenue. He said on page 14, line 11, $5 from each physician and each hospital for the number of babies delivered. Rep. Addy said this is in the insurance fund, and you will have to go back

to page 35, lines 7 and 8.

Rep. Peck asked about the different fees, and Rep. Addy said it is two different accounts. He said the purpose is that the doctor will have to pass on less insurance costs to the patient than they are now doing.

Rep. Peck asked about the number of anticipated births, and was told between 12,000 and 13,000 are estimated.

Rep. Swysgood asked if we were opening a door for other groups of insurance groups for cities, towns, etc. Rep. Addy said the League of Cities and Towns and Counties have already set up their own group, which was probably the first self insurance fund we authorized.

Rep. Swysgood asked if there would be a problem that some of the physicians might not want to come into this. He asked if they had been contacted and what there position might be. Mr. Neilly said yes, they have been contacted, and there is a degree of interest. He said some of this also depends on attracting new physicians into the state. He said the assumption is that the lower premiums would be an inducement for physicians to come to the small communities in the state.

Tape 2, Side A, 000.

Rep. Grinde said if this were so important, where were all the physicians, and Mr. Neilly said the lateness of the hearing and the short time notice made it impossible for people to know about it, or to get to Helena for the hearing.

Chairman Bardanouve asked, in order to save this bill, if the financing of the bill was removed from the general fund and the bill sent up to the House, in the hopes of finding another way to finance it, would that be your preference rather than to have the bill killed in committee, and what alternatives would you lobby for in the legislative process. Mr. Neilly said the only alternative left is the casualty and property alternative or the general fund. (030) Representative Kelly said he would say please fund it some way. To put it out without any money will mean no decisions are made. He said this is a one time source of funding, and one the governor has talked about is acceleration income tax payments.

Chairman Bardanouve asked what the final recommendation of the Governor's Task Force, and Mr. Neilly said as he recollected, the Governor's Obstetrical Advisory Council affirmatively rejected the alternative proposed by the insurance commissioner's office and in terms of these types of proposals, the only one that received an affirmative recommendation in terms of an insurance proposal was the Montana Medical Association legislation, and the

reservations that were expressed in the report had to do with actuarial soundness and there was some verbal expression as to constitutionality. Rep. Bardanouve asked what the alternative was that was rejected, and Mr. Neilly said Andy Bennett's office had a measure that involved a no fault fund that was for zero coverage up to full coverage for all neurologically damaged infants would be placed in this pool and given out of pocket damages and attorney fees. That is House Bill 749, and was tabled in House Judiciary.

Representative Cody asked Ms. Terrell about the loss ratio. She said about 248% but has dropped. She asked what year the loss ratio was and was told in 1984 it was 248.5, in '85 it was 148.6; before '88 the figure was 95% and for '88 it was 25%. She said this was as she recalled, and would like to verify her figures. Rep. Cody asked if this could owe to the fact there were less doctors in the O. B. business, less premiums and not as many cases? Ms. Terrell said the loss ratio reflect a number of factors. She said the St. Paul company has been unable to compete with the non profit companies in Montana and have not written new doctors for a period of time. There is a trend for claims reducing, and her company will be announcing a rate reduction and hope to attract doctors back into the company. She said there is a population decline and a declining birth rate, and all of these figure into the loss ratio.

Rep. Spaeth said in looking at the coverage and the funding that one of the major sources of revenue would be the annual surcharge. Mr. Neilly answered yes. Rep. Spaeth asked about a mechanism to trigger a pay back, and Mr. Neilly said one was the interest that accrues to the benefit of the loan. He said the interest, plus whatever amount the surcharge exceeded the claims and became surplus, they would be able to retire the loan.

Representative Swysgood said in looking at the funding, you have to say the state is subsidizing a certain segment of the economy. (167) In Dillon he said the Hospital is subsidizing the O. B. doctors to keep them in business. He said that form of subsidy is not meeting with a good reception from taxpayers because you have those who are beyond the age of using the service, those who can't use it, and those who do. On a broader spectrum with the whole state subsidizing it, how is it going to be received, when it is considered by most to be a high income profession.

Rep. Connelly said she wondered if the reason we had this problem isn't because the insurance companies are charging these outrageous rates. She said it had been mentioned earlier that there weren't that many claims in Montana.

Chairman Bardanouve said some of the members were in other meetings and the committee would take action later. Rep. Marks said he would suggest the committee think about

reinserting the financing arrangement the way it was as a premium tax, put the bill out and let the House take care of it on the floor.

Closing by Sponsor: Representative Addy closed by saying he had spent more hours on this bill than even the pay plan. He said it would have a big impact on the state, and was a much needed piece of legislation.

Recess at 1:10 p.m. to recess or adjournment of the House. Reconvened at 6:35 p.m.

DISPOSITION OF HOUSE BILL 699

Motion: Motion by Representative Marks that House Bill 6 be amended, EXHIBIT, AMENDMENT 1.

Discussion: Rep. Cody said she could not understand why Property and Casualty had anything to do with medical malpractice. Rep. Bardanouve said neither did the general fund.

Amendments, Discussion, and Votes: Voted, passed, Representatives Swysgood, Cody and Grinde voting no.

Motion: Motion by Representative Cobb to amend by adding the severability Clause, EXHIBIT, AMENDMENT 2.

Recommendation: Voted, passed, unanimous vote.

Motion: Motion by Representative Marks that House Bill 699 do pass as amended.

Substitute Motion: Substitute motion by Representative Grinde that House Bill 699 do not pass.

Voted, Roll call Vote, Motion Failed, 6 yes, 13 voting no.

Recommendation and Vote: Revert to original motion: Do pass as amended. Reverse Vote was requested. 13 yes, 6 no. Motion passed.

ADJOURNMENT

Adjournment At: 6:44 p.m.

Bardanouve

REP. FRANCIS BARDANOUVE, Chairman

DAILY ROLL CALL

HOUSE APPROPRIATIONS COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date 3/28/89

NAME	PRESENT	ABSENT	EXCUSED
REPRESENTATIVE BARDANOUVE	✓		
REPRESENTATIVE SPAETH	✓		
REPRESENTATIVE PECK	✓		
REPRESENTATIVE IVERSON	✓		
REPRESENTATIVE SWIFT	✓		
REPRESENTATIVE QUILICI	✓	Presenting 100 in 105 →	✓
REPRESENTATIVE BRADLEY	✓		
REPRESENTATIVE PETERSON	✓		
REPRESENTATIVE MARKS	✓		
REPRESENTATIVE CONNELLY	✓		
REPRESENTATIVE MENAHAN	✓		
REPRESENTATIVE THOFT	✓		
REPRESENTATIVE KADAS	✓		
REPRESENTATIVE SWYSGOOD	✓		
REPRESENTATIVE KIMBERLEY	✓		
REPRESENTATIVE NISBET	✓		
REPRESENTATIVE COBB	✓		
REPRESENTATIVE GRINDE	✓		
REPRESENTATIVE CODY	✓		
REPRESENTATIVE GRADY	✓		

STANDING COMMITTEE REPORT

March 28, 1989

Mr. Speaker: We, the committee on Appropriations report that HOUSE BILL 699 (second reading copy -- yellow), with statement of intent included, do pass as amended .

Signed: _____
Francis Bardanouve, Chairman

And, that such amendments read:

1. Title, lines 20 and 21.
Strike: "TEMPORARY" on line 20 through "REPAID" on line 21
Insert: "PREMIUM TAX ON PROPERTY AND CASUALTY CARRIERS"

2. Page 12, lines 11 through 15.
Strike: "A LOAN" on line 11 through end of line 15
Insert: "levied and collected on all property and casualty carriers authorized to write and engaged in writing property and casualty insurance under 33-1-206 or 33-1-210 in this state during 1987 and engaged in writing property and casualty insurance as of December 31, 1988, a one-time refundable surcharge in the form of a 1.17% premium tax surcharge based on 1987 carrier annual reports made under 33-2-705. A total of $100,000 of the surcharge forms the capitalization of the secondary pool of the funds and the balance of the surcharge forms the capitalization of the primary pool of funds. If the surcharge is refunded the refund must be made in the manner provided in [section 10]."

3. Page 15, line 24.
Following: "~~paid.~~"
Insert: "The one-time refundable surcharge for property and casualty insurance carriers provided for in this section must be collected by the commisssioner on March 1, 1989, under 33-2-705 without deferral or installment or within 30 days of [the effective date of this act], whichever occurs later. The surcharge must be remitted to the department by the commissioner within 14 days of receipt, and if the surcharge is not timely paid as provided in this section,

the certificate of authority of the insurer must be suspended by the commissioner under 33-2-119 until the surcharge is paid."

4. Page 18, lines 3 through 5.
Strike: "THE GENERAL" on line 3 through "CREDIT" on line 5
Insert: "the property and casualty insurance carriers who have paid a surcharge into the primary pool of funds, pro rata and proportionate to their original contributions"

5. Page 18, line 5.
Strike: "AMOUNTS"
Insert: "contributions"

6. Page 48, lines 10 and 11.
Following: "~~dissolution~~"
Strike: "DISSOLUTION of fund -- transfer to Montana insurance guaranty association."
Insert: "Severability."

7. Page 48, line 23 through page 49, line 18.
Strike: "(1)" on page 48, line 23 through "33-10-105" on page 49, line 18
Insert: "(1) If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

(2) The administrator may petition the district court of the first judicial district to terminate [this act] if a part or one or more applications of a part is invalid; and

(a) the primary pool of funds cannot be maintained on an actuarially sound basis for more than three years from the time such soundness is required by [this act]; or

(b) the primary pool of funds will be exhausted by the payment of all fixed and known obligations.

(3) All claimants, participating physicians and hospitals, as defined in [this act] have standing to appear in any court proceeding instituted by the administrator under subsection 2.

(4) If the court finds that the conditions described in either subsection 2 (a) or subsection 2 (b) or both have occurred, [this act] shall be terminated. Upon the entry of an order of termination the court shall direct the administrator to take possession of the assets and to administer them under the general supervision of the court.

(5) Upon an order of termination, no person may submit a claim under [this act]. The administrator is to make no payments to claimants until a distribution plan is approved by the court or upon petition of an individual claimant on the basis of hardship and a showing that in all likelihood they would share in any distribution.

(6) Within 30 days of the termination order the administrator is to submit to the court a plan of distribution of the assets. The plan of distribution is to give priority to claimants and distribute the funds in an equitable manner.

(7) All claimants who have not received a final award determination by the panel on the date [this act] is terminated by court order, are not bound by the provisions of [this act]"

Proposed Amendment to HB 699
by: Michael J. Sherwood, MTLA

EXHIBIT 1
DATE 3/28/89
HB 699

Page 13, Line 10:

Insert after the word "SOUND": AND INCREASE THE FUNDS IN THE PRIMARY POOL BY A SUM SUFFICIENT TO PAY BACK TEN PERCENT OF THE BALANCE OWED TO THE STATE GENERAL FUND OR $100,000, WHICHEVER IS GREATER, IN EACH FISCAL YEAR"

Amendment in the pkt

ESTIMATED NOSE COVERAGE FOR PACF- PRESENT RATES

MATURE RATE -- 1M/3M

INCLUDES PHYSICIANS WHO ARE ASSOCIATED WITH OB'S AND FAMILY PRACTICE OB'S: 202

THE DOCTORS' COMPANY	PHYSICIAN COUNT	TOTAL COUNT	APPROXIMATE COST	TOTAL COST
OBSTETRICS-GYNECOLOGY	36		$ 3,084,984	
FAMILY PRACTICE/OBSTETRICS	27		1,237,545	
EMERGENCY MEDICINE	3		98,950	
FAMILY PRACTICE?ASST/SURG.	6		98,928	
FAMILY PRACTICE/MAJOR SURG.	2		65,966	
INTERNAL MEDICINE	6		79,186	
GENERAL SURGERY	@		82,094	
PEDIATRICS	1		16,488	
GYNECOLOGY	1		41,047	
GASTROENTEROLOGY	1		13,108	
CERTIFIED NURSE MIDWIFE	2		84,341	
CERTIFIED NURSE PRACTICIONER	1		7,351	
	88	88	$ 4,910,078	$ 4,910,078
UTAH MEDICAL INSURANCE				
OBSTETRICS-GYNECOLOGY	5		379,190	
FAMILY PRACTICE/OBSTETRICS	27		980,991	
* ASSOCIATES ESTIMATED/UMIA	10		140,000	
	42	130	$ 1,500,181	$ 6,410,259
INSUR. CORP. OF AMERICA				
OBSTETRICS-GYNECOLOGY	5		200,374	
FAMILY PRACTICE/OBSTETRICS	13		372,125	
* ASSOCIATES ESTIMATED/ICA	12		133,000	
	30	160	$ 705,499	$ 7,115,758
ST. PAUL FIRE & MARINE				
FAMILY PRACTICE/OBSTETRICS	28		$ 672,000	
* ASSOCIATES ESTIMATED/SPFM	14		140,000	
	42		$ 812,000	
		TOTAL = 202		$ 7,927,958

THIS ESTIMATE DOES NOT INCLUDE MMA'S 14% INFLATIONARY ANNUAL INCREASE.

IF THE FUND GOES BELLY UP AND THE PHYSICIANS HAVE TO BUY TAIL TO CONTINUE CARRIER COVERAGE, THE DOCTORS' COMPANY IS 1.8%, UMIA SAYS THEY INDIVIDUALLY FIGURE THE COST, ST. PAUL AND ICA ARE APPROXIMATELY 3.00%

EXAMPLE: THE DOCTORS' COMPANY TAIL COST WOULD BE: $ 8,838,140.

Fiscal analysis of current funding of HB 699 and funding if actuary retains 10 percent of loan balance for repayment (assuming an 8 percent return on investment for state funds)

	COSTS OF CURRENT BILL		COSTS WITH AMENDMENT	
YEAR	CASH	INTEREST	CASH	INTEREST
1989	6,400,000	0	6.400,000.	0
1990	0	512,000.		512,000.
1991	0	552,960		552,960
1992	0	597,196		597,196
1993	0	644,972	<640,000>	644,972
1994	0	696,570	<576,000>	645,370
1995	0	752,295	<518,400>	650,919
1996	0	812,479	<466,560>	665,235
1997	0	877,477	<419,904>	681,129
1998	0	947,675	<377,913>	702,027
	6,400,000	5,797,121	3,911,218	4,410,904

Based on the foregoing calculations at the end of ten years the state would have $12,197,121 less in its treasury utilizing the current bill and would have $8,322,122 less if it passes the bill as amended. The figure using 20 years would be close to triple the ten year figure for each option.

The American College of Obstetricians and Gynecologists

EXHIBIT 2
DATE 3/28/89
HB 699

August 23, 1988

William J. Peters, MD, FACOG
300 North Willson Avenue
Suite 2004
Bozeman, MT 59715

Dear Dr. Peters:

As you requested, Ken Heland and I have reviewed the revised Montana liability proposal. ACOG does not have an official position. In fact, ACOG does not usually take positions on specific state legislation. The comments that follow are based on our knowledge of the liability situation and the experience of other states. Items that ACOG has commented on in the past are noted.

GENERAL COMMENTS

The liability situation is threatening critical access to obstetric services. While it is easy to criticize innovative proposals, we cannot afford to wait until a perfect system is designed and tested. The strength of this proposal is that it uses the information that is available to design an innovative approach to address the specific problems and characteristics of Montana. We applaud the creativity of this approach. We believe this system has many pro-patient characteristics and will be viewed as being fair to all parties.

Primary Fund

The cornerstone of this proposal is to encourage physicians to continue practicing obstetrics by an immediate reduction in liability insurance premiums. This is accomplished by providing coverage above $100,000/$300,000 through a patient compensation fund. There is, as the report notes, somewhat mixed success among the states with such funds. All have required significant premium increases and some have even gone broke. ACOG has not taken a position on patient compensation funds, but staff feel one may have merit.

Our primary concern with this proposal is whether there are enough physicians practicing obstetrics in Montana to produce adequate capital for the fund and to allow sufficient spreading of the risk. This problem could be lessened by including all physicians in the fund, rather than only those practicing obstetrics.

Another concern is the ability to maintain the fund on an actuarily sound basis and keep premiums down in the long run. The immediate reduction in the total premium paid (premium for insurance coverage plus the patient compensation fund contribution) means the fund will have less money available than the insurance companies have had. This lower

amount will be adequate in the short run only if the insurance companies have been over-reserving, making excessive profits, or charging rates that are not based on Montana experience. We do not have conclusive evidence on these points. With regard to the last issue, we do know that in Maine insurers were basing rates on the loss experience of other states that did not have nearly as favorable loss experience as Maine. If Montana has better claims experience than the other states being used by insurers to calculate rates for Montana, then a savings can be expected.

Solvency of the fund is paramount. Physicians would be in an unfortunate situation if the fund went bankrupt and left them uninsured. The actuary's report should help to assess the stability of the fund. This issue should be studied seriously.

The proposal does contain a number of reforms designed to decrease, or make more predictable, the amount of awards. Periodic payments of awards is an element of tort reform that ACOG has supported and is certainly a reasonable one to include in this proposal. We question doing away with the contingency fee system for attorneys. No objective evidence proves that this will reduce the costs of awards or decrease the number of suits brought. Further, a serious constitutional challenge will be made arguing that it impedes access to the courts. Likewise, the provision requiring the losing party to pay the winning party's fees may be constitutionally challenged. Such provisions need to be drafted carefully so that they serve to decrease frivolous claims but do not create impediments to bringing a lawsuit. Finally, attempting to place some reasonable limits on noneconomic damages is helpful. We do not know the specifics of how the terms used to assess the extent of damage are defined in Montana law and, therefore, cannot comment on the specifics of this provision.

It is unclear how joint claims against physicians and hospitals are treated. From our reading, hospitals are mandatory contributors to the fund but are not allowed to participate in the protections of the fund. Particularly in the obstetrics area, claims are usually against the physician and the hospital. This issue should be considered.

Secondary Fund

The secondary fund provides for a no-fault "trip insurance." This is a concept that has been discussed a lot, but has not been tried in the medical area so our comments are speculative.

Several questions are raised. A major one is will patients choose to be compensated through this system? Given that the benefits are less than under the primary fund (e.g. no rehabilitation care or replacement services), and that patients choose after the injury occurs whether or not to proceed under the no-fault system, won't all those who can prove fault choose that tort system and those who could not recover under the fault-based system choose this one? Allowing the patient to choose after the injury occurs which system to use increases the likelihood that it will pass constitutional muster. Provisions assuring that patients understand their choices further improve the likelihood of it being found to be constitutional.

One of the problems always discussed in connection with no-fault proposals is the uncertainty with respect to how many compensable events will occur. In this vein, one must question whether $250,000 is adequate capital to begin operations and whether $25 per obstetric patient will be adequate.

The proposal does not specify exactly how compensable events are defined. The purpose description implies that it is only those injuries occurring as the result of medical

intervention, not all adverse outcomes of obstetric care. However, this is not clear. We would recommend the conditions for recovery be spelled out. If recovery is limited to those injuries resulting from medical intervention, then those being compensated and thus, costs will be limited. However, this results in complicated decisions particularly in obstetric care. For example, did the infant's cerebral palsy result from intervention during delivery or from some natural cause?

Several problems result from the payment of the $25 fee. First, it is unclear what is the triggering event for payment. The proposal says "in advance of any medical treatment related to the birthing process or obstetrical care." If this means $25 for each prenatal visit, for ultrasound, etc., then it will be a very expensive proposition and very few women will be able to afford to contribute. On the other hand, if it means one payment for each pregnancy, collections will be fairly low. Secondly, it is unclear why anyone would pay the fee rather than providing the letter saying they can afford to pay the fee. It is desirable to include a mechanism to allow low-income women to participate, but if there are no limits it threatens the funding of the system. Finally, the proposal refers both to deducting the fee from the physician's charge and to the patient paying the fee.

Another issue is whether the patient should be notified as to whether or not the physician is qualified. Since the fund applies only to incidents after qualification and claims made while qualified, even with notification a patient may not know for sure whether their claim is covered. This is particularly troublesome since the patient makes a contribution. It would be fairer in this case only to require qualification at the time the contribution is made.

We question why the proposal plans for delayed implementation of the secondary fund. If this idea is worth pursuing, early implementation would seem appropriate.

SPECIFIC COMMENTS

Throughout the proposal, terms like physicians in the "baby delivery business" and "involved in the birthing process" are used. These terms are imprecise. We would recommend using physicians who provide obstetric or maternity care.

Section 4(23)

(b) Does the definition of "bodily impairment" include reproductive function?

(c) Perhaps rather than referring to "scars or adverse changes in bodily appearance that are "medically required," one should refer to those that can be reasonably expected from the medical intervention. Some scars or changes may not be "required" but frequently may occur as the result of intervention.

Section 7

(1)(b) This section needs to be clarified. Does it mean that casualty insurers pay 1/10 of 1% of net written premiums including those for medical malpractice premiums, thus resulting in a surcharge on medical malpractice twice?

(2)(a)(i) We would question whether this amount will be adequate. Again, this can be better answered when the actuary's report is available.

(2)(a)(iii) We question whether a $1 per delivery will be worth collecting from physicians. According to our most recent survey, the average obstetricians-gynecologist delivers 166 babies. Thus on average you would collect $166. For family physicians, the number would be smaller. It might be more cost-efficient to increase the annual surcharge slightly to cover this, rather than collect a different amount from each physician which requires additional administrative effort.

Section 8

(2) When payment is delayed until the following year, a greater increase will be required to keep fund actuarily sound. As the cost to participate goes up, fewer physicians will participate resulting in less spreading of the risk.

Section 12

Why wait to pay claimants? One of ACOG's objectives in solutions to the liability situation is to insure prompt compensation of injured individuals. Holding deserved compensation until an arbitrary date does not forward this goal.

Section 14

This procedure appears to be basically sound. One major concern is that (5) allows suit to be brought against the physician if the administrator of the fund does not consent to an entry of judgment against the fund. No standards are included as to when the administrator can object to the entry of judgment. Further, the physician is put in an untenable position if the administrator has this power. For the fund to be involved the case exceeds the policy limit (either the per occurrence or annual aggregate). Thus, if the fund is able to be removed, the physician has no coverage. Given this potential situation a prudent physician would be forced to purchase higher coverage, thus defeating the purpose of the fund.

A few clarifications are needed. The proposal provides that if the annual aggregate has not been paid the administrator can agree to the settlement jointly with the physician or his or her insurer. It also says that any one of the three may object. The situations covered by these two statements overlap as even if two agree there is one party left to object. It would be simpler to say that any party may object and if so, the district court would resolve. (As indicated above, we think it makes no sense to give the administrator absolute veto power.)

Further, the proposal should specify under what conditions the court can refuse to order payment. If there is a panel decision against the physician, the only issues in this process would appear to be: 1) was the physician qualified, and 2) the amount of damages. There may be others, but in any case this process needs further thought.

It is unclear why an agreed upon settlement or a damage award by the panel would need court review except where one of the parties is contesting. It seems this is an unnecessary and potentially time-consuming and costly step. (Although if everyone agrees, the cost should not be excessive.)

All the references to the annual aggregate not being used are inappropriate. It appears these were included to allow the physician a "say" if there was a possibility that his or her insurance might pay. If the insurance company has already paid the per occurrence limit, then whether or not the annual aggregate has been used, the insurer will pay no more.

Section 16

(3) Something is missing from this subsection, the phrase is not a complete thought.

Section 27

We believe it should refer to the particular "professional" or "physician" rather than the profession.

I trust these comments are useful. Again, these are not official ACOG views but rather the comments of staff. Please keep us informed as action occurs and feel free to call if we can be of assistance. As you requested, a copy has been sent to Kay Foster.

Sincerely,

Kathy Bryant

Kathy Bryant, JD
Associate Director
Government Relations

KB:dor

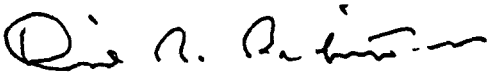
cc: Kay Foster
Ken Heland
Kathryn Moore

Exhibit 3 3/28/89
HB 699

Actuarial Considerations for the Formation of a Patients' Compensation Fund in Montana

Prepared for Montana Medical Association
Helena, Montana

Prepared by Milliman & Robertson, Inc.



David R. Bickerstaff, F.C.A.S.
Consulting Actuary

January 31, 1989

THE DOCTORS' COMPANY WITH 4750 PHYSICIANS INSURED:

EXHIBIT
DATE 3/28/89
HB 699

AS OF 1-1-89 CLAIMS INFORMATION
150 CLAIMS OPEN (3 UNALLOCATED)

RESERVES: $9,756,881.00
854,079.09 LOSSES ALLOCATED
$10,610,960.09 AGAINST EXPENSES.

AVERAGE OF $66373.34 — CLOSED IN 1988

PAID $1,883,847
199,942 ALAE
$2,083,789

4 WERE OBSTETRICIANS — 1 FP/OB (NOT OB)

OPEN
AS OF 1-1-88 112 CLAIMS (1 UNALLOCATED)

RESERVES: $8,190,881
519,283 ALAE
$8,710,164

PAID $1,153,613
34,887 ALAE
$1,88,500

3 WERE OBSTETRICIANS - 1 FP (NOT OB)

20% ALLOWED OVER RESERVE —

Initials Date
Prepared by MD 4/26/89
Approved by

1989 Montana Rate Comparison TDC vs UMIA
+ TDC rates figured w/ 18% net MMA discount 01/3m liability limits

Specialty/ Class Code	TDC yr 1	UMIA yr 1	TDC yr 2	UMIA yr 2	TDC yr 3	UMIA yr 3	TDC yr 4	UMIA yr 4	UMIA yr 5
Anesthes. 5/5	5986	6855	9450	15929	12192	22184	13366.	24023	25249
2nd. Non Srg 5/2	2690.	7132.	4248	2517.	5481	3471.	6012.	3752.	3939.
2nd Surg. 4/3	6731	3676	10621	8480.	13704	14791	15026	12765	13414
Dermatology 1/1	1499	1132	2365	2517	3054	3471	3349.	3752	3939.
Diag Rad 2B/B (not angiograms)	3218	3676	5077	8480	6550	N791	7183	12765	13414
ER 4/3	6731.	3676	10621.	8480	13704	14791	15026.	12765	13414
Emin surg 2/2	3365	2053	5310	4685	6852	6499	7511	7033	7389
Emin surg 4/3	6731	3676	10621	8480	13704	14791	15026.	12765	13414
Fam Pract 6/4A	9351.	5589	14760	12790	19044	17753	20880.	19272	20185
Gen Surg 7/5	8377	6855	13218	15929	17056	22184	18699.	24023	25249
Int Med 19/8.1	2689	1132.	4248	2517.	5481.	3471.	6012.	3752.	3939
Neurology 2A/2	3365	2053	5310.	4685	6770	6499	7511.	7033.	7389
Neurosurg 9/7A	17955	15125	28333	35341	36556	49274	40075	53322	56103
OB/GYN 10/7A	17490	11369	27598	26546	35608	37005	39639	40082	42132
Orthoped 8/7	12777	11369	20270	26546	25896	37005	28392	40082	42132
Otolaryng 4A/5 w/plastic	8603	6855	13579	15929	17522	22184	19211	24023	25249
Plastic Surg 6/6	9351	8299	14760	19338	19044	26946	20880	29184	30676
Psychiatry 1/1A	1499	1076	2365	2377	3054	3374	3349	3538	3744
Urology 4/4	6731	4768	10621	11013	13704	15320	15026	16587	17431
Radiology 3A/2	3365	2053	5310	4685	6852	6499	7511	7033	7389

EXH. 5
DATE 5-28-89
HB 699

Cobb

EXHIBIT 6
DATE 3/28/89
HB 699

Amendments to House Bill No.699
Second Reading Copy

Requested by Rep. Bardnaouve
For the Committee on

Prepared by LFA
March 28, 1989

1. Grey bill reference March 16, 1989: Page 34, line 31 through page 48, line 9.
Strike: Section 32 in its entirety.
Insert: "NEW SECTION. Section 32. Severability. (1) If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

(2) The administrator may petition the district court of the First Judicial District to terminate [this act] if a part or one or more applications of a part is invalid; and

(a) the primary pool of funds cannot be maintained on an actuarially sound basis for more than three years from the time such soundness is required by [this act]; or

(b) the primary pool of funds will be exhaused by the payment of all fixed and known obligations.

(3) All claimants, participating physicians and hospitals, as defined in [this act] have standing to appear in any court proceeding instituted by the administrator under Section 2.

(4) If the court finds that the conditions described in either Section 2(a) or Section 2(b) or both have occurred, [this act] shall be terminated. Upon the entry of an order of termination the court shall direct the administrator to take possession of the assets and to administer them under the general supervision of the court.

(5) Upon an order of termination, no person may submit a claim under [this act]. The administrator is to make no payments to claimants until a distribution plan is approved by the court or upon petition of an individual claimant on the basis of hardship and a showing that in all likelihood they would share in any distribution.

(6) Within 30 days of the termination order the administrator is to submit to the court a plan of distribution of the assets. The plan of distribution is to give priority to claimants and distribute the funds in an equitable manner.

(7) All claimants who have not received a final award determination by the panel on the date [this act] is terminated by court order, are not bound by the provision of [this act]."

Mark 4 Passed

EXHIBIT 7
DATE 3/28/89
HB 699

Amendments to House Bill No. 699
Second Reading Copy

For the Committee on Appropriations

Prepared by John MacMaster
March 28, 1989

1. Title, lines 20 and 21.
Strike: "TEMPORARY" on line 20 through "REPAID" ON LINE 21
Insert: "PREMIUM TAX ON PROPERTY AND CASUALTY CARRIERS"

2. Page 12, lines 11 through 15.
Strike: "A LOAN" on line 11 through end of line 15
Insert: "levied and collected on all property and casualty carriers authorized to write and engaged in writing property and casualty insurance under 33-1-206 or 33-1-210 in this state during 1987 and engaged in writing property and casualty insurance as of December 31, 1988, a one-time refundable surcharge in the form of a 1.17% premium tax surcharge based on 1987 carrier annual reports made under 33-2-705. A total of $100,000 of the surcharge forms the capitalization of the secondary pool of funds and the balance of the surcharge forms the capitalization of the primary pool of funds. If the surcharge is refunded the refund must be made in the manner provided in [section 10]."

3. Page 15, line 24.
Following: "~~paid.~~"
Insert: "The one-time refundable surcharge for property and casualty insurance carriers provided for in this section must be collected by the commissioner on March 1, 1989, under 33-2-705 without deferral or installment or within 30 days of [the effective date of this act], whichever occurs later. The surcharge must be remitted to the department by the commissioner within 14 days of receipt, and if the surcharge is not timely paid as provided in this section, the certificate of authority of the insurer must be suspended by the commissioner under 33-2-119 until the surcharge is paid."

4. Page 18, lines 3 through 5.
Strike: "THE GENERAL" on line 3 through "CREDIT," on line 5
Insert: "the property and casualty insurance carriers who have paid a surcharge into the primary pool of funds, pro rata and proportionate to their original contributions"

5. Page 18, line 5.
Strike: "AMOUNTS"
Insert: "contributions"

VISITORS' REGISTER

APPROPRIATIONS COMMITTEE

BILL NO. 699 DATE 3-28-89

SPONSOR ADDY

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Stan Fins	Helena	X	
Leonard Kaufman	Billings		X
[illegible]	Bill	X	
Mike Sherwood	MTLA		X
JOHN DELANO	Helena	+	
Jim Ahrens	Helena	✓	
Dave Brown	State Reg. Butte	X	
Roger McGlenn	IIAM		X
Jacqueline Terrell	Am. Ins. Assoc.		X
Bonnie Tippy	Alliance of Am. Ins.		X

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33

ROLL CALL VOTE

HOUSE APPROPRIATIONS COMMITTEE

DATE 3-28-89 BILL NO. 699 NUMBER 1

NAME	AYE	NAY
REPRESENTATIVE SPAETH		✓
REPRESENTATIVE PECK (ab)		
REPRESENTATIVE IVERSON		✓
REPRESENTATIVE SWIFT	✓	
REPRESENTATIVE QUILICI		✓
REPRESENTATIVE BRADLEY		✓
REPRESENTATIVE PETERSON		✓
REPRESENTATIVE MARKS		✓
REPRESENTATIVE CONNELLY		✓
REPRESENTATIVE MENAHAN		✓
REPRESENTATIVE THOFT		✓
REPRESENTATIVE KADAS		✓
REPRESENTATIVE SWYSGOOD	✓	
REPRESENTATIVE KIMBERLEY		✓
REPRESENTATIVE NISBET		✓
REPRESENTATIVE COBB	✓	
REPRESENTATIVE GRINDE	✓	
REPRESENTATIVE CODY	✓	
REPRESENTATIVE GRADY	✓	
REPRESENTATIVE BARDANOUVE		✓

TALLY 6 13

Sylvia Kinsey
Secretary

Representative Bardanouve
Chairman

MOTION:

Sub my
1-6 rep Grinde
failed

Form CS-31
Rev. 1985

Reverse
as am do pass