

MINUTES

MONTANA SENATE 51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Bruce Crippen, on April 12, 1989, at 10:00 a.m. in Room 413.

ROLL CALL

Members Present: Chairman Bruce Crippen, V. Chairman Al Bishop, Senators Bob Brown, John Harp, Mike Halligan, Loren Jenkins, Joe Mazurek, R. J. Pinsoneault and Bill Yellowtail.

Members Excused: Senator Tom Beck

Members Absent: None

Staff Present: Staff Attorney Valencia Lane and Committee Secretary Rosemary Jacoby

Announcements/Discussion: None

EXECUTIVE SESSION ON HOUSE BILL 699

Senator Crippen asked Senator Mazurek, chairman of the subcommittee on House Bill 699 to give a report on progress of the committee.

Senator Mazurek said that Senators Bishop and Halligan had worked with him, as well as representatives of the physicians, insurance carriers, board of investments, trial lawyers, bar association, defense lawyers and others in an effort to come to a fair compromise. He said the bill had been worked on in the House by the Judiciary Committee and a subcommittee, but still had problems when it was passed over to the Senate.

He said that, after the Senate Judiciary hearing, the Doctors' Company and the MMA recommended 10 points on which they agreed regarding actuarial soundness and other issued. Some of those points were:

- * The program would take limited number of physicians who could participate in the program

- * The loan amount would increase from \$7.2 million to \$8.6 million
- * High risk pregnancies would be eliminated from the secondary pool
- * The "no fault" system (the secondary fund) would be "sunsetting" to 1991 in an effort to check the actuarial soundness of that fund, which was initially to be capitalized at \$100,000.
- * It required "tail coverage" and some other consensus points.

The funding mechanism -- a loan from the instate investment fund -- was left intact. He said he had an amendment which would clarify that it would be a mandatory investment. They studied all possible funding sources including reinstatement of insurance assessment, a 2% income tax surcharge, bonding and a one-time revenue source from SB 423 and SB 424. The fact that this was a large commitment "up front" was felt to be a significant risk, he said, and made the decision more difficult.

In summary, he said, the subcommittee tried to clean up the language, incorporated changes agreed upon by all sides, increased the amount of the loan, changed the amount of the fund so the bill could work in an actuary sense, he said. He felt they would have two years to see how it worked, and could amend it further at the next session.

He said that a summary of the subcommittee changes had been distributed to the committee. (Exhibit 1) He called attention to the amendment on page 50 (second page of Ex. 1) and said that it had been of concern to Rep. Whalen. It had been proposed that the subcommittee remove physician medical malpractice lines of insurance from Chapter 400 which would allow regional rate-making and give certain authority to the commissioner of insurance. He said that amendment had been included on the basis of recommendations from the insurance industry. Rep. Whalen said that amendment would eviscerate his bill. If the committee chose to segregate that amendment, Senator Mazurek commented, he would not object.

Senator Mazurek said there was general agreement on the amendments, though there was still question on the funding. He said the funding would have to be mandatory or it would not work.

Senator Halligan said he was satisfied that there had been adequate opportunity for all sides to give input into the amendment of the bill.

Senator Crippen said that the committee would be allowed to ask for information from interested parties who were present for the meeting, even though that was not the customary method of conducting executive sessions.

Amendment and Votes: Senator Mazurek MOVED that the committee adopt all of the amendments except 51 and 52 of the set identified as Exhibit 2. Valencia Lane said she wanted to clarify that there would be editorial changes one of which was on p. 50 where the loan was discussed. She said the total increase wasn't shown on p. 50, line 13.

Senator Crippen asked if the actuarial soundness had been accomplished. Senator Mazurek said the MMA was satisfied with the amendments in that area. He felt the bill should have a greater chance than before of being solvent.

A vote was taken on the Mazurek Motion. The MOTION CARRIED UNANIMOUSLY.

Amendment and Vote: Senator Mazurek MOVED that the committee adopt an amendment that would provide mandatory funding by the Board of Investments.

Senator Mazurek said there was a dispute over whether or not the loan was mandatory. He felt that, if the status was discretionary, that the loan would not be made. He said it would have to be made mandatory from the instate investment fund or come up with another mechanism. The rate proposed was 4% on the \$8.7 million.

In regard to the funding, Senator Mazurek explained to the committee that he had received a copy of a memo to Representative Bardanouve from the Legislative Fiscal Analysts Office. The memo said that the loan: Would violate the "prudent expert" principle, that it didn't require collateral, that it didn't give first claim of assets, that it limited the rate to 4% and that it didn't require a period of repayment.

Senator Halligan asked Steve Brown to comment on the motion. Steve Brown, a member of the Board of Investments, said the mandatory funding would create a pseudo general fund category. It would be better for the Board of Investments, he replied, in that it wouldn't give the board the right to

exercise any discretion. If discretion were allowed, he added, he personally would not recommend making the loan. He felt the rest of the board would agree with him. If the fund were to fail, the board would be able to place blame on the legislature.

Former Senator Brown said that the board took no stand on the bill other than on the funding. This proposed loan would earn much less than other investments in the state's portfolio, he told the committee. He suggested to the committee that the cause was either considered worthy of general fund appropriation or it wasn't. He suggested that the funding mechanism in the bill indicated an unsureness on the part of the legislature. If they went forward with it, it could establish a whole new category of risky ventures, he believed.

Senator Crippen asked Steve Brown if he would be willing to loan the money at a 6% rate, or even 8%, 10% or 20%. Steve Brown said no, because the loan wouldn't be secured. The board would be considered "imprudent" under law. He said if all the doctors' offices were placed under lien, then maybe the loan could be arranged.

Senator Jenkins called attention to a possible error in the Mazurek amendments concerning the second "strike". Senator Crippen thanked him for his astute observation.

Senator Pinsoneault said he noticed that all the "tort reform" had been removed. He said he understood that it hinged on significant tort reform. If it had been left in, would the board have made the loan, he asked. Steve Brown said the board was only interested in one thing -- making prudent investments.

Senator Mazurek said the subcommittee added sub (3) to clarify that this would come from instate adjustment fund, but he said the amendments didn't do that. Valencia said that wasn't requested. Chairman Crippen ruled that sub (3) had been added to the Mazurek amendments.

The MOTION FAILED on a vote of 2 to 7 with Senators Mazurek and Halligan voting YES.

Amendment and Vote:

Senator Halligan MOVED that a coordination instruction be written to coordinate with Senate Bills 423 and 424 to allocate the portion of that one-time revenue to the primary pool with a pay-back of 4%.

Senator Harp said it was important to identify the bills, that one was individual and one was corporate. Steve Brown said that 423 was the corporate bill.

Senator Halligan AMENDED his MOTION to mention only SB 423.

Senator Mazurek asked if the bill would have no affect if SB 423 didn't pass. Senator Halligan answered yes, but didn't know any other way to handle the situation. Several members of the committee questioned the suitability of the motion.

Senator Halligan further AMENDED his motion tying the funding mechanism of House Bill 699 to passage of SB 468 and its provisions requiring orderly estimated payments of all taxpayers subject to an accelerated corporate license. Senator Crippen asked if that was presently in SB 468 and Senator Halligan said no, but it was the only bill alive to which such a mechanism could be attached.

Valencia said that a coordination instruction could be placed in but it would have to have a specific bill such as SB 468. The committee would also have to amend SB 468 as well, she pointed out.

Senator Halligan's motion was voted upon. The MOTION FAILED by a vote of 1 to 8 with Senator Halligan voting YES.

Discussion: Senator Mazurek said the other mechanisms discussed were assessment on all property and casualty insurers in the state at the rate of 1.17% as introduced; a 2% surcharge on the personal income tax with a 2-year sunset raising a \$10 million during the biennium; plus other proposals already discussed.

Senator Brown asked why the 1.17% was removed by the House. Rep. Kelly Addy said that the subcommittee for the House Judiciary Committee didn't like that. They felt that it wasn't a rational relationship between the sources of revenue and the public purpose. He said there would be risk in funding the bill and there would be risk in not funding the bill. The committee would have to decide which risk were the greater, he added. There is going to continue to be an exodus of doctors from the small towns with a loss of hospitals resulting, he contended.

Senator Mazurek suggested that maybe a refundable tax credit for OB practitioners could be enacted. He didn't think that could be done within HB 699, however.

Senator Crippen said there was obviously a struggle with the funding mechanism. He asked Representative Addy to comment on the possibility of helping the doctors with insurance premiums or doing a tax credit.

Representative Addy said he didn't have any idea what the impact would be in allowing a tax credit. He would assume it would help. The reason he had not gone that route was that he wanted to set up a fund locally, so that money would not be going out of state to insurance companies, where rates were not set or controlled locally. He felt the state should take over control of its own destiny.

Senator Crippen said the state had taken control in the area of Workers Compensation and had ended up with a "black hole." Rep. Addy said this subject was very different from Workers' Compensation, with fewer people involved and fewer risks. He said there was a tremendous amount of bungling involved in Workers' Comp, as well as it being a much larger operation with many more layers.

Senator Pinsoneault said that the testimony heard in committee mentioned that malpractice premiums had stabilized and have even lessened in some instances. He asked if that were correct.

Representative Addy said he heard Dr. Sabella mention before the committee that there would not be a premium increase. As to the tax credit, Representative Addy said that would not be his preference, though he appreciated the committee's efforts to find a way to help solve the problem.

Mr. Neeley, lobbyist for the Montana Medical Association said he had done a study on the tax credit approach and rejected it. There is no indication that it or a subsidy would induce any doctor to remain in the practice of medicine in Montana. He knew of hospitals in the state who had offered subsidies. He said it was not just the dollars, but the lack of predictability. The rate increases in Montana have been phenomenal, he testified, and was told by an actuary that it would continue to rise.

Senator Halligan asked if the Montana Medical Association would consider a refundable credit tied to premiums paid on rural doctors. Mr. Neeley said that 3/4 of rural doctors have incomes of \$50,000 or less gross income per year. Under Montana income tax schedule, that would mean a tax credit of approximately \$4,200, which he felt would not be enough to induce a doctor to stay in a small town.

Senator Mazurek said there were no guarantees. He had hoped that perhaps an interim measure could be agreed upon, but he was observing no agreement, nor a willingness to fund the bill.

Senator Crippen said he found inconsistency in the testimony. Tort reform had been removed, and a "no fault" system has been allowed which could open the door for many claims, he said.

Mr. Neeley said he disagreed. He said high risk pregnancies had been excluded, and that mandatory periodic payments had been included.

Senator Crippen asked Representative Bardanouve if he had any comments to make regarding the bill.

Representative Bardanouve said he had some very strong feelings on the bill. He said he would like to see the bill become law, but not as written. It placed a liability on the Board of Investments which was intolerable, he said. If the Board of Investments did attempt to make the loan, he said he personally would file an injunction against the board making the loan. He said that, in 1965, he started the battle to start a Board of Investments and he felt that the state's investment program was one of the best in the country -- sound and above reproach. He said that if the bill were passed, "copy cat" legislation would follow in other sessions for that type of funding. He explained that he had asked the Legislative Fiscal Analysts Office to make an analysis of the bill and stated that the analysis would be made available to committee members. (Exhibit 4) The analysis pointed out that, should the fund be abolished, the assets would not go to the Board of Investments, but to the people who are insured. He disagreed with the funding of the bill and urged that the committee not pass it.

Recommendation and Vote: Senator Halligan MOVED that House Bill 699 BE CONCURRED IN AS AMENDED.

Senator Pineseault MOVED a substitute motion that House Bill 699 BE TABLED.

Senator Halligan said he understood the bill did not have to be back until the 86th day.

Senator Crippen said he understood that the Rules Committee would allow the bill to go beyond the 83rd day.

Senator Halligan said that, if the bill were tabled, he would like to work on alternatives before the final deadline and bring it out on the floor.

Senator Crippen said he felt it was an important bill and should receive floor debate in both houses.

Senator Pineseault said he did not make his recommendation lightly. He knew that much hard work had gone into it, but he agreed with Rep. Bardanouve.

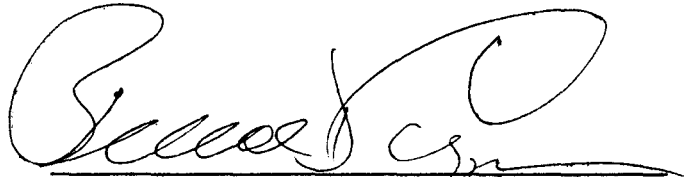
Senator Mazurek said there was no funding and would go nowhere in its present form. He stated that the bill was a good effort.

The MOTION CARRIED by a vote of 7 to 1 with Senator Halligan voting NO and Senator Brown temporarily absent.

NOTE: A copy of the final copy of the amendments has been included in the minutes (Exhibit 5).

ADJOURNMENT

Adjournment At: 2 p.m.



SENATOR BRUCE D. CRIPPEN, Chairman

BDC/rj

minrjes.412

ROLL CALL

JUDICIARY

COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date 4-12-89

NAME	PRESENT	ABSENT	EXCUSED
SENATOR CRIPPEN	✓		
SENATOR BECK			✓
SENATOR BISHOP	✓		
SENATOR BROWN	✓		
SENATOR HALLIGAN	✓		
SENATOR HARP	✓		
SENATOR JENKINS	✓		
SENATOR MAZUREK	✓		
SENATOR PINSONEAULT	✓		
SENATOR YELLOWTAIL	✓		

Each day attach to minutes.

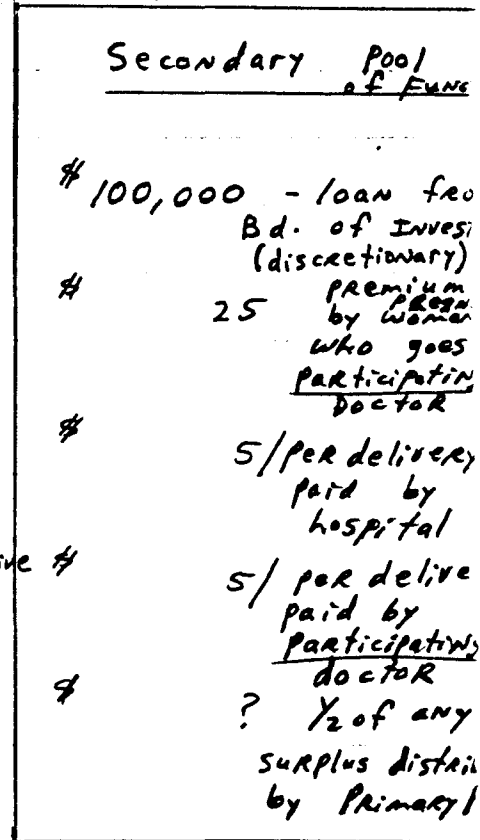
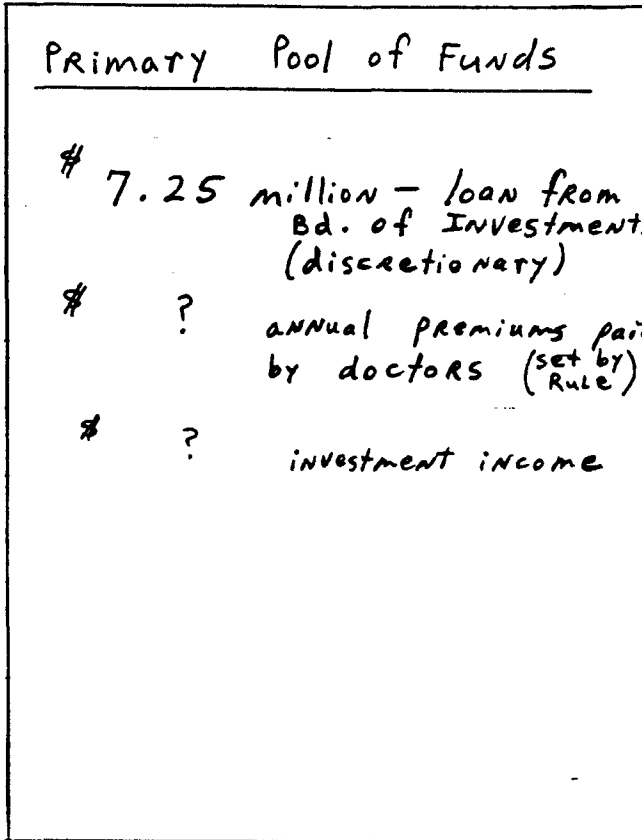
SUMMARY OF SUBCOMMITTEE CHANGES - HB 699
Third Reading Copy (BLUE)
Senate Judiciary Committee
April 12, 1989

- P.1 * Take "assured" out of title; correct reference to "loan" rather than "line of credit"
- P.2 * Add termination date to title; delete "assured"
- P.3 * Delete "assured"
- P.6 * Add to definition of "actuarially sound" the requirement that loan be repaid
- P.7 * Take out reference to "consent" to avoid "informed consent" complications; add reference to "high-risk" pregnancies to remove them from coverage under no-fault pool
- P.9 * Delete reference to "hospital" (clarification and consistency)
- P.10 * Delete "assured"
- P.11 * Delete "assured"
- P.13 * Increase loan from \$7,250,000 to \$8,600,000; clarify that surcharges go to secondary pool of funds, as well as Primary pool of funds (clarification)
- P.14 * Delete language referring to a surcharge to be paid by professional corporations, etc., (clarification - deletes surplusage language that was confusing); clarify that penalty is for "each claim" (not once in a lifetime only)
- P.17 * Delete requirement that benefits to be paid under this plan would be prorated if primary pool of funds doesn't have sufficient funds to pay all claims
- P.19 * Clarify that capitalization is "loan", not "line of credit"; delete subsection (2) (State Bar amendment - not needed now that capitalization is "public" - was needed when funding came from insurance companies)
- P.20 * Make reinsurance discretionary (because Fund may have difficulty getting reinsurance)
- P.25 * Clarify contribution from doctors (to reflect the fact that no longer distinguishing between individuals and professional corporations); enact participation limits of 70 family practitioners and 30 OB's - can have more, but require additional surcharges.
- P.26 * Require tail coverage
- P.29 * Replace Section 17 pertaining to "adequate defense of the Fund" replace with simple clarifying language that Fund is "excess insurer" for all purposes; i.e., can be involved in settlement negotiations, defense costs, etc., just as any regular insurance

- p.2.
- company would do (apparently original language would have insulated Fund from this role); Clarified Punitive damages - private carriers who insure doctors for primary limits cannot be held vicariously liable for actions of Fund
- P.36 * Eliminate "high-risk" pregnancies from coverage of Secondary Pool of Funds;
- P.36 &37 * Delete language regarding pamphlet describing Fund
- P.38 * Require copy of executed copy of arbitration agreement to be filed with administrator
- P.39 * Clean up language regarding arbitration procedures -- delete references to "professional" arbitrator; specify how arbitrator to be selected; clarify that Montana Administrative Procedures Act applies to arbitration procedure
- P.44 * Insert in a more appropriate place the pamphlet information requirements; create rebuttable presumption in infant injury cases before Primary Pool of Funds that periodic payments in best interests of claimant
- 7 P.50 * Remove "physician medical malpractice lines of insurance" from Ch. 400, L. 1989 (new rate-making law); i.e., this Fund and its competitors would be exempt from new rate-making law [new Sections 30 and 32]
- P.53 * Delete Applicability section (it was confusing)
- P.54* Sunset No-fault System in 1991; require actuarial analysis

§ 7 P 11

§ 7 P 11-17



LOAN P. 43
 →
 for administrative costs + attorney fees (ONLY)

1/2 of any surplus to secondary pool of funds

1/2 of any surplus to Bd. of Investments to repay loan

Primary pool of funds acts as excess insurer for participating doctors i.e. pay claims, judgments, settlements, in excess of Doctor's primary insurance limits of \$100,000/per occurrence and \$300,000/annual aggregate P. 26

No-fault system

- ① claimant executes arbitration agreement
- ② takes arb. agreement to Doctor (implication is he has to sign) claimant can stop here
- ③ files claim with Medical/Legal Panel - opts into No-fault P. 38 subsect. (5) P. 39 subsect. (7)

RECOVERY: P. 41 + 42

- medicals incurred to date
- future medicals
- 1 1/2 times state's average weekly wage for disability

Amendments to House Bill No. 699
Third Reading Copy (BLUE)Requested by Judiciary Subcommittee
For the Committee on JudiciaryPrepared by Valencia Lane
April 12, 1989**FINAL**
(may be
Editorial
changes)1. Title, line 5.
Strike: "ASSURED"2. Title, line 22.
Strike: "TEMPORARY LINE OF CREDIT"
Insert: "LOAN"3. Title, line 25.
Strike: "IMMEDIATE"4. Title, line 1, page 2.
Following: "DATE"
Insert: "AND A TERMINATION DATE"5. Page 2, lines 14 and 20.
Page 3, line 11.
Strike: "Assured"6. Page 6, line 12.
Following: "accept"
Insert: "and the original funds used to capitalize the fund are repaid in a timely manner"7. Page 7, line 14.
Strike: "and"8. Page 7, lines 16 and 17.
Following: "intervention" on line 16
Strike: remainder of line 16 through "consent." on line 17
Insert: "; and"9. Page 7.
Following: line 17
Insert: "(d) is not associated with a high-risk pregnancy, documented as such by the physician prior to delivery."

10. Page 9, line 1.
Strike: "or hospital"

11. Page 10, line 4.
Page 11, line 3.
Strike: "assured"

12. Page 13, line 5.
Strike: "\$7,250,000"
Insert: "\$8,600,000"

13. Page 13, line 14.
Following: "funds"
Insert: "and the secondary pool of funds"

14. Page 13, line 17.
Strike: "(i)"

15. Page 14, lines 8 through 14.
Strike: subsection (ii) in its entirety

16. Page 14, line 20.
Following: "because of"
Strike: "the"
Insert: "each such"

17. Page 14, line 22.
Following: "because of"
Strike: "the"
Insert: "each such"

18. Page 17, line 13.
Strike: "(1)"

19. Page 17, line 20 through page 18, line 11.
Strike: subsection (2) in its entirety

20. Page 18, line 23.
Strike: "(1)"

21. Page 19, line 6.
Strike: "(a)"
Insert: "(1)"

22. Page 19, lines 13 and 14.

Following: "AMOUNTS" on line 13

Strike: remainder of line 13 through "CREDIT" on line 14

Insert: "loaned"

23. Page 19, line 16.

Strike: "(b)"

Insert: "(2)"

24. Page 19, lines 17 through 25.

Strike: subsection (2) in its entirety

25. Page 20, line 2.

Strike: "SHALL"

Insert: "may"

26. Page 20, line 4.

Following: "~~department~~"

Insert: ", subject to the control of the department"

27. Page 25, line 8.

Following: "(c)"

Strike: "(i) if acting as an individual physician,"

28. Page 25, line 13.

Strike: second "or"

29. Page 25, lines 14 through 19.

Strike: subsection (ii) in its entirety

30. Page 25, line 21.

Strike: "."

Insert: ";

31. Page 25.

Following: line 21

Insert: "(e) pay into the primary pool of funds a surplus contribution in an amount determined by the actuary hired by the administrator, with the contribution to be repaid pursuant to [section 10], if:

(i) the physician's qualification causes the number of participating family practitioners to exceed 70 in number or the number of participating obstetricians to exceed 30; and

(ii) the surplus of the primary pool of funds is less

than the original amount of contributed capital.

(2) If at any time the number of applications for participation in the primary pool of funds, if all were to be accepted, would cause the number of participating physicians to exceed the limits provided by subsection (1)(e), the administrator shall determine the order of participation based on the goals stated in [section 2]."

Renumber: subsequent subsection

32. Page 26, line 18.

Following: "QUALIFIED"

Insert: "and except that such a disqualified physician is entitled to the benefits and subject to the duties of [section 21]"

33. Page 29, lines 1 through 12.

Strike: section 17 in its entirety

Insert: "NEW SECTION. Section 17. Fund to be excess carrier.

The primary pool of funds is considered to be an excess carrier for all purposes under [sections 1 through 24]."

34. Page 29, lines 13 and 14.

Following: "18." on line 13

Strike: remainder of line 13 through "punitive" on line 14

Insert: "Fund not liable for punitive or exemplary"

35. Page 29, line 15.

Following: "damages"

Strike: "of any kind"

36. Page 29, lines 16 and 17.

Following: line 15

Strike: lines 16 and 17 in their entirety

Insert: "A carrier representing a physician subject to [sections 1 through 25] is not vicariously liable for punitive or exemplary damages for acts or omissions of the primary pool of funds. This section does not relieve the liability of a physician for punitive or exemplary damages."

37. Page 36, line 2.

Following: "physician"

Insert: ", where the claim does not involve a high-risk pregnancy"

38. Page 36, line 23 through page 37, line 13.

Following: "(3)" on line 23

Strike: remainder of line 23 thorough "PAMPHLET." on page 37, line 13

39. Page 38, line 15.

Following: "claim."

Insert: "An executed copy of the agreement to arbitrate must be provided to the administrator."

40. Page 39, line 4.

Following: "claim"

Insert: ", except that all hearings must be governed by the contested case and judicial review provisions of the Montana Administrative Procedure Act"

41. Page 39, line 5.

Following: "AND"

Strike: "A PROFESSIONAL"

Insert: "an"

42. Page 39, lines 6 and 7.

Following: the first "ARBITRATOR" on line 6

Strike: remainder of line 6 through "AND" on line 7

Insert: "who"

43. Page 39, line 8.

Following: "PANEL."

Insert: "The arbitrator must be selected from a list of arbitrators provided by the state bar of Montana, in the same manner as the attorney member is selected."

44. Page 39, lines 11 and 12.

Following: "27-6-606" on line 11

Strike: remainder of line 11 through "chapter 5" on line 12

45. Page 39, lines 13 through 18.

Strike: subsection (6) in its entirety

Renumber: subsequent subsections

46. Page 40, line 11.

Strike: "(7)"

Insert: "(6)"

47. Page 42, line 25.

Strike: "without becoming actuarially unsound"

48. Page 44, line 2.

Strike: "(7)"

Insert: "(6)"
 Strike: "(10)"
 Insert: "(9)"

49. Page 44.

Following: line 6

Insert: "(15) The Montana medical legal panel shall provide a pamphlet that clearly and adequately describes the provisions of this section to each member of the state bar of Montana and any person requesting forms for the filing of a claim. The pamphlet must be written by the state bar of Montana and approved by the department and the administrator. The primary pool of funds shall pay the cost of publishing and distributing the pamphlet."

50. Page 44.

Following: line 15

Insert: "NEW SECTION. Section 25. Periodic payments -- presumption. If a claim related to the birthing process or obstetrical care against a qualified physician involves an injury to a child and the claim is not a wrongful death claim, then there shall be a rebuttable presumption, for purposes of 25-9-403, that the periodic payment of future damages is in the best interests of the claimant."

Renumber: subsequent sections

51. Page 50.

Following: line 17

Insert: "NEW SECTION. Section 29. Applicability. [Sections 2 through 12 of Chapter 400, L. 1989] do not apply to a physician medical malpractice line of insurance."

Renumber: subsequent sections

52. Page 50.

Following: line 21

Insert: "NEW SECTION. Section 31. Codification instruction. [Section 29] is intended to be codified as an integral part of Title 33, chapter 16, and the provisions of Title 33, chapter 16, apply to [section 29]."

Renumber: subsequent sections

53. Page 53, line 21 through page 54, line 8.

Strike: section 31 in its entirety

Renumber: subsequent section

54. Page 54, line 10.

Strike: "on passage and approval"

Insert: "July 1, 1989"

55. Page 54.

Following: line 10

Insert: "

NEW SECTION. Section 34. Termination -- repayment of initial capitalization -- actuarial analysis. (1) Except as provided in subsection (1)(b), [section 22] terminates July 1, 1991.

(b) The provisions of subsection (1)(a) do not apply to claims for recovery for required benefits filed prior to July 1, 1991.

(2) [Section 10(1)(b)] terminates July 1, 1991.

(3) After payment of all awards required by [section 22], the entity that provided the initial capital for the secondary pool of funds pursuant to [section 7] must be repaid in the manner required by [section 7].

(4) On or before December 1, 1990, the commissioner shall have an actuarial analysis of the secondary pool conducted, at the expense of the secondary pool, and shall present the findings of the analysis the 52nd legislature."

Amendments to House Bill No. 699
Third Reading Copy (BLUE)

Requested by Senator Mazurek
For the Committee on Judiciary

Prepared by Valencia Lane
April 12, 1989

1. Page 50, line 12.

Following: "(4)"

Strike: "The"

Strike: "Notwithstanding any other provision of law, the"

Strike: "may"

Insert: "shall"

2. Page 50, line 13.

Strike: "up to \$7,350,000"

Insert: "\$8,700,000"

SENATE JUDICIARY
EX- 4, p.1
DATE 4-12-89E
BILL NO. HB 699

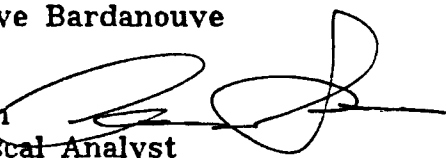


STATE OF MONTANA
Office of the Legislative Fiscal Analyst
STATE CAPITOL
HELENA, MONTANA 59620
406/444-2986

JUDY RIPPINGALE
LEGISLATIVE FISCAL ANALYST

April 3, 1989

TO: Representative Bardanouve
Seat #6

FROM: Carroll South 
Associate Fiscal Analyst

SUBJECT: House Bill 699

At your request, I have reviewed House Bill 699 as amended by the Committee of the Whole in the House of Representatives. As introduced, the bill would have capitalized a "Patient Assured Compensation Fund," by levying a one-time refundable surcharge of 1.17 percent on casualty insurance carriers in the state. The fiscal note written for the introduced bill states that the surcharge would raise \$6.3 million with which to capitalize the fund. As amended by the House, the fund would be capitalized by a loan of \$7.35 million from the state Board of Investments; \$7.25 million to the primary fund, and \$100,000 to a secondary fund. The loan is to bear interest at 4 percent per year.

Section 7 of the bill requires that the loan be made, and Section 28, which amends the statute governing the investment activities of the board, authorizes the board to make to the loan. However, the statute governing the board's investment activity requires it to operate under the "prudent expert principle." This principle requires that the board maximize the rate of return and minimize the risk of loss, unless under the circumstances, it is clearly prudent not to do so. Under current law, the board would have sole discretion to determine if the proposed loan met the "prudent principle" test.

House Bill 699 as amended would not permit the board to minimize risk to state investment funds or maximize the rate of return as required by current law. House Bill 699 as amended: 1) does not require collateral; 2) does not give the state first claim to assets of the compensation fund; 3) does not guarantee that the loan will ever be repaid; 4) requires interest of only 4 percent on the loan; 5) does not require the first loan payment for four years; and 6) does not require that the loan be repaid within a specified period.

The proposed loan will be deposited in the "Compensation Fund" and used to pay patient claims and operational costs. There is no equipment or real property to repossess if the borrower defaults on the loan. The only asset against which the board could file a claim is the money in the fund itself. However, Section 30 states that if the program is terminated, the claimants rather than the state have first priority on remaining assets, even though a major portion of those assets may have been loaned by the state.

House Bill 699 proposes a new program funded by a loan from the state, but provides no guarantee of repayment. Participation in the program is voluntary. The amounts to be levied against the participating physicians are not specified as they were in the introduced bill. The number and amounts of claims against the fund can only be estimated. While Section 7 requires that an annual surcharge be levied against participating physicians in amounts necessary to maintain the fund's actuarial soundness, Section 30 clearly permits termination of the program under certain conditions. If the program is terminated while the loan is outstanding, the loan may not be repaid.

If the board invests \$7.35 million at 4 percent, which it otherwise could have invested at 8 or 9 percent, the state will lose approximately

\$400,000 annually in earnings. Because the bill does not require a specific time period for loan repayment, the total loss of earnings to the state can not be determined.

Section 10 states that the first loan payment is not due until July 1, 1993. Because this loan would be made at a reduced interest rate, the delayed payment will actually increase the loss of return on the state's investment. If payments began the year after the loan was made, the loan repayments could be reinvested by the board at a rate of return higher than 4 percent, thereby mitigating the state's loss during the first four years.

After the first loan payment is made Section 10 states that payments may be made on July 1 yearly. However, payments are required only if the primary fund has \$1 million in excess of the amount necessary to make it actuarially sound. Only half the funds in excess of the \$1 million are available for loan repayment. The other half must be transferred to the secondary pool of funds. If, on July 1 of each year, the primary fund does not have \$1 million in excess of actuarial soundness, no payment is required. The term of loan repayment is totally dependant upon the degree of financial success the program experiences.

Greg Petesch has analyzed the amendments to House Bill 699 as they relate to legal issues. He states that the amendments authorize but do not require the board to make the loan. He further states that the board would have to determine that the loan was in the best interest of the state and conformed to the criteria contained in current law which includes conformance to the "prudent expert principle."

If you need further information, please contact me.

Amendments to House Bill No. 699
Third Reading Copy (BLUE)
FINAL (WITH EDITORIAL CHANGES)
For the Committee on Judiciary

Prepared by Valencia Lane
April 12, 1989

1. Title, line 5.
Strike: "ASSURED"

2. Title, line 22.
Strike: "TEMPORARY LINE OF CREDIT"
Insert: "LOAN"

3. Title, line 25.
Strike: "IMMEDIATE"

4. Title, page 2, line 1.
Following: "DATE"
Insert: "AND A TERMINATION DATE"

5. Page 2, line 11.
Page 10, line 4.
Page 11, line 3.
Page 50, line 13.
Strike: "assured"

6. Page 2, lines 14 and 20.
Page 3, line 11.
Strike: "Assured"

7. Page 2, line 20.
Page 6, line 9.
Page 7, lines 3 and 11.
Page 10, line 14.
Page 11, lines 5, 6, 11, and 23.
Page 13, lines 22 and 25.
Page 14, line 16.
Page 15, line 7.
Page 18, line 17.
Page 20, line 19.
Page 21, lines 7 and 21.
Page 24, line 25.
Page 25, line 4.
Page 26, lines 12, 14, and 20.
Page 27, lines 16, 18, and 19.
Page 28, lines 6, 21, and 22.
Page 29, line 23.
Page 30, lines 16 and 18.

Page 33, line 22.
Page 34, lines 3, 19, and 22.
Page 35, lines 1 and 17.
Page 40, lines 5 and 13.
Page 43, line 14.
Page 44, line 13.
Page 45, lines 9 and 10.
Strike: "24"
Insert: "25"

8. Page 6, line 12.
Following: "accept"
Insert: "and the original funds used to capitalize the fund are repaid in a timely manner"

9. Page 7, line 14.
Strike: "and"

10. Page 7, lines 16 and 17.
Following: "intervention" on line 16
Strike: remainder of line 16 through "consent." on line 17
Insert: "; and"

11. Page 7.
Following: line 17
Insert: "(d) is not associated with a high-risk pregnancy, documented as such by the physician prior to delivery."

12. Page 9, line 1.
Strike: "or hospital"

13. Page 13, line 5.
Strike: "\$7,250,000"
Insert: "\$8,600,000"

14. Page 13, line 14.
Following: "funds"
Insert: "and the secondary pool of funds"

15. Page 13, line 17.
Strike: "(i)"

16. Page 14, lines 8 through 14.
Strike: subsection (ii) in its entirety

17. Page 14, line 20.
Following: "because of"
Strike: "the"
Insert: "each such"

18. Page 14, line 22.
Following: "because of"
Strike: "the"
Insert: "each such"

19. Page 17, line 13.
Strike: "(1)"

20. Page 17, line 20 through page 18, line 11.
Strike: subsection (2) in its entirety

21. Page 18, line 23.
Strike: "(1)"

22. Page 19, line 6.
Strike: "(a)"
Insert: "(1)"

23. Page 19, lines 13 and 14.
Following: "AMOUNTS" on line 13
Strike: remainder of line 13 through "CREDIT" on line 14
Insert: "loaned"

24. Page 19, line 16.
Strike: "(b)"
Insert: "(2)"

25. Page 19, lines 17 through 25.
Strike: subsection (2) in its entirety

26. Page 20, line 2.
Strike: "SHALL"
Insert: "may"

27. Page 20, line 4.
Following: "~~department~~"
Insert: ", subject to the control of the department"

28. Page 25, line 8.

Following: "(c)"
Strike: "(i) if acting as an individual physician,"

29. Page 25, line 12.
Strike: "(2)"
Insert: "(3)"

30. Page 25, line 13.
Strike: second "or"

31. Page 25, lines 14 through 19.
Strike: subsection (ii) in its entirety

32. Page 25, line 21.
Strike: "."
Insert: ";

33. Page 25.
Following: line 21
Insert: "(e) pay into the primary pool of funds a surplus contribution in an amount determined by the actuary hired by the administrator, with the contribution to be repaid pursuant to [section 10], if:
 (i) the physician's qualification causes the number of participating family practitioners to exceed 70 in number or the number of participating obstetricians to exceed 30; and
 (ii) the surplus of the primary pool of funds is less than the original amount of contributed capital.
 (2) If at any time the number of applications for participation in the primary pool of funds, if all were to be accepted, would cause the number of participating physicians to exceed the limits provided by subsection (1)(e), the administrator shall determine the order of participation based on the goals stated in [section 2]."
Renumber: subsequent subsection

34. Page 26, line 18.
Following: "QUALIFIED"
Insert: "and except that such a disqualified physician is entitled to the benefits and subject to the duties of [section 21]"

35. Page 29, lines 1 through 12.
Strike: section 17 in its entirety
Insert: "NEW SECTION. Section 17. Fund to be excess carrier. The primary pool of funds is considered to be an excess carrier for all purposes under [sections 1 through 25]."

36. Page 29, lines 13 and 14.

Following: "18." on line 13

Strike: remainder of line 13 through "punitive" on line 14

Insert: "Fund not liable for punitive or exemplary"

37. Page 29, line 15.

Following: "damages"

Strike: "of any kind"

38. Page 29, lines 16 and 17.

Following: line 15

Strike: lines 16 and 17 in their entirety

Insert: "A carrier representing a physician subject to [sections 1 through 25] is not vicariously liable for punitive or exemplary damages for acts or omissions of the primary pool of funds. This section does not relieve the liability of a physician for punitive or exemplary damages."

39. Page 36, line 2.

Following: "physician"

Insert: ", where the claim does not involve a high-risk pregnancy"

40. Page 36, line 23 through page 37, line 13.

Following: "(3)" on line 23

Strike: remainder of line 23 through "PAMPHLET." on page 37, line 13

41. Page 38, line 15.

Following: "claim."

Insert: "An executed copy of the agreement to arbitrate must be provided to the administrator."

42. Page 39, line 4.

Following: "claim"

Insert: ", except that all hearings must be governed by the contested case and judicial review provisions of the Montana Administrative Procedure Act"

43. Page 39, line 5.

Following: "AND"

Strike: "A PROFESSIONAL"

Insert: "an"

44. Page 39, lines 6 and 7.

Following: the first "ARBITRATOR" on line 6

Strike: remainder of line 6 through "AND" on line 7
Insert: "who"

45. Page 39, line 8.

Following: "PANEL."

Insert: "The arbitrator must be selected from a list of arbitrators provided by the state bar of Montana, in the same manner as the attorney member is selected."

46. Page 39, lines 11 and 12.

Following: "27-6-606" on line 11

Strike: remainder of line 11 through "chapter 5" on line 12

47. Page 39, lines 13 through 18.

Strike: subsection (6) in its entirety

Renumber: subsequent subsections

48. Page 40, line 11.

Strike: "(7)"

Insert: "(6)"

49. Page 42, line 25.

Strike: "without becoming actuarially unsound"

50. Page 44, line 2.

Strike: "(7)"

Insert: "(6)"

Strike: "(10)"

Insert: "(9)"

51. Page 44.

Following: line 6

Insert: "(14) The Montana medical legal panel shall provide a pamphlet that clearly and adequately describes the provisions of this section to each member of the state bar of Montana and any person requesting forms for the filing of a claim. The pamphlet must be written by the state bar of Montana and approved by the department and the administrator. The primary pool of funds shall pay the cost of publishing and distributing the pamphlet."

52. Page 44.

Following: line 15

Insert: "NEW SECTION. Section 25. Periodic payments -- presumption. If a claim related to the birthing process or obstetrical care against a qualified physician involves an injury to a child and the claim is not a wrongful death

claim, then there shall be a rebuttable presumption, for purposes of 25-9-403, that the periodic payment of future damages is in the best interests of the claimant."

Renumber: subsequent sections

53. Page 50, line 13.
Strike: "\$7,350,000"
Insert: "\$8,700,000"

54. Page 53, line 21 through page 54, line 2.
Strike: page 53, line 21 through "fund." on page 54, line 2
Renumber: subsequent section

55. Page 54, line 10.
Strike: "on passage and approval"
Insert: "July 1, 1989"

56. Page 54.
Following: line 10
Insert: "NEW SECTION. Section 32. Termination -- repayment of initial capitalization -- actuarial analysis. (1) Except as provided in subsection (1)(b), [section 22] terminates July 1, 1991.
(b) The provisions of subsection (1)(a) do not apply to claims for recovery for required benefits filed prior to July 1, 1991.
(2) [Section 10(1)(b)] terminates July 1, 1991.
(3) After payment of all awards required by [section 22], the entity that provided the initial capital for the secondary pool of funds pursuant to [section 7] must be repaid in the manner required by [section 7].
(4) On or before December 1, 1990, the commissioner shall have an actuarial analysis of the secondary pool conducted, at the expense of the secondary pool, and shall present the findings of the analysis the 52nd legislature."

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 4-12-89 ES House Bill No. 699 Time # 1

NAME	YES	NO
SEN. BISHOP		✓
SEN. BECK		
SEN. BROWN		✓
SEN. HALLIGAN	✓	
SEN. HARP		✓
SEN. JENKINS		✓
SEN. MAZUREK	✓	
SEN. PINSONEAULT		✓
SEN. YELLOWTAIL		✓
SEN. CRIPPEN		✓

Rosemary Jacoby
Secretary

Sen. Bruce Crippen
Chairman

Motion: Senator Mazurek - Exhibit 3
amendments

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 4-12-89 ES House Bill No. 699 Time #2

NAME	YES	NO
SEN. BISHOP	✓	
SEN. BECK		
SEN. BROWN		
SEN. HALLIGAN		✓
SEN. HARP	✓	
SEN. JENKINS	✓	
SEN. MAZUREK	✓	
SEN. PINSONEAULT	✓	
SEN. YELLOWTAIL	✓	
SEN. CRIPPEN	✓	

To Table

Rosemary Jacoby
Secretary

Sen. Bruce Crippen
Chairman

Motion: Senator Halligan Be Concurred in As Amended
Sen. Pinsonneault - Substitute Motion - Tabled
Carried 7-1