

FINAL STATUS

HB 21 INTRODUCED BY BRADLEY
 STATE REINSURANCE PROGRAM

 3/27 INTRODUCED
 3/27 REFERRED TO BUSINESS & LABOR
 DIED IN COMMITTEE

1 House BILL NO. 21
2 INTRODUCED BY Bredley
3
4 A BILL FOR AN ACT ENTITLED: "AN ACT CREATING A STATE
5 REINSURANCE PROGRAM TO PROVIDE LIABILITY REINSURANCE FOR
6 GOVERNMENTAL ENTITIES, CORPORATIONS, BUSINESSES, AND SERVICE
7 PROVIDERS; AUTHORIZING INSURANCE POOLS AND JOINT
8 UNDERWRITING ASSOCIATIONS; AMENDING SECTIONS 17-6-308,
9 17-7-502, AND 27-1-221, MCA; AND PROVIDING AN IMMEDIATE
10 EFFECTIVE DATE."

11
12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

13 NEW SECTION. Section 1. Purpose. The purpose of
14 [sections 1 through 13] is to alleviate the current problems
15 of unavailability and unaffordability of liability
16 insurance. The legislature desires that liability insurance
17 be available to governmental entities, corporations,
18 businesses, service providers, and their personnel at fair
19 rates. It is not the intent of the legislature to subsidize
20 the cost of insurance with tax dollars. It is intended that
21 insurance provided to insureds through implementation of
22 [sections 1 through 13] be reasonably priced relative to the
23 risk covered and that premiums reflect individual
24 experience, to the extent possible. It is further intended
25 that the reinsurer program authorized by [section 6] be

1 fully self-sustaining over time.

2 NEW SECTION. Section 2. Commissioner's powers and
3 duties -- application -- hearings. (1) Within 30 days after
4 the receipt of an application by any governmental entity,
5 corporation, business, or service provider or any group,
6 association, or self-insured pool representing such
7 governmental entities, corporations, businesses, or service
8 providers, the commissioner shall conduct a hearing on the
9 reasonable availability and affordability of adequate
10 commercial general liability insurance and other lines of
11 insurance for that governmental entity, corporation,
12 business, or service provider or the members of any group,
13 association, or self-insured pool of governmental entities,
14 corporations, businesses, or service providers.

15 (2) The commissioner may in his discretion hold
16 hearings to investigate the reasonable availability or
17 affordability of general liability insurance and other lines
18 of insurance that may from time to time become unavailable
19 or unaffordable, thereby threatening the health, welfare, or
20 commerce of the state by making some manufactured good or
21 provided service unavailable or available only at
22 unreasonable cost.

23 (3) Within 30 days after the hearing required under
24 subsection (1) or conducted under subsection (2), the
25 commissioner shall determine in writing, based upon the

1 record of the hearing, whether the insurance described in
 2 subsection (1) or (2) is and will be reasonably available or
 3 affordable to affected governmental entities, corporations,
 4 businesses, and service providers or the members of any
 5 group, association, or self-insured pool representing
 6 governmental entities, corporations, businesses, or service
 7 providers to cover anticipated claims.

8 NEW SECTION. Section 3. Authority to implement
 9 programs -- determination required. The commissioner is
 10 authorized to implement the insurance pool described in
 11 [section 5] and the reinsurance coverage described in
 12 [section 6] if he determines at any time after a hearing
 13 that:

14 (1) the insurance described in [section 2(1) or (2)]
 15 is not available or reasonably affordable from the private
 16 sector to applicants under [section 2(1)] or to the affected
 17 parties described in [section 2(2)] to cover anticipated
 18 claims;

19 (2) in order for an applicant under [section 2(1)] or
 20 an affected party described pursuant to [section 2(2)] to
 21 have regular operations in the state, assistance under any
 22 of the programs authorized under [section 5] or [section 6]
 23 is necessary;

24 (3) the availability of goods or services from an
 25 applicant under [section 2(1)] or an affected party under

1 [section 2(2)] is essential to promote the public health,
 2 welfare, or general commerce of the state; and

3 (4) one or both of the programs provided for in
 4 [section 5] or [section 6] reasonably assure the
 5 availability or affordability of such insurance or of such
 6 goods or services in the state.

7 NEW SECTION. Section 4. Manner of implementing
 8 program. To the extent feasible, the programs provided for
 9 under [sections 1 through 13] shall be implemented in a
 10 manner to insure that:

11 (1) the programs do not act as a disincentive to
 12 improvements in product safety or safe service delivery and
 13 operate to promote product safety and safe service delivery
 14 through the establishment of models for risk management that
 15 may be agreed upon by the commissioner, the insurers, and
 16 the insureds as a prerequisite for eligibility for any of
 17 the programs under [sections 1 through 13]; and

18 (2) each insurer which benefits from the programs
 19 agrees that the insurance written during participation in
 20 the programs has premiums based upon an experience rate.

21 NEW SECTION. Section 5. Insurance pools -- joint
 22 underwriting associations. (1) After making findings under
 23 [sections 2 and 3], the commissioner shall assist any
 24 insurance companies which meet the requirements of
 25 subsection (4) to form or otherwise join together in

1 voluntary insurance pools for the purpose of assuming, on
 2 terms and conditions agreed upon, the financial
 3 responsibility that will enable the companies to assume a
 4 reasonable portion of responsibility for the adjustment and
 5 payment of claims arising from product- or service-induced
 6 injuries, disabilities, illnesses, and deaths.

7 (2) If after a hearing under [sections 2 and 3] the
 8 commissioner determines that no voluntary pool exists to
 9 provide liability insurance coverage, he may create an
 10 unincorporated, nonprofit, temporary, joint underwriting
 11 association, consisting of all those insurers licensed to
 12 write in this state, on a direct premium basis, the kinds of
 13 insurance covered by the association. Every such insurer
 14 shall be a member of the association and shall remain a
 15 member as a condition of its authority to continue to
 16 transact liability insurance in this state. The association
 17 constitutes a legal entity separate and distinct from its
 18 members.

19 (3) Each year the commissioner may establish differing
 20 amounts above which reinsurance claims shall be paid for
 21 each governmental entity, corporation, business, service
 22 provider, pool, association, or insurer and each good or
 23 service based on the needs of the governmental entity,
 24 corporation, business, service provider, pool, association,
 25 or insurer, and on other relevant factors.

1 (4) Any insurer licensed in this state is eligible for
 2 participation in the insurance pools.

3 (5) An insurance pool or joint underwriting
 4 association may be funded by premiums approved by the
 5 commissioner and paid by insureds to the pool or
 6 association. If the commissioner finds, after notice and
 7 public hearing, that the premiums charged by an insurance
 8 pool or association make the insurance unavailable for
 9 governmental entities, corporations, businesses, or service
 10 providers, the commissioner may amend the terms and
 11 conditions of reinsurance under [sections 1 through 13] to
 12 lower premiums to be paid by the insureds.

13 NEW SECTION. Section 6. Reinsurance -- rates --
 14 premiums. (1) In order to further the purposes of [sections
 15 1 through 13], the commissioner may take any action
 16 necessary to make reinsurance coverage under this section
 17 available to insurers licensed in this state, insurance
 18 pools and associations formed under [section 5], and
 19 self-insured pools for losses assumed by the insurer, pool,
 20 association, or self-insured pool in accordance with the
 21 agreements entered into under this section.

22 (2) Following the date of enactment of [sections 1
 23 through 13], the commissioner is authorized to enter into
 24 any contract, agreement, treaty, or other arrangement with
 25 any licensed insurer, pool, association, or self-insured

1 pool for reinsurance coverage, in consideration of payment
 2 of such premiums, fees, or other charges by an insurer,
 3 pool, association, or self-insured pool that the
 4 commissioner considers to be adequate as required under
 5 [section 5] to obtain aggregate reinsurance premiums and
 6 charges in excess of the estimated amount of insured
 7 product- or service-induced losses in 1986 and 1987. After
 8 1987, the commissioner may increase or decrease premiums or
 9 charges if he finds that the action is necessary or
 10 appropriate to carry out the purposes of [sections 1 through
 11 13].

12 (3) Reinsurance offered under [sections 1 through 13]
 13 shall reimburse an insurer, pool, association, or
 14 self-insured pool for its total proved and approved claims
 15 for covered losses resulting from product- or
 16 service-induced injuries, disabilities, illnesses, and
 17 deaths during the term of the reinsurance contract,
 18 agreement, treaty, or other arrangement, over and above the
 19 amount of the insurer's, pool's, association's, or
 20 self-insured pool's retention of losses provided in the
 21 reinsurance contract, agreement, treaty, or other
 22 arrangement entered into under this section.

23 (4) A reinsurance contract, agreement, treaty, or
 24 other arrangement shall include any terms and conditions
 25 that the commissioner considers necessary to carry out the

1 purposes of [sections 1 through 13]. The terms and
 2 conditions of a contract, agreement, treaty, or other
 3 arrangement with an insurer, pool, association, or
 4 self-insured pool throughout the state in any one year shall
 5 be uniform; however, when necessary to further the purposes
 6 of [sections 1 through 13], pro rata and other forms of
 7 reinsurance may be included in the terms and conditions.

8 (5) Reinsurance shall be provided on terms and
 9 conditions and be subject to such deductibles and other
 10 restrictions and limitations as the commissioner considers
 11 appropriate. No reinsurance shall be made available to a
 12 governmental entity, corporation, business, service
 13 provider, insurer, pool, association, or self-insured pool
 14 that the commissioner determines to be uninsurable or to any
 15 governmental entity, corporation, business, service
 16 provider, insurer, pool, association, or self-insured pool
 17 which fails to adopt reasonable protective measures to
 18 prevent loss consistent with standards established by the
 19 commissioner under [section 4(1)].

20 (6) A contract, agreement, treaty, or other
 21 arrangement for reinsurance under this section shall be for
 22 a calendar year.

23 NEW SECTION. Section 7. Reinsurance account -- fees.
 24 (1) To carry out the programs authorized under [sections 1
 25 through 13], there is created in the state treasury an

1 account within the state special revenue fund designated the
2 "reinsurance account" to which shall be credited:

3 (a) such amounts as may from time to time be loaned to
4 the reinsurance account from the Montana in-state investment
5 fund as provided in 17-6-306 in order to maintain the
6 account in an operative condition adequate to meet its
7 liabilities;

8 (b) premiums, fees, or other charges collected in
9 connection with the reinsurance coverage provided under
10 [section 6];

11 (c) amounts raised by the establishment of a uniform
12 surcharge on premiums paid to property and casualty
13 insurers, as provided in [section 12];

14 (d) interest earned on investments of the account;

15 (e) amounts received from civil actions as provided in
16 [section 15]; and

17 (f) receipts from any other source that may, from time
18 to time, be credited to the account.

19 (2) The money so received and deposited in the
20 reinsurance account must be available without fiscal year
21 limitations to:

22 (a) pay reinsurance claims under [section 6];

23 (b) pay such administrative expenses as may be
24 necessary or appropriate to carry out the purposes of
25 [sections 1 through 13]; and

1 (c) repay to the Montana in-state investment fund
2 sums, including interest thereon, that may be borrowed from
3 it under the provisions of subsection (1)(a).

4 (3) Money in the reinsurance account is statutorily
5 appropriated, as provided in 17-7-502, for the purposes of
6 this section.

7 NEW SECTION. Section 8. Contracted services. The
8 commissioner may enter into a contract for services with any
9 properly licensed insurer, reinsurer, insurance agent or
10 broker, insurance adjustment organization, actuary,
11 consultant, risk manager, or other qualified person to
12 assist the commissioner in carrying out the responsibilities
13 under [sections 1 through 13]. Contracted services may
14 include but are not limited to risk management, establishing
15 reserves and reinsurance premiums, administration and
16 payment of claims, and writing reinsurance policies,
17 contracts, or treaties and the terms thereof.

18 NEW SECTION. Section 9. Commissioner's review and
19 reporting requirements. The commissioner shall periodically
20 review each plan under [sections 1 through 13] and the
21 methods and practices by which such plan is actually being
22 carried out in order to:

23 (1) assure that the plan is effectively making
24 commercial general liability and other essential lines of
25 liability insurance readily available to such governmental

1 entities, corporations, businesses, and service providers as
 2 is intended and is otherwise carrying out the purposes of
 3 [sections 1 through 13];

4 (2) identify any aspects of the operation or
 5 administration of the plan that may require revision,
 6 modification, or other action to carry out such purposes;
 7 and

8 (3) report to each regular session of the legislature
 9 the findings of any investigation under this section and the
 10 current status of all programs under [sections 1 through
 11 13].

12 NEW SECTION. Section 10. Report to legislature.
 13 Before implementation of the programs under [sections 1
 14 through 13] for the benefit of any applicant, affected
 15 party, insurer, pool of insurers, or self-insured pool, the
 16 commissioner shall prepare and transmit a report to the 50th
 17 legislature that:

18 (1) indicates the nature and extent of anticipated
 19 participation by private insurers in the delivery under
 20 [sections 1 through 13] of reinsurance to governmental
 21 entities, corporations, businesses, service providers, pools
 22 of insurers, and self-insured pools;

23 (2) identifies anticipated costs of the provision of
 24 such reinsurance; and

25 (3) identifies any potential applicant that has made

1 inquiry to the commissioner about programs available under
 2 [sections 1 through 13] and, in the case of affected
 3 parties, those that might benefit from participation under
 4 the programs authorized under [sections 1 through 13].

5 NEW SECTION. Section 11. Enforcement -- limitation.
 6 (1) The commissioner may file suit in any appropriate state
 7 district court to recover from any insurer or self-insured
 8 pool the amount of any unpaid premiums lawfully payable by
 9 such insurer or self-insured pool to the state and any
 10 unpaid surcharge lawfully payable by an insurer under the
 11 provisions of [sections 12 and 17].

12 (2) No action or proceeding brought under this section
 13 may be brought for any amount in excess of that lawfully
 14 payable to the state and any such action shall be brought
 15 within 5 years after the right to such payment accrued.
 16 Unless false or fraudulent conduct warrants, a claim shall
 17 not be considered to have accrued until its discovery.

18 NEW SECTION. Section 12. Premium surcharge. Beginning
 19 in 1987, the commissioner shall by June 1 of each year
 20 assess and collect from each authorized property or casualty
 21 insurer and each formerly authorized property or casualty
 22 insurer, with respect to premiums received while an
 23 authorized insurer in this state, a surcharge on net premium
 24 income on Montana property, subjects, or risks, as described
 25 in 33-2-705, for the previous calendar year, as shown by the

insurer's annual statement for that year. The surcharge may not be less than 0.25% or more than 1%, as determined by the commissioner to be necessary to maintain the reinsurance account created under [section 7] in an operative condition adequate to meet its liabilities. Such surcharge is statutorily appropriated, as provided in 17-7-502.

NEW SECTION. Section 13. Spread of risk. The commissioner shall establish criteria to assure that each insurer receiving reinsurance from the state reinsures a sufficient portion of its business, which is related to any distressed line, as determined under [section 2], with the state. This shall be done to assure the state a spread of risk and to prevent adverse selection against the state reinsurance program.

Section 14. Section 17-6-308, MCA, is amended to read:

"17-6-308. Authorized investments. (1) The Montana in-state investment fund must be invested as authorized by rules adopted by the board. For purposes of this section, "investment" includes the guaranty of loans or bonds in consideration for a fee, in lieu of the actual acquisition of such loans or bonds.

(2) The board may use the in-state investment fund to guarantee loans or bonds issued under the provisions of 17-5-1501 through 17-5-1529, Title 17, chapter 5, part 16, or Title 90, chapter 7. Each guaranty must be given in

consideration of a fee. The fees must be paid to the board. The guaranty must provide directly or by separate agreement that the board is fully subrogated to the rights of the obligee under the loan or bond. The board shall by rule establish the maximum ratio between guaranty funds available and loans or bonds to be guaranteed. The board may covenant in bond issues to maintain such ratio. Unless bonds issued to finance a project are secured by a common capital reserve account and a common guaranty fund, the maximum amount of the guaranty authorized by this section may not exceed \$3,000,000 with respect to the bonds or loans to finance the project.

(3) The board may make loans from the in-state investment fund to the capital reserve account created pursuant to 17-5-1515 and the guaranty fund created pursuant to 17-5-1520 to establish balances or restore deficiencies therein. The board may agree in connection with the issuance of bonds or notes secured by such account or fund to make such loans. Loans must be on such terms and conditions as the board determines and must be repaid from revenues of the board realized from the exercise of its powers under 17-5-1501 through 17-5-1529, subject to the prior pledge of the revenues to the bonds and notes.

(4) The board may make loans from the in-state investment fund to the reinsurance account created pursuant

1 to [section 7] as needed to maintain the account in an
2 operative condition adequate to meet its liabilities. Loans
3 must be on such terms and conditions as the board determines
4 and must be repaid, including interest."

5 Section 15. Section 27-1-221, MCA, is amended to read:

6 "27-1-221. When exemplary damages allowed. (1) Subject
7 to subsection (2), in any action for a breach of an
8 obligation not arising from contract where the defendant has
9 been guilty of oppression, fraud, or malice, actual or
10 presumed, the jury, in addition to the actual damages, may
11 give damages for the sake of example and by way of punishing
12 the defendant.

13 (2) The jury may not award exemplary or punitive
14 damages unless the plaintiff has proved all elements of the
15 claim for exemplary or punitive damages by clear and
16 convincing evidence. Clear and convincing evidence means
17 evidence in which there is no serious or substantial doubt
18 about the correctness of the conclusions drawn from the
19 evidence. It is more than a preponderance of evidence, but
20 less than beyond a reasonable doubt.

21 (3) Presumed malice exists when a person has knowledge
22 of facts, intentionally avoids learning of facts, or
23 recklessly disregards facts, knowledge of which may be
24 proven by direct or circumstantial evidence, which creates a
25 high degree of risk of harm to the substantial interests of

1 another, and either deliberately proceeds to act in
2 conscious disregard of or indifference to that risk or
3 recklessly proceeds in unreasonable disregard of or
4 indifference to that risk.

5 (4) The plaintiff may not present, with respect to the
6 issue of exemplary or punitive damages, any evidence to the
7 jury regarding the defendant's financial affairs or net
8 worth unless the judge first rules, outside the presence of
9 the jury, that the plaintiff has presented a prima facie
10 claim for exemplary or punitive damages.

11 (5) A defendant is guilty of oppression if he
12 intentionally causes cruel and unjust hardship by:

13 (a) misuse or abuse of authority or power; or

14 (b) taking advantage of some weakness, disability, or
15 misfortune of another person.

16 (6) (a) In cases of actual fraud or actual malice, the
17 jury may award reasonable punitive damages after considering
18 the circumstances of the case.

19 (b) In all other cases where punitive damages are
20 awarded, punitive damages may be in an amount up to but no
21 greater than \$25,000 or 1% of the defendant's net worth,
22 whichever is greater.

23 (7) In cases where punitive damages may be awarded,
24 the jury shall not be instructed, informed, or advised in
25 any manner as to the limitations on the amount of exemplary

1 or punitive damages as set forth in subsection (6)(b).
 2 (8) If exemplary or punitive damages are awarded under
 3 this section, the court shall forward the amount of one-half
 4 of such damages to the state treasurer for deposit in the
 5 reinsurance account created under [section 7]. Such amounts
 6 are statutorily appropriated, as provided in 17-7-502, and
 7 shall be used to maintain the reinsurance account in an
 8 operative condition adequate to meet its liabilities."

9 Section 16. Section 17-7-502, MCA, is amended to read:

10 "17-7-502. Statutory appropriations -- definition --
 11 requisites for validity. (1) A statutory appropriation is an
 12 appropriation made by permanent law that authorizes spending
 13 by a state agency without the need for a biennial
 14 legislative appropriation or budget amendment.

15 (2) Except as provided in subsection (4), to be
 16 effective, a statutory appropriation must comply with both
 17 of the following provisions:

18 (a) The law containing the statutory authority must be
 19 listed in subsection (3).

20 (b) The law or portion of the law making a statutory
 21 appropriation must specifically state that a statutory
 22 appropriation is made as provided in this section.

23 (3) The following laws are the only laws containing
 24 statutory appropriations:

25 (a) 2-9-202;

1 (b) 2-17-105;
 2 (c) 2-18-812;
 3 (d) 10-3-203;
 4 (e) 10-3-312;
 5 (f) 10-3-314;
 6 (g) 10-4-301;
 7 (h) 13-37-304;
 8 (i) 15-31-702;
 9 (j) 15-36-112;
 10 (k) 15-70-101;
 11 (l) 16-1-404;
 12 (m) 16-1-410;
 13 (n) 16-1-411;
 14 (o) 17-3-212;
 15 (p) 17-5-404;
 16 (q) 17-5-424;
 17 (r) 17-5-804;
 18 (s) 19-8-504;
 19 (t) 19-9-702;
 20 (u) 19-9-1007;
 21 (v) 19-10-205;
 22 (w) 19-10-305;
 23 (x) 19-10-506;
 24 (y) 19-11-512;
 25 (z) 19-11-513;

1 (aa) 19-11-606;
 2 (bb) 19-12-301;
 3 (cc) 19-13-604;
 4 (dd) 20-6-406;
 5 (ee) 20-8-111;
 6 (ff) 23-5-612;
 7 (gg) 27-1-221;
 8 tgg}(hh) 37-51-501;
 9 t{hh}(ii) 53-24-206;
 10 t{iit}(jj) 75-1-1101;
 11 t{jjt}(kk) 75-7-305;
 12 t{kk}(ll) 80-2-103;
 13 t{ll}(mm) 80-2-228;
 14 t{mm}(nn) 90-3-301;
 15 t{nn}(oo) 90-3-302;
 16 t{oo}(pp) 90-15-103; and
 17 (qq) [section 7];
 18 (rr) [section 12];
 19 t{pp}(ss) Sec. 13, HB 861, L. 1985; and
 20 (tt) Sec. 17, [LC 44].

21 (4) There is a statutory appropriation to pay the
 22 principal, interest, premiums, and costs of issuing, paying,
 23 and securing all bonds, notes, or other obligations, as due,
 24 that have been authorized and issued pursuant to the laws of
 25 Montana. Agencies that have entered into agreements

1 authorized by the laws of Montana to pay the state
 2 treasurer, for deposit in accordance with 17-2-101 through
 3 17-2-107, as determined by the state treasurer, an amount
 4 sufficient to pay the principal and interest as due on the
 5 bonds or notes have statutory appropriation authority for
 6 such payments."

7 NEW SECTION. Section 17. Initial surcharge. The
 8 commissioner shall, not later than 120 days after [the
 9 effective date of this act], collect a surcharge of 0.25% on
 10 1985 net premiums from the insurers and on the risks
 11 provided in [section 12]. Such surcharge is statutorily
 12 appropriated, as provided in 17-7-502.

13 NEW SECTION. Section 18. Extension of authority. Any
 14 existing authority of the commissioner of insurance to make
 15 rules on the subject of the provisions of this act is
 16 extended to the provisions of this act.

17 NEW SECTION. Section 19. Codification instruction.
 18 Sections 1 through 10 are intended to be codified as an
 19 integral part of Title 33, and the provisions of Title 33
 20 apply to sections 1 through 10.

21 NEW SECTION. Section 20. Severability. If a part of
 22 this act is invalid, all valid parts that are severable from
 23 the invalid part remain in effect. If a part of this act is
 24 invalid in one or more of its applications, the part remains
 25 in effect in all valid applications that are severable from

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- 1 the invalid applications.
- 2 NEW SECTION. Section 21. Effective date. This act is
- 3 effective on passage and approval.

-End-