

OIL AND WATER: MIXING POLITICS WITH PRIVACY PROTECTION IN PROPERTY-CASUALTY LINES

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Montana's relatively young Constitution guarantees a fundamental right of privacy to all persons.² The tension between absolute privacy protection and the unimpeded transaction of insurance business animated many enactments in Montana's recent legislative sessions³ and was a powerful rallying point in state political campaigns. Over two sessions this tension influenced legislative initiatives to strengthen healthcare privacy, bring Montana's Insurance Information Privacy and Protection Act ("MIIPPA") into compliance with the Gramm-Leach-Bliley Act ("GLBA"), and cure 1999 legislation that undermined the normal operation of property-casualty insurance transactions.

Montana's Privacy Protections

Constitutional Provisions. The Montana Constitution provides: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."⁴ This right is elevated above privacy rights guaranteed under the federal constitution, and is considered inviolate absent a showing of compelling state interest, and a determination that the merit of public disclosure exceeds the demand of individual privacy.⁵

Montanans regard this right as paramount and the Montana Code Annotated is replete with provisions flowing from this Constitutional guarantee that protect Montana personal privacy rights. Among the strongest nationally, these privacy protections are consistently upheld by Montana's Supreme Court.⁶ Indeed, even insurers enjoy additional privacy protections in Montana which flow from the same Constitutional guarantees.⁷

Pre-1999 Statutes. Montana enacted the Insurance Information and Privacy Protection Act in a form substantially similar to the NAIC model as revised December 1981. With the exception of 1997 amendments permitting consumer correction of information collected by insurance support organizations and consumer reporting agencies, little court or legislative attention was directed to MIIPPA.⁹ Industry personnel and support organizations were all conversant with its terms and requirements; operational hurdles were minimal.

MIIPPA applies to life, health, disability and property-casualty insurance.¹⁰ While MIIPPA contains no express exclusion for commercial lines or workers' compensation, regulatory interpretation had historically excluded both from the Act's scope, relying on the definition of "insurance transaction":

a transaction involving insurance *primarily for personal, family, or household needs, rather than for business or professional needs* . . .¹¹

Before amendment in 1999, MIIPPA provided for protection of personal and privileged information by regulating its *use* through broad prohibitions on the use of identifiable information about an individual with numerous specific exceptions targeted to normal insurance transactions and functions.¹² Specifically relevant to claims adjustment, underwriting, policy services, and fraud investigation activities, MIIPPA explicitly permitted disclosure of personal information to persons *other than* insurance institutions, insurance producers, or insurance-support organizations. No restriction on *collection* of personal or privileged information was contained in MIIPPA.

Senate Bill 103: Montana's Venture Into All-Lines Privacy Protection

SB 103¹³ was introduced at the request of Insurance Commissioner Mark O'Keefe in his second term in elected office.¹⁴ O'Keefe had successfully portrayed himself as Montana's chief consumer advocate and in that role brought SB 103 as a consumer protection measure to protect sensitive personal healthcare information by requiring insurers to obtain written authorization prior to collecting or disclosing "personal or privileged" information from any "individual."¹⁵

Commissioner O'Keefe used SB 103 to advance his political aspirations. By the initial hearing, on January 15,

1999, the political community knew that O'Keefe would make a serious bid for the Governor's Office in 2000.¹⁶ SB 103 was to be a set piece in his campaign. It was, therefore, no surprise when local media arrived to cover the Commissioner's testimony. With cameras rolling, O'Keefe informed the Senate Committee on Public Health, Safety and Welfare that SB 103 was vital to Montanans and that, should the Committee kill the bill, he would draft a constitutional initiative on healthcare information privacy for placement on the ballot in the general election.

SB 103 was advanced as creating additional consumer protections by restricting the use of personal health care information. It was touted as a bill that would allow healthcare information to flow safely, while cutting insurance fraud, insuring the quality of information, and fostering research. Importantly, according to its sponsor, SB 103 would not affect the transfer of healthcare information by an insurer when it was for "legitimate reasons" such as between insurers and claims handlers, adjusters, and law enforcement.¹⁷

According to proponents, the operation of SB 103 would be simple. The sponsor and Commissioner O'Keefe implied that the bill only limited health insurers in their use of an individual's healthcare information. This limitation would apply only to "secondary disclosure" of information between insurers and third parties, and only to nonlegitimate transfers of personally identifiable information. Supporters presented anecdotal testimony regarding insurers' sale of healthcare information to drug manufacturers who then solicited claimants' business through the mail.¹⁸ Focus on this use of healthcare information drew attention away from the bill's unintended consequences.

SB 103 passed by wide margins. It became effective January 1, 2000. After the 1999 session ended, several key Commissioner staff, who had been important to the passage of the bill, left the Department. These individuals took with them critical institutional memory that would have limited the bill's scope to healthcare information transferred by health insurers. Replacement staff took a different view of the legislation and, shortly after arrival, advised industry representatives SB 103 applied to all lines of insurance.

In response to the Department's changed construction, Montana property-casualty representatives expressed concerns to the Department regarding the broadened scope and the many difficulties that would arise under the intended construction.¹⁹ Specifically, the Commissioner was advised that the "prior written authorization" requirements of SB 103 would stop efficient collection and disclosure of information necessary to promptly service claims.²⁰ He was also advised that this requirement would stall application, underwriting, and policy servicing processes.²¹ Nonetheless, as chief consumer advocate, the Commissioner remained committed to apply SB 103 across all lines of insurance, and even resisted special-session industry efforts to delay the effective date of the bill.²²

In April 2000, the Commissioner issued a draft "privacy advisory memorandum" for industry comment making clear his intention to construe SB 103 as covering all lines of insurance. In spite of concerns previously raised, the Department advised insurers that they should prepare to obtain written authorization before collecting anyone's personal information, including information publically available. To acknowledge property-casualty concerns, the Department stated it would permit the use of "blanket" authorization forms.

With the issuance of the first "blanket" authorization, the Department's position changed dramatically. In August 2000, one insurer issued an authorization meeting the requirements of SB 103.²³ The authorization advised policyholders of the types of information that might be collected and the ways in which the insurer might use the information. It also advised policyholders that, without required signatures, coverage might be discontinued. Immediately the Department began receiving "several calls per minute" from Montana consumers, for more than two weeks, requiring additional telephone personnel.²⁴

The fallout from the first authorization prompted the Department to request that insurers issue no further authorizations until further notice.²⁵ The consumer uproar also resulted in significant political pressure on gubernatorial candidate O'Keefe.²⁶ Responding to these developments, Commissioner O'Keefe immediately created a "privacy task force" made up of industry and consumer interests to address the difficulties created by SB 103.²⁷ The task force began meeting just one month before statewide elections and immediately concurred there was no legitimate way to address SB 103 short of legislative action.²⁸ The task force then spent the next several months conceiving and drafting curative legislation.

Curative Legislation: 2001's SB 465

Montana's 2001 legislative session began before the task force completed its work. National industry groups recommended solutions ranging from no action pending further developments in federal regulation to adoption of NAIC, NCOIL, or later "industry consensus" model acts. Because of nuances existing in Montana law and onerous provisions added by SB 103, a "no action" approach in Montana was not an option. Moreover, the Department felt that adoption of any of the models offered less protection to Montana consumers than under existing law. Local industry representatives and the Insurance Department thus continued consensus development of SB 465.

The bill had four goals: preserve existing privacy protections; cure problems created by SB 103; comply with GLBA requirements relating to insurers; and regulate use and disclosure of personal information for marketing purposes. As introduced, SB 465 was incomplete, needing marketing provisions, technical amendments, and critical repealer language. Introduction was uncommonly late for a bill of this importance.²⁹ All interested parties³⁰ nonetheless represented to the legislature that the bill should receive necessary final amendments in the legislative process. The bill was signed into law on April 21, 2001.

As enacted, SB 465 contains six primary provisions.

1. Repeal of any requirement to obtain written authorization from an individual prior to *collecting* personal information. The most critical element of the curative legislation, this repealer had unanimous support of all interests following the bill, and addressed the very real operational problems presented by SB 103. Retroactivity of this repealer to the effective date of SB 103, January 1, 2000, addresses industry exposure to regulatory penalty, market conduct sanctions, or civil damages from noncompliance with collection authorization requirements.³¹
2. Notice requirements to individuals. SB 465 requires insurers and producers to notify individuals of the kinds of personal information the insurer or producer may disclose without the individual's permission under extensive statutory exceptions contained in 33-19-306, MCA, and the rights an individual has under the amended law to access information in the possession of insurers, producers, and insurance support organizations. Abbreviated notice requirements, that differ from those in NAIC or industry consensus models, remain in law. Telephonic and electronic notice is permitted under appropriate circumstances.³²
3. Disclosure prohibitions with expanded insurance transaction exceptions. SB 465 maintains the prohibitions of the 1982 Model Act on insurer and producer disclosure of personal information without express written authorization³³ but expands exceptions in 33-19-306, MCA, to allow transaction of legitimate insurance business without written authorization.³⁴ Mindful of the inability to forecast all necessary exceptions, industry and consumer interests alike supported a grant of additional rulemaking authority to the Commissioner to address future unanticipated operational difficulties.³⁵ While Montana's authorization requirements are in some instances more stringent than other states, even with SB 465 amendments, MIIPPA nevertheless remains essentially an "opt-out" law.
4. Marketing regulation. Montana's newly-elected Insurance Commissioner initially opposed any marketing use of personal information. While Montana may now be the most restrictive of states that have chosen to regulate in this area, ultimately, industry and the Commissioner struck a compromise both could support. Unfettered marketing of or use for marketing purposes of personal information is strictly prohibited, unless the individual expressly permits the use by written authorization, which must meet additional requirements to those contained in Section 6.³⁶

Without authorization, however, insurers have important uses of personal information for marketing purposes available to them. Free exchange of personal information is permitted among insurers, producers, other licensees, and affiliates for the purpose of marketing insurance or financial products. Moreover, the description of products or services of any kind by an insurer's producer to the producer's client is not considered "marketing" if the product or service is available through the producer. Importantly, disclosures to "persons contractually engaged to provide services for or on behalf of" a licensee for marketing insurance or financial products are permitted, so long as the contractor agrees in writing to not further disclose the information except to "carry out the limited purpose of the engagement." All exceptions, however, prohibit the disclosure of healthcare information for marketing products other than insurance.³⁷

5. Enforcement. SB 465 preserves two independent enforcement schemes, one regulatory, the other private civil action by the aggrieved individual against the violator.³⁸ SB 465 amends regulatory enforcement to conform to the Montana Administrative Procedure Act which was enacted after MIIPPA. Although fines are increased, amendments now provide consistent procedural rules. Independent civil action is unamended.³⁹
6. Coordination of state and federal healthcare privacy provisions. While SB 103 had not created significant obstacles for life and health industry interests, continued evolution of federal acts encouraged amendment of MIIPPA to insure coordination and compliance, especially in view of Montana's biennial session schedule.⁴⁰

It is important to call attention to one area of MIIPPA that SB 465 does not amend. Montana's unique requirements governing recordkeeping and individual access to information about disclosures of personal information remain unchanged.⁴¹

Conclusion

As enacted, SB 465 leaves intact baseline provisions of the 1982 NAIC Model Act as strengthened in MIIPPA. The goal was to cure critical operational problems created by SB 103, including protection to insurers who attempted but could not comply with the amended law, and enact amendments considered mandatory to comply with GLBA, while at the same time striking an all-important balance between valid consumer privacy needs and important business uses of personal information. We believe the goal was achieved and that property-casualty insurers in Montana can do business with an operational consistency with other states.

Endnotes

1. Jacqueline Lenmark and Gregory Van Horssen are Montana retained counsel for the American Insurance Association and State Farm Insurance, respectively.
2. Mont. Const. art. II, § 10.
3. Montana meets in regular legislative session biennially for 90 legislative days, commencing the first business day following New Year's Day. The 2001 session began January 2 and ended sine die on April 22.
4. Mont. Const. art. II, § 10.
5. *Belth v. Bennett*, 227 Mont. 341, 740 P.2d 638(1987).
6. *E.g., Allstate Ins. Co. v. Billings*, 239 Mont. 321, 780 P.2d 186 (1989).
7. *Belth, supra*.
8. 1981 Mont. Laws 580, codified at Title 33, chapter 19, MCA.
9. Chap. 518, L. 1983; Chap. 101, L. 1985; Chap. 258, L. 1997.
10. 33-19-103(1)(a), (b), MCA.
11. 33-19-104(13), MCA (emphasis supplied).
12. 33-19-204, -306, MCA (1997).
13. S.B. 103, 1999 Mont. Laws 212.
14. Montana's Insurance Commissioner is elected, serving a 4-year term.
15. Ultimately, the broad definition of these terms contributed to the difficulties that SB 103 created for property-casualty insurers.

16. In his run for Governor in 2000, O'Keefe was narrowly defeated by Republican Judy Martz.
17. Testimony of Sponsor Sen. Eve Franklin and Commissioner O'Keefe before the Senate Committee on Public Health, Welfare and Safety, January 15, 1999.
18. *Id.* The sponsor testified that the bill required an individual's specific written permission before a "secondary receiver" could transfer personal information to others who might use it for profit.
19. January 18, 2000 letter from Jacqueline Lenmark on behalf of several property-casualty insurers, raising multiple concerns, including overly broad and inconsistent definitions, consumer inconvenience, policy service, underwriting, claims handling, recordkeeping, fraud detection/prevention, and federal law conflicts.
20. *Id.*, advising that the intended construction requiring prior written authorization to collect information would make it impossible to get a claimant's location or make contact with service personnel to assist a claimant who was in need of roadside assistance.
21. *Id.*, advising that the intended construction would render underwriting and updating or upgrading coverage difficult, if not impossible.
22. H.B. 10, Spec. Sess. May 2000.
23. SAFECO Insurance Company issued the first authorization August 17, 2000.
24. Source: Deputy Insurance Commissioner, Peter Funk.
25. Montana Insurance Department Advisory, August 30, 2000.
26. Republican opponent, Judy Martz criticized O'Keefe in an August 28, 2000 press release for ignoring the "impacts his regulatory policies have on Montana's consumers." The Republican candidate for Commissioner stated in the same release, "I am personally saddened that the consumers of Montana are going to pay the price for Mark O'Keefe's efforts to politicize issues rather than solve real problems facing hard working Montanans."
27. The task force included representatives of property-casualty, life and health insurance, independent agents, financial advisors, AARP and labor.
28. The task force met over a period of 4½ months prior to arriving at the curative language introduced in the 2001 session.
29. S.B. 465, 2001 Mont. Laws 341, 1st reading, February 13, 2001, 9 days from the required transmittal deadline.
30. Insurance Department, American Insurance Association, State Farm Insurance, National Association of Independent Insurers, Alliance of American Insurers, AFL-CIO, AARP, Independent Insurance Agents of Montana, Prudential Insurance Companies, Blue Cross Blue Shield of Montana, Health Insurance Association of America, American Council of Life Insurers, Montana Association of Certified Insurance and Financial Advisors, Farmers Insurance Group.
31. S.B. 465, *supra*, §§ 11(1), 15; S.B. 103, *supra*, § 5.
32. S.B. 465, § 5(4), (6)(c), (7).
33. *Id.* § 5, 6.
34. *Id.* § 7.
35. *Id.* § 4, 7(22).

36. *Id.* § 8(1).

37. *Id.* § 8.

38. Title 33, Chapter 19, Part 4, MCA(1999).

39. S.B. 465 § 9, 10. Damages are limited to actual damages. *Id.* (2). *See also*, H.B. 504, 2001 Mont. Laws 227 (Insurance Commissioner's "housekeeping bill" in which the administrative procedures throughout the Insurance Code are conformed to MAPA).

40. *Id.* § 1, 3, 5.

41. 33-19-301- 305, MCA.