

FEDERATION OF REGULATORY COUNSEL, INC.

**MONTANA LEGISLATIVE AND REGULATORY UPDATE**

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Montana's 60<sup>th</sup> biennial regular session adjourned *sine die* Friday, April 27, 2007, on the 90<sup>th</sup> day, the last day for meeting under Montana law. With a Democratic Governor, this legislature was the first split majority legislature in 14 years. Democrats controlled the Senate 26-24 as a result of one elected Republican switching parties after the election. Republicans controlled the House 50-49-1. While other recent legislatures have dealt with significant budget shortfalls, this legislature faced a projected budget surplus of \$1billion+. More than 2,500 bills were requested and over 1,500 bills were introduced, with less than half becoming law. Because of strong philosophical disagreement about how to use the surplus, a deeply polarized legislature adjourned with its major tasks--budget (required), tax relief (desired by both parties), and school funding (to address litigation against the state)--undone. The Governor called the legislature back into special session on May 10, 2007, to address the unfinished business, reopening the door to issues already dealt with. The special session adjourned *sine die* May 15, 2007, major tasks now completed--budget, limited tax relief, and some additional school funding--and leaving most other action of the regular session intact. 2

While fiscal differences of opinion dominated the 60<sup>th</sup> legislature, some significant legislation affecting insurance interests was enacted, which in turn has generated regulation of importance. Finally, some failed measures provide a cautionary tale, not only for future Montana legislatures, but also for other states. 3

**Property and Casualty**

**SB 70 - State Emergency Response Commission**

SB 70 revises the composition of the State Emergency Response Commission, increasing its membership from 27 to 29 and adding a member from the Montana insurance producer and company representatives. **Signed by Governor. Chapter 67. Eff. 10/1/07. Codified 10-3-1204, MCA.**

**SB 204 - Prohibiting insurers from requiring estimates at a specified location**

As introduced, SB 204 prohibited an insurer from requiring that a claimant have repair estimates performed at a particular location. Montana law already prohibited insurers from requiring repairs to be performed at a specified location. This bill would have prohibited insurers from obtaining competitive estimates, and insurers thus opposed it as anticonsumer. Responding to insurer concerns, the bill was amended to allow insurer access to a vehicle for the purpose of obtaining competitive estimates. **Signed by Governor. Chapter 339. Eff. 10/1/07. Codified 33-18-224, MCA.**

**SB 300 - Primary seatbelt law**

Introduced at the request of the Montana Motor Carriers Association and with insurance industry support, SB 300 would have enacted primary seatbelt and child passenger safety legislation. Historically, Montana has not looked favorably on mandatory seatbelt legislation. This remained true in this session, although the bill failed by only one vote in the second house. **Failed on 2<sup>nd</sup> reading in House.**

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### **SB 537 - Prepaid legal plans**

Sellers of legal services expense plans (often called "prepaid legal plans") would no longer have been required to be licensed as insurance producers. SB 537 moved regulation of legal services expense plans from the Commissioner of Insurance to the Department of Justice under the Consumer Protection Act and related sections (Title 30, chapter 14, MCA). Plans marketed through multilevel distribution companies would still have been required to register the marketing plan with the Commissioner of Securities. **Returned by Governor with recommended amendments; Governor's amendments rejected by legislature; passed 2<sup>nd</sup> time by legislature; to Governor for reconsideration. Governor vetoed. Veto override attempt failed.**

### **HB 543 - Disclosure of insured's liability limits to claimants**

After failing in the 2005 session, this bill was again introduced to require an insured or the insured's insurer to disclose liability limits upon request from potential claimants prior to claim being made or litigation being filed. It was advanced as a bill that would reduce litigation with the rationale that no one sues if there is no coverage. **Tabled by the House Business Committee.**

### **HB 565 - Comparative negligence application to Workplace Safety Act**

At the request of the Montana Contractors Association, HB 565 was introduced to amend the Montana Workplace Safety Act to require application of comparative negligence principles in actions against workplace owners and lessees over alleged violations of the act. Currently, strict liability principles apply to workplace safety act violations. **Failed on 3<sup>rd</sup> reading in the House.**

### **HB 587 - Anti-stacking law**

Introduced with strong company and producer support, HB 587 restores statutory permission to include antistacking clauses in auto insurance policies. Coverages provided under one policy, or under more than one policy, issued by the same insurer, cannot be added together where the premiums charged actuarially reflect limiting of coverage separately to the vehicles covered under the policy. **Signed by Governor. Chapter 201. Eff. 4/17/2007. Codified 33-23-203, MCA.**

## **Workers' Compensation**

### **SB 108 - "Housekeeping"; medical utilization and treatment guidelines**

Introduced at the request of the Department of Labor and Industry, SB 108 covers a number of "housekeeping" measures under the Workers' Compensation Act and authorizes the Department of Labor to develop medical utilization and treatment guidelines for injured workers. The measure is one component resulting from collaborative interim work of insurance industry, labor, employer, and Department stakeholders responding to the results of a recent WCRI administrative inventory and other Department-supported analysis of cost drivers in Montana's workers' compensation system. **Signed by Governor. Chapter 117. Eff. 7/1/07. Codified in multiple sections of Title 39, chapter 71, MCA.**

### **SB 304 - Limitation on access to worker health care information**

Responding to recent litigation, SB 304 would have prohibited the disclosure of claimant health care information by a health care provider to a workers' compensation insurer or representative without notice to and participation by the claimant's attorney. **Tabled in Senate Business and Industry.**

### **SB 474 - State Fund regulatory parity**

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At the request of private companies writing workers' compensation insurance in Montana, SB 474 would have required State Compensation Insurance Fund rates to be developed and filed under the Montana Insurance Code and also required parallel notice provisions on policy renewals. In the current three-way competitive market, private carriers file their rates with the Insurance Commissioner under a NCCI loss cost competitive rating law. The State Fund establishes its rates under an administrative process regulated by the Legislative Auditor. While it is required to report its loss costs to NCCI, Montana's designated advisory organization, the State Fund is not required to employ NCCI class codes or statistical rating plan in establishing its rates. SB 474 would have required both State Fund and private carriers to use the same rating law and the same time frames in establishing their rates and in noticing policyholders of renewals with altered terms. **Tabled in Senate Business Committee.**

### **HB 213 - Healthy Workplace Act**

HB 213 would have added additional tort remedies to Montana employment law for emotional and psychological injury occurring in the workplace, whether inflicted by employer, coworker, or third parties. If enacted, the bill would have overlapped and conflicted with existing employment, discrimination, and workers' compensation law. **Tabled by the House Business Committee.**

### **HB 738 - Treatment guidelines/medical rates**

Again, a product of collaborative work among industry, regulatory, and user stakeholders, HB 738 establishes the rate for workers' compensation medical services based on the average of conversion factors used by the top five insurers or third-party administrators providing disability [health] insurance in Montana using the resource-based relative value scale to determine fees for covered services; provides for evidence-based utilization and treatment guidelines for primary and secondary medical services; and establishes a rebuttable presumption that the utilization and treatment guidelines are correct medical treatment for the injured worker. Insurers are not responsible for treatments or services not within utilization and treatment guidelines unless providers obtain prior authorization. There is an independent medical review process for insurer denial of treatment or services. **Signed by Governor. Ch. 330. Eff. 7/1/07. Codified 39-71-704, -743, MCA.**

### **HB 785 - Athlete exemption**

HB 785 exempts from workers' compensation coverage athletes engaged in contact sports, including football and hockey. **Signed by Governor. Ch. 288. Eff. 4/26/07. Codified 39-71-401, MCA.**

### **HB 786 - Motor Carriers**

HB 786 exempts from workers' compensation coverage persons performing the services of intrastate or interstate common or contract motor carriers when hired by brokers. **Signed by Governor. Ch. 179. Eff. 7/1/07. Codified 39-71-401, MCA.**

## **Life Insurance**

### **SB 276 - Funeral insurance sales by funeral directors**

Brought forward by the Montana Funeral Directors Association, SB 276 allows funeral directors to be licensed as life insurance producers for the purpose of selling limited life insurance policies with a benefit of not greater than \$15,000. Persons selling the limited policy are required to hold dual licensure as funeral director and insurance producer. **Signed by Governor. Ch. 507. Eff. 1/1/08. Codified in multiple sections in Title 33, chapters 17, 18, and 20, MCA.**

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### **SB 535 - Annuity suitability**

SB 535 enacts the NAIC Suitability in Annuity Transactions Model Regulation and the NAIC Annuity Disclosure Model Regulation, jointly implementing suitability protections developed by the NAIC and industry in responding to concerns about annuity sales practices. **Signed by Governor. Chapter 476. Eff. 10/1/07. Codified in multiple sections in Title 33, chapter 20, parts 8 and 9, MCA.**

### **SB 542- Modernization of group life insurance**

SB 542 for the modernization of the group life insurance law in Montana permits group life insurance policies to be purchased with premiums paid entirely by the employee. The bill also removes the requirement that group life insurance plans cover at least 75 percent of eligible group members. These changes provide greater access to affordable life insurance coverage and are consistent with the most recent NAIC "Group Life Insurance Definition and Group Life Insurance Standard Provisions Model Act" (October 2005). **Signed by Governor. Chapter 430. Eff. 10/1/07. Codified 33-20-1101, -1111, -1209, MCA.**

### **HB 108 - Withholding of an estimated tax from pension and annuity distributions**

Introduced at the request of the Department of Revenue, HB 108 proposed to require withholding of an estimated tax from pension and annuity distributions. Purportedly based upon IRC Sec. 3405, the measure did not parallel Sec. 3405 and engrafted other requirements and liabilities for the payor of a distribution not contemplated by Sec. 3405. **Tabled in House Taxation Committee. 4**

**HB 156 - Long term care insurance** Representing general revision and updating of Montana's long-term care [LTC] insurance law, HB 156 revises pertinent definitions; revises provision relating to nonforfeiture benefits; expands rulemaking authority for the Commissioner of Insurance; revises provision relating to delivery of policy summaries and benefit triggers; provides additional standards for LTC contracts; and expands training requirements for LTC insurance producers. **Signed by Governor. Ch. 32. Eff. 7/1/07. Codified in multiple sections of Title 33, chapters 20 and 22, MCA.**

### **HB 764 - Life insurance sales practices to military personnel**

HB 764 implements Federal mandates passed by Congress in September 2006 providing that states should work together to develop guidelines ensuring that active military personnel are protected from unscrupulous life insurance sales practices and to require certain standards and disclosures in the sale of life insurance products to military personnel. **Signed by Governor. Chapter 333. Eff. 4/27/07. Codified 33-18-103, MCA. Administrative rules implementing NAIC Model Rules have been noticed and adoption is anticipated. 5**

## **Regulation and Litigation**

### **SB 116 - Identity theft; credit freezes**

SB 116 enacts additional consumer protections for victims of identity theft and for "freezes" and "thaws" of consumer credit reports. Insurers are exempt from the provisions of SB 116. **Signed by Governor. Ch. 138. Eff. 7-1-107. Codified 30-14-1726 through - 1736, MCA.6**

### **SB 138 - Insurer Subsidiaries; "Stuffing"**

Introduced at the request of the Montana Director of Revenue, SB 138 would have prohibited the practice of "insurance stuffing" and specified when corporations could take dividends-received deductions for dividends received from insurers, provided procedures to calculate dividends-received deductions, permitted

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disregarding permanent deferral of gain recognition for transactions, and permitted the Department of Revenue to include in gross income taxpayer's pro-rata share of the insurers' current earnings and profits in the taxable year. The bill would have been effective immediately and provided a retroactive applicability date. **Died in House Taxation Committee on April 13, 2007. 7**

### **SB 157 - Insurance Commissioner "housekeeping"**

Commissioner Morrison's "housekeeping" bill corrects incorrect references, cleans up conflicts, and updates language in the Montana Insurance Code. A product of industry and regulatory collaboration, the bill contains only legislation upon which there was agreement. **Signed by Governor. Ch. 399. Eff. Multiple dates. Codified in multiple sections of MCA.**

### **SB 161 - Captive insurers**

Represents a general revision and significant expansion of the Montana captive insurance law, including provisions amending investment, and capital and surplus requirements. **Signed by Governor. Ch. 518. Eff. 10/1/07. Codified in multiple sections of Title 33, chapter 28, MCA.**

### **HB 212, SB 330, SB 429 - Credit Scoring**

After three contentious sessions over credit scoring, in 2005, Montana enacted the NCOIL credit scoring model with minor revisions. The law became effective October 1, 2005. Nevertheless, three bills, each attempting a wholesale or partial repeal of statutes permitting the use of credit scoring were introduced in 2007. **All three bills tabled in the business committee in the house of origin. 8**

### **HB 464 - Third party bad faith**

After an intense lobbying effort and two bitter floor debates on second reading, HB 464, introduced to counter supreme and federal court opinions upholding current law regarding available damages and attorney fees in insurance UCSPA ("bad faith") actions was indefinitely postponed by the Senate. The bill would have provided for damages for "all detriment" caused by an act of insurance bad faith and awarded attorney fees incurred in the *underlying claim* to a prevailing plaintiff. Insurance industry opposition stressed the pressure the enactment would have on settlement, claims costs and premium. At the time, only two states, Montana and West Virginia, allowed third party bad faith causes of action against insurers. Had HB 464 passed, Montana would have been the only state to allow the recovery of attorney fees as damages. **Failed on 2<sup>nd</sup> reading and indefinitely postponed in Senate. 9**

### **HB 724 - Service contracts**

Based upon the Service Contract Industry Council model law, HB 724 introduces new requirements in Montana law for service contracts as part of certain business arrangements. Regulation of service contracts is under the authority of the Department of Justice. **Signed by Governor. Ch. 162. Eff. 4/6/07. Codified 30-14-1301 through - 1304, MCA.**

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### **Endnotes**

1. Jacqueline Lenmark is Montana retained counsel for the American Insurance Association and the American Council of Life Insurers.

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2. While presumably called only for funding emergency wildfire expenses, the Montana legislature convenes again in special session on September 5, 2007.
3. Information on the 60<sup>th</sup> Montana general session is available at <http://leg.mt.gov/css/sessions/60th/default.asp>. Detailed information on bills is at [http://laws.leg.mt.gov/pls/laws07/law0203w\\$.startup](http://laws.leg.mt.gov/pls/laws07/law0203w$.startup). Special session information is available at [http://leg.mt.gov/css/sessions/special\\_session/may\\_2007/default.asp](http://leg.mt.gov/css/sessions/special_session/may_2007/default.asp). Detailed information on special session bills is at [http://laws.leg.mt.gov/pls/laws0507/LAW0200W\\$.startup](http://laws.leg.mt.gov/pls/laws0507/LAW0200W$.startup).
4. Reintroduced in SB 220 and tabled in Senate Taxation Committee; reintroduced in the Special Session and part of omnibus taxation bill HB 5 which was tabled in House Taxation.
5. HB 764 was preceded by HB 542, which was requested by Commissioner John Morrison to address the same purpose. A coalition of insurer and producer interests defeated HB 542 on the basis that it was an overbroad delegation of legislative authority to the Commissioner to promulgate rules regarding *all* lines of insurance and *all* military personnel regardless of status. After killing HB 542, the legislature enacted HB 764, drafted to closely reflect Congressional direction on the issue. The redrafted legislation garnered support from HB 542's sponsor and Commissioner Morrison, who issued a press release commending the legislation.
6. Independent consumer protections for insurance consumers are contained in Title 33, chapter 19, MCA, the Montana Insurance Information Privacy and Protection Act.
7. SB 138 was amended into HB 833, along with other dead tax bills, which died at the end of Regular Session. Amended again into SpS-SB9, it again died at the end of the special session. All three bills were based upon California legislation addressing the constitutionality of California statute.
8. Rep. Jonathan Windy Boy brought HB 212 arguing that credit scoring was having an adverse effect on his constituents, many of whom resided on reservations with high unemployment. Sen. Steven Gallus also introduced two bills to ban credit scoring: SB 330 directed to auto insurance only and SB 429 directed to homeowners insurance. Arguing that an individual's credit score should have the privacy protection of the Montana Constitution, Gallus has introduced credit score bans in every session since 1999, when he vowed to do so as long as he was in the legislature or until he is successful. Although he participated in the compromise leading to enactment of the NCOIL model, Insurance Commissioner John Morrison supported all three bills to repeal.
9. Introduced by trial lawyer Rep. Ken Peterson (R-Billings), HB 464 was the No. 1 priority of the Montana Trial Lawyers Association in 2007.