SENATE BILL NO. 165

INTRODUCED BY B. USHER

A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING A DUTY OF COOPERATION OF AN INSURED OR A THIRD-PARTY CLAIMANT TOWARD AN INSURER WHEN DEALING WITH CLAIMS AND SEEKING RECOVERY OF BENEFITS UNDER AN INSURANCE POLICY; PROVIDING THAT A BREACH OF THE DUTY MAY BE ASSERTED BY AN INSURER AS AN AFFIRMATIVE DEFENSE TO ANY CAUSE OF ACTION AGAINST AN INSURER UNDER SECTION 33-18-242, MCA, OR COMMENCED BY AN INSURED OR THIRD-PARTY CLAIMANT THAT ALLEGES THE INSURER'S BREACH OF CONTRACT OR THE INSURER'S BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING; ALLOWING AN INSURER TO INTRODUCE EVIDENCE CONCERNING AN INSURED'S OR THIRD-PARTY CLAIMANT'S CONDUCT IN ANY CAUSE OF ACTION AGAINST AN INSURER UNDER SECTION 33-18-242, MCA, OR THAT ALLEGES THE INSURER'S BREACH OF CONTRACT OR THE INSURER'S BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING; AMENDING SECTION 33-18-242, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

WHEREAS, it is the public policy of this state that, when liability is reasonably clear and insurance coverage exists, the prompt, fair, and equitable settlement of insurance claims are encouraged as beneficial to claimants, policyholders, insurers, and all citizens of this state; and

WHEREAS, this public policy benefits the citizens of this state because it promotes prompt, fair, and equitable settlements of insurance claims and reduces the nature, extent, and duration of costly litigation in the courts of this state; and

WHEREAS, this public policy is not promoted when an insured or a third-party claimant fails to act fairly toward an insurer and fails to cooperate when making, reporting, presenting, or delivering insurance claims or settlement demands to insurers; and

WHEREAS, it is the public policy of this state that both insured policyholders and insurers doing business in this state are entitled to a fair and reasonable opportunity to fairly investigate and evaluate

insurance claims based on reasonably available and supporting documents, records, and information regarding the insurance claim.

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

NEW SECTION. **Section 1. Insured and third-party claimant's duties -- affirmative defense.** (1) An insured or a third-party claimant shall cooperate with an insurer with respect to an insurance claim or cause of action made or asserted against ~~an~~ the insured, the insurer, or both, or reported ~~or delivered to an insurer under an insurance policy issued by~~ to the insurer. The duty to cooperate includes, in addition to other duties specified in the insurance policy, the duty to comply with the reasonable requests of the insurer in the investigation and handling of the insurance claim.

(2) An insured or a third-party claimant shall deliver claim information to the insurer to allow the insurer a fair and reasonable opportunity to investigate and evaluate each claim made against an insured, insurer, or both, or reported ~~or delivered to an insurer under an insurance policy issued by~~ to the insurer.

(3) A breach of any of the duties of an insured or a third-party claimant set forth in this section does not create a separate or independent cause of action by an insurer against an insured or a third-party claimant, but the breach of a duty may be:

(a) considered as evidence regarding whether the insurer had an opportunity to conduct a reasonable investigation based on the reasonably available claim information and whether the insurer had a reasonable basis in law or in fact for contesting the claim or the amount of the claim; and

(b) asserted by an insurer as an affirmative defense to a cause of action commenced by an insured or a third-party claimant under 33-18-242 for an insurer's alleged violation of 33-18-201(4), (5) or (6), or commenced by an insured or a third-party claimant that alleges the insurer's breach of contract or the insurer's breach of the implied covenant of good faith and fair dealing.

(4) An insurer may introduce any evidence ~~otherwise admissible~~ in a civil action ~~in the state~~ regarding the actions, inactions, and other conduct of an insured or a third-party claimant in a civil action commenced by an insured or a third-party claimant with respect to a claim or cause of action under 33-18-242

for an insurer's alleged violation of 33-18-201(4), (5) or (6), or commenced by an insured or a third-party claimant that alleges the insurer's breach of contract or the insurer's breach of the implied covenant of good faith and fair dealing.

(5) For the purposes of this section, the following definitions apply:

(a) (i) "Claim information" means documents, records, or information created, maintained, or stored in a media format that is reasonably available to an insured or a third-party claimant and that relates to, establishes, ~~or~~ proves, or may tend to establish or prove:

(A) damages of any kind or nature relating to the claim or cause of action against the insured, insurer, or both; and

(B) the liability of the insured, insurer, or both to pay, satisfy, or otherwise compensate for the damages as provided in subsection (5)(a)(i)(A).

(ii) The term includes information that is reasonably available to an insured or a third-party claimant only if the claim information is in the possession of the insured or third-party claimant, or their representatives or attorneys, or if the claim information can be reasonably obtained by the insured or third-party claimant on request.

~~(b) "Claimant" means a third-party claimant making, alleging, or pursuing an insurance claim or cause of action against an insured for damages, or against an insurer pursuant to 33-18-242, together with and including an attorney or any other authorized representative acting for or on behalf of the third-party claimant or any assignee of a third-party claimant.~~

~~(c)~~(b) "Insured" means an ~~insured~~ individual or entity insured under an insurance policy, against whom a third-party claimant is making, alleging, or pursuing an insurance claim or cause of action for damages, or an ~~insured~~ individual or entity making, alleging, or pursuing a claim or cause of action ~~arising from or related in any manner to~~ for which coverage may be provided by the insurance policy issued by the insurer to the ~~insured, together with and including an attorney or any other authorized representative acting for or on behalf of an insured or any assignee of an insured~~ individual or entity.

(c) "Third-party claimant" means a third party making, alleging, or pursuing an insurance claim or cause of action against an insured for damages, or against an insurer pursuant to 33-18-242. For purposes of

this definition, the term also means an attorney or any other authorized representative acting for or on behalf of the third-party claimant or any assignee of the third-party claimant.

Section 2. Section 33-18-242, MCA, is amended to read:

"**33-18-242. Independent cause of action -- burden of proof.** (1) An insured or a third-party claimant has an independent cause of action against an insurer for actual damages caused by the insurer's violation of ~~subsection (1), (4), (5), (6), (9), or (13) of~~ 33-18-201(1), (4), (5), (6), (9), or (13).

(2) In an action under this section, a plaintiff is not required to prove that the violations were of such frequency as to indicate a general business practice.

(3) An insured who has suffered damages as a result of the handling of an insurance claim may bring an action against the insurer for breach of the insurance contract, for fraud, or pursuant to this section, but not under any other theory or cause of action. An insured may not bring an action for bad faith in connection with the handling of an insurance claim.

(4) A third-party claimant who has suffered damages as a result of the handling of an insurance claim may bring an action against the insurer for fraud or pursuant to this section, but not under any other theory or cause of action. A third-party claimant may not bring an action for bad faith in connection with the handling of an insurance claim.

~~(4)~~(5) In an action under this section, the court or jury may award such damages as were proximately caused by the violation of ~~subsection (1), (4), (5), (6), (9), or (13) of~~ 33-18-201(1), (4), (5), (6), (9), or (13). Exemplary damages may also be assessed in accordance with 27-1-221.

~~(5)~~(6) An insurer may not be held liable under this section if the insurer had a reasonable basis in law or in fact for contesting the claim or the amount of the claim, whichever is in issue.

~~(6)~~(7) (a) An insured may file an action under this section, together with any other cause of action the insured has against the insurer. Actions may be bifurcated for trial where justice so requires.

(b) A third-party claimant may not file an action under this section until after the underlying claim has been settled or a judgment entered in favor of the claimant on the underlying claim.

~~(7)~~(8) The period prescribed for commencement of an action under this section is:

(a) for an insured, within 2 years from the date of the violation of 33-18-201; and

(b) for a third-party claimant, within 1 year from the date of the settlement of or the entry of judgment on the underlying claim.

~~(8)~~(9) As used in this section, an insurer includes a person, firm, or corporation utilizing self-insurance to pay claims made against them."

NEW SECTION. **Section 2. Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 33, chapter 18, part 2, and the provisions of Title 33, chapter 18, part 2, apply to [section 1].

NEW SECTION. **Section 3. Saving clause.** [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

NEW SECTION. **Section 4. Effective date.** [This act] is effective on passage and approval.

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AMEND