

## 1 HOUSE BILL NO. 347

2 INTRODUCED BY S. MENDENHALL

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING STATUTORY THIRD-PARTY BAD FAITH LITIGATION  
5 AGAINST INSURERS TO EXEMPT MEDICAL MALPRACTICE INSURANCE; AMENDING SECTION 33-18-242,  
6 MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

7

8 WHEREAS, the State of Montana has a compelling interest in ensuring its citizens have access to  
9 medical care and in ensuring that health care professionals practicing in the state have access to medical  
10 professional liability insurance to ensure resources are available to compensate those injured by actual  
11 negligence; and

12 WHEREAS, the availability of affordable professional liability insurance is often a significant consideration  
13 for health care professionals in deciding where to practice and thus impacts the availability of medical care; and

14 WHEREAS, most states in the United States have moved away from the doctrine of third-party bad faith  
15 in the context of insurance, which doctrine places the interests of the insured and claimant on an effectively equal  
16 footing; and

17 WHEREAS, the continuing viability of third-party bad faith actions in the context of medical professional  
18 liability or medical malpractice claims is a disincentive for insurers to enter and compete in the Montana market;  
19 and

20 WHEREAS, for a health care provider, the settlement of a professional liability claim carries with it  
21 professional and economic consequences, which may include career-long damage to reputation and income, loss  
22 or limitation of privileges at health care facilities, and review or discipline by the licensing authority; and

23 WHEREAS, in recognition of the potentially lifelong impacts of indemnity payments on health care  
24 professionals, the vast majority of professional liability policies of insurance include consent clauses giving the  
25 insured ultimate authority over whether a claim should be settled or tried; and

26 WHEREAS, because of the consequences of an indemnity payment on behalf of a health care  
27 professional and because medical professional liability claims are often medically and factually complex, a health  
28 care professional may be unwilling to agree to a settlement of a claim in which negligence is not established or,  
29 as is the case in other lines of insurance when the insurer makes the settlement decision merely to avoid costly  
30 litigation, claims that the plaintiff contends warrant payment are not settled; and

1 WHEREAS, in the context of medical professional liability or medical malpractice claims, the interests  
2 of the insured health care professional and the claimant are in unavoidable conflict; and

3 WHEREAS, the doctrine of third-party bad faith puts involved professional liability insurers in an  
4 untenable situation and exposure to the threat of costly litigation by third parties brought under section 33-18-242,  
5 MCA; and

6 WHEREAS, in recognition of this legitimate interest of the insured health care professionals of the State  
7 of Montana, professional liability insurers, particularly physician-owned insurers such as those that insure the  
8 majority of Montana health care providers, typically do not agree to settle a claim against a health care provider  
9 without the consent of the provider named in the claim and risk exposure to third-party bad faith claims; and

10 WHEREAS, the Legislature recognizes that the cause of action granted by section 33-18-242, MCA,  
11 should not be available in claims against health care providers for professional negligence.

12

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

14

15 **Section 1.** Section 33-18-242, MCA, is amended to read:

16 **"33-18-242. Independent cause of action -- burden of proof -- exception.** (1) Except in an action  
17 that includes a medical malpractice claim or claims against one or more health care providers, an insured or a  
18 third-party claimant has an independent cause of action against an insurer for actual damages caused by the  
19 insurer's violation of subsection (1), (4), (5), (6), (9), or (13) of 33-18-201. A third-party claimant does not have  
20 an independent cause of action for a medical malpractice claim or a claim against a health insurance provider.

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

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

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

30 (5) An insurer may not be held liable under this section if the insurer had a reasonable basis in law or

1 in fact for contesting the claim or the amount of the claim, whichever is in issue.

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

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

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

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

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

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

12

13 NEW SECTION. **Section 2. Effective date.** [This act] is effective on passage and approval.

14

15 NEW SECTION. **Section 3. Applicability.** [This act] applies to claims arising on or after [the effective  
16 date of this act].

17

- END -