

HOUSE BILL NO. 74

INTRODUCED BY S. VINTON

BY REQUEST OF THE STATE AUDITOR

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING LAWS RELATED TO REMEDIES THAT MAY BE SOUGHT BY THE MONTANA STATE AUDITOR; ~~REVISING LAWS RELATED TO INJUNCTIONS;~~ CLARIFYING REMEDIES REGARDING PRIVATE RIGHTS OF ACTION; ALLOWING RESTITUTION FOR INSURANCE CONSUMERS; ~~AMENDING SECTION 33-1-318~~ SECTIONS 33-1-317, 33-1-1211, 33-1-1302, 33-17-502, 33-17-1001, 33-18-233, 33-19-405, 33-20-805, 33-20-806, 33-22-115, AND 33-38-108, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

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

(Refer to Introduced Bill)

Strike everything after the enacting clause and insert:

**Section 1.** Section 33-1-317, MCA, is amended to read:

**"33-1-317. Penalty imposed by commissioner -- restitution.** (1) The commissioner may, after having conducted a hearing pursuant to 33-1-701, impose a fine not to exceed the sum of \$25,000 upon a person found to have violated a provision of this code or regulation promulgated by the commissioner, except that the fine imposed upon insurance producers or adjusters may not exceed \$5,000 per violation. The fine is in addition to all other penalties imposed by the laws of this state and must be collected by the commissioner in the name of the state of Montana. Imposition of a fine under this section is an order from which an appeal may be taken, pursuant to the provisions of 33-1-711.

(2) (a) The commissioner may, after giving reasonable notice and an opportunity for a hearing, require a person who commits a violation of this title or any rule or order issued under this title to make restitution, with interest, to a person who has sustained a financial loss resulting from the violation.

(b) The interest rate must be calculated as of the date of the final order or upon final judgment if the matter is appealed.

(c) Interest accrues at a rate commensurate with that specified in 25-9-205.

(3) (a) Fines and restitution under this section are in addition to all other penalties imposed by the laws

1 of this state AND MAY NOT PREEMPT ANY OTHER REMEDIES, CIVIL OR OTHERWISE, ALLOWED BY THE LAWS OF THIS STATE.

2 (b) Imposition of a fine or restitution under this section is an order that is subject to an appeal as provided  
3 in 33-1-711.

4 (c) THIS SECTION MAY NOT BE CONSTRUED AS CREATING A PRIVATE RIGHT OF ACTION IN ADDITION TO THOSE  
5 EXISTING UNDER THE LAWS OF THIS STATE."

6

7 **Section 2.** Section 33-1-1211, MCA, is amended to read:

8 **"33-1-1211. Administrative or civil penalties.** (1) If, after a hearing conducted under 33-1-701, the  
9 commissioner determines that a person has committed administrative or civil insurance fraud, the commissioner  
10 may:

11 (a) impose any penalty or procedure provided for in 33-1-317; or

12 (b) require the person to pay the costs of the proceeding.

13 (2) In addition to any other penalties, the commissioner shall require a person who commits  
14 administrative or civil insurance fraud to make restitution to the insurer or to any other person for all financial loss  
15 sustained as a result of the insurance fraud."

16

17 **Section 3.** Section 33-1-1302, MCA, is amended to read:

18 **"33-1-1302. Insurance, viatical settlement, medical care discount card, and pharmacy discount**  
19 **card administrative or civil fraud -- insurer.** (1) A person commits the act of insurance, viatical settlement,  
20 medical care discount card, or pharmacy discount card fraud when:

21 (a) in the course of offering or selling insurance, a medical care discount card, or a pharmacy discount  
22 card, the person misrepresents a material fact, known to the person to be untrue or made with reckless  
23 indifference as to whether it is true, with the intention of causing another person to rely upon the  
24 misrepresentation to that relying person's detriment; or

25 (b) with respect to a viatical settlement, the person violates the provisions of 33-1-1304.

26 (2) A person commits the act of insurance fraud or viatical settlement fraud by engaging in any  
27 transaction, act, practice, course of business, or course of dealing that involves a violation of insurable interest  
28 laws.

29 (3) The commissioner may, after having conducted a hearing pursuant to 33-1-701, impose the penalties  
30 or procedures provided for in 33-1-317 for a violation of 33-1-1304 or this section. Failure to pay a fine under this

1 section results in a lien upon the assets and property of the person as provided in 33-1-318(3).

2 ~~(4) In addition to any penalty provided for in 33-1-317, the commissioner may require a person regulated~~  
3 ~~under this title who commits insurance, viatical settlement, medical care discount card, or pharmacy discount card~~  
4 ~~fraud to make full restitution to the victim for all financial losses sustained as a result of the fraud with interest of~~  
5 ~~10% a year from the date of the fraud plus any costs and reasonable attorney fees, less the amount of any~~  
6 ~~income, refund, or other benefit received by the victim from the insurance, viatical settlement, medical care~~  
7 ~~discount card, or pharmacy discount card.~~

8 ~~(5)(4)~~ The commissioner may require a person who commits a violation of this part to make full restitution  
9 to any person who may have sustained any losses as a result of the fraud with interest of 10% a year from the  
10 date of the loss plus any costs and reasonable attorney fees.

11 ~~(6)(5)~~ An insurer, insurance producer, or other person who sustained any losses and who was awarded  
12 restitution may bring suit to recover those sums, including any attorney fees, interest at 10% a year, and costs  
13 incurred in obtaining a judgment.

14 ~~(7)(6)~~ Failure of a person to pay any amount ordered under this section constitutes a forfeiture of the right  
15 to do business in this state."  
16

17 **Section 4.** Section 33-17-502, MCA, is amended to read:

18 **"33-17-502. Prohibition on representation as consultant -- receiving fee.** (1) A person not licensed  
19 as an insurance consultant in this state who identifies or represents to the public that the person is an insurance  
20 consultant without having been licensed as an insurance consultant under this part or a person who uses any  
21 other designation or title that is likely to mislead the public and represents to the public that the person has  
22 particular insurance qualifications other than those for which the person may be otherwise licensed or otherwise  
23 qualified may be fined or subject to procedures pursuant to 33-1-317.

24 (2) A person not licensed as an insurance consultant with respect to the relevant kinds of insurance who  
25 receives a fee for examining, appraising, reviewing, or evaluating any insurance policy, annuity or pension  
26 contract, plan, or program or who makes recommendations or gives advice with regard to any insurance policy,  
27 annuity or pension contract, plan, or program without first having been licensed by the commissioner as an  
28 insurance consultant may be fined or subject to procedures pursuant to 33-1-317.

29 (3) This part does not apply to:

30 (a) licensed attorneys at law in this state acting in their professional capacity; or

1 (b) an actuary or a certified public accountant who provides information, recommendations, advice, or  
 2 services in a professional capacity if neither the actuary nor the certified public accountant or the actuary's or  
 3 certified public accountant's employer receives any compensation directly or indirectly on account of any  
 4 insurance, bond, annuity or pension contract that results in whole or part from that information, recommendation,  
 5 advice, or services."

6

7 **Section 5.** Section 33-17-1001, MCA, is amended to read:

8 **"33-17-1001. Suspension, revocation, or refusal of license.** (1) The commissioner may suspend,  
 9 revoke, refuse to renew, or refuse to issue a license under this chapter, may levy a ~~civil~~ penalty or enforce other  
 10 procedures in accordance with 33-1-317, or may choose any combination of actions when a licensee or applicant  
 11 for licensure has:

12 (a) engaged or is about to engage in an act or practice for which issuance of the license could have been  
 13 refused;

14 (b) obtained or attempted to obtain a license through misrepresentation or fraud, including but not limited  
 15 to providing incorrect, misleading, incomplete, or materially untrue information in the license application or in the  
 16 continuing education affidavit;

17 (c) violated or failed to comply with a provision of this code or has violated a rule, subpoena, or order  
 18 of the commissioner or of the commissioner of any other state;

19 (d) improperly withheld, misappropriated, or converted to the licensee's or applicant's own use money  
 20 or property belonging to policyholders, insurers, beneficiaries, or others and received in conduct of business  
 21 under the license;

22 (e) been convicted of a felony;

23 (f) in the conduct of the affairs under the license, used fraudulent, coercive, or dishonest practices or the  
 24 licensee or applicant is incompetent, untrustworthy, financially irresponsible, or a source of injury and loss to the  
 25 public;

26 (g) misrepresented the terms of an actual or proposed insurance contract or application for insurance;

27 (h) been found guilty of an unfair trade practice or fraud prohibited by Title 33, chapter 18;

28 (i) had a similar license denied, suspended, or revoked in any other state;

29 (j) forged another's name to an application for insurance or to any document related to an insurance  
 30 transaction;

- 1 (k) cheated on an examination for a license;
- 2 (l) knowingly accepted insurance business from a person who is not licensed;
- 3 (m) failed to comply with a final administrative or court order imposing a child support obligation; or
- 4 (n) failed to pay state income tax determined to be delinquent or to comply with any final administrative
- 5 or court order directing payment of state income tax.

6 (2) The license of a business entity may be suspended, revoked, refused, or denied if a reason listed

7 in subsection (1) applies to an individual designated in the license to exercise its powers.

8 (3) The commissioner retains the authority to enforce the provisions of and impose any penalty or

9 remedy authorized by the insurance code against any person who is under investigation for or charged with a

10 violation of the insurance code even if the person's license or registration has been surrendered, suspended,

11 revoked, refused, or denied or has lapsed."

12

13 **Section 6.** Section 33-18-233, MCA, is amended to read:

14 **"33-18-233. Administrative penalty or other procedures for failure to pay promptly.** (1) The

15 commissioner may, after a hearing, impose ~~an administrative a fine or other procedures~~ as provided in 33-1-317

16 on an insurer if the commissioner finds that the insurer as a general course of business practice in this state fails

17 to:

- 18 (a) use due diligence in processing all claims;
- 19 (b) pay claims in a timely manner;
- 20 (c) provide proper notice, when required, with respect to the reasons for the insurer's failure to make
- 21 claim payments when due;
- 22 (d) pay, without just cause, proper claims arising under coverage provided by its policies, whether the
- 23 claims are in favor of an insured, in favor of a third person with respect to the liability of an insured to the third
- 24 person, or in favor of any other person entitled to the benefits of a policy; or
- 25 (e) pay interest pursuant to 33-18-232(2).

26 (2) If an insurer can demonstrate that it has consistently paid 90% of the total dollar amount outstanding

27 in claims to each claimant within 20 working days and all of the amount within 30 working days of receipt of claims

28 during the 6-month period immediately preceding the hearing date, the insurer is not subject to the fine described

29 in subsection (1)."

30

1           **Section 7.** Section 33-19-405, MCA, is amended to read:

2           **"33-19-405. ~~Civil penalty~~ Penalty and procedures.** A person who violates this chapter is subject to  
3 the ~~civil penalty~~ and procedures provided in 33-1-317."

4

5           **Section 8.** Section 33-20-805, MCA, is amended to read:

6           **"33-20-805. Duties of insurers, insurance producers, and independent agencies.** (1) In  
7 recommending to a consumer the purchase of an annuity or the exchange of an annuity that results in another  
8 insurance transaction or series of insurance transactions, the insurance producer or the insurer when an  
9 insurance producer is not involved must have reasonable grounds for believing that the recommendation is  
10 suitable for the consumer on the basis of the facts disclosed by the consumer as to the consumer's investments,  
11 other insurance products, financial situation, and needs, including the consumer's suitability information, and that  
12 there is a reasonable basis to believe all of the following:

13           (a) the consumer has been reasonably informed of various features of the annuity, including the potential  
14 surrender period and surrender charge, potential tax penalty if the consumer sells, exchanges, surrenders, or  
15 annuitizes the annuity, mortality and expense fees, investment advisory fees, potential charges for and features  
16 of riders, limitations on interest returns, insurance and investment components, and market risk;

17           (b) the consumer would receive a benefit from the transaction;

18           (c) the particular annuity as a whole, the underlying subaccounts to which funds are allocated at the time  
19 of the purchase, exchange, or replacement of the annuity, and riders and similar product enhancements, if any,  
20 are suitable for the particular consumer based on the consumer's suitability information; and

21           (d) in the case of an exchange or replacement of an annuity, the exchange or replacement is suitable,  
22 including taking into consideration whether:

23           (i) the consumer will incur a surrender charge, be subject to the commencement of a new surrender  
24 period, lose existing benefits, or be subject to increased fees, investment advisory fees, or charges for riders and  
25 similar product enhancements;

26           (ii) the consumer would benefit from product enhancements and improvements;

27           (iii) the consumer has had another annuity exchange or replacement and, in particular, an exchange or  
28 replacement within the preceding 36 months; and

29           (iv) the transaction as a whole is suitable for the consumer based on the consumer's suitability  
30 information.

1 (2) Prior to the execution of a purchase, exchange, or replacement of an annuity resulting from a  
2 recommendation, an insurance producer or an insurer when an insurance producer is not involved shall make  
3 reasonable efforts to obtain the consumer's suitability information.

4 (3) Except as permitted under subsection (4), an insurer may not issue an annuity recommended to a  
5 consumer unless there is a reasonable basis to believe the annuity is suitable based on the consumer's suitability  
6 information.

7 (4) (a) Except as provided under subsection (4)(b), an insurance producer or an insurer when an  
8 insurance producer is not involved does not have any obligation to a consumer under subsection (1) or (3) related  
9 to any annuity transaction if:

10 (i) no recommendation is made;

11 (ii) a recommendation is made but later found to have been prepared based on materially inaccurate  
12 information provided by the consumer;

13 (iii) the consumer refuses to provide relevant suitability information requested by the insurer or insurance  
14 producer and the annuity transaction is not recommended; or

15 (iv) the consumer decides to enter into an annuity transaction that is not based on a recommendation of  
16 the insurer or insurance producer.

17 (b) An insurer's or insurance producer's issuance of an annuity under subsection (4)(a) must be  
18 reasonable under all the circumstances actually known or which after reasonable inquiry should be known to the  
19 insurer or insurance producer at the time the annuity is issued.

20 (5) An insurance producer or an insurer when an insurance producer is not involved shall at the time of  
21 sale:

22 (a) make a record of any recommendation subject to subsection (1);

23 (b) obtain a statement signed by the consumer acknowledging the consumer's refusal to provide  
24 suitability information, if any; and

25 (c) if a consumer decides to enter into an annuity transaction that is not based on the insurance  
26 producer's or insurer's recommendation, obtain a statement signed by the consumer acknowledging that the  
27 annuity transaction is not recommended.

28 (6) An insurer shall establish and maintain a supervision system that is reasonably designed to achieve  
29 the insurer's and its insurance producers' compliance with this section and, at a minimum, shall:

30 (a) maintain reasonable procedures to inform its insurance producers of the requirements of this section

1 and shall incorporate the requirements of this section into relevant insurance producer training manuals;

2 (b) establish standards for insurance producer product training and maintain reasonable procedures to  
3 require its insurance producers to comply with the requirements of 33-20-807;

4 (c) provide product-specific training and training materials that explain all material features of its annuity  
5 products to its insurance producers;

6 (d) maintain procedures that are designed to ensure that there is a reasonable basis for determining that  
7 a recommendation is suitable for the consumer prior to issuance of an annuity. The review procedures must  
8 establish selection criteria for the purpose of identifying selected transactions for additional review.

9 (e) maintain reasonable procedures, such as confirmation of consumer suitability information, systematic  
10 consumer surveys, interviews, confirmation letters, and programs of internal monitoring, to detect  
11 recommendations that are not suitable; and

12 (f) annually provide a report to senior management, including to the senior manager responsible for audit  
13 functions, that details a review, with appropriate testing, reasonably designed to determine the effectiveness of  
14 the supervision system, the exceptions found, and corrective action taken or recommended, if any.

15 (7) (a) An insurer may contract with a third party to establish and maintain a system of supervision as  
16 provided for in subsection (6).

17 (b) An insurer is responsible for taking appropriate corrective action and may be subject to ~~sanctions and~~  
18 the penalties and procedures under 33-1-317 and 33-1-318 regardless of whether the insurer contracts for  
19 performance of a function and regardless of the insurer's compliance with subsection (7)(c).

20 (c) An insurer's supervision system under subsection (6) must include supervision of the performance  
21 of third parties under this subsection (7) and must include, at a minimum, the following:

22 (i) annually obtaining a certification from a director, officer, or principal of the third party that the third  
23 party is performing the required functions; and

24 (ii) monitoring and, as appropriate, conducting audits to ensure that the third parties are performing the  
25 required functions.

26 (8) An insurer is not required by this section to:

27 (a) review or provide for review of insurance producer solicited transactions not related to annuities; or

28 (b) include in its system of supervision an insurance producer's recommendations to consumers of  
29 products other than the annuities offered by the insurer.

30 (9) An insurance producer or an insurer when an insurance producer is not involved may not dissuade



1 or attempt to dissuade a consumer from:

2 (a) truthfully responding to an insurer's request for confirmation of suitability information;

3 (b) filing a complaint; or

4 (c) cooperating with the investigation of a complaint.

5 (10)(a) Insurers, insurance producers, and independent agencies shall maintain or must be able to make  
6 available to the commissioner records of the information collected from the consumer and other information used  
7 in making the recommendations that were the basis for insurance transactions for 5 years after the insurance  
8 transaction is completed by the insurer. An insurer is permitted, but is not required, to maintain documentation  
9 on behalf of an insurance producer.

10 (b) Records required to be maintained by this section may be maintained in paper, photographic,  
11 microprocess, magnetic, mechanical, or electronic media or by any process that accurately reproduces the actual  
12 document."

13

14 **Section 9.** Section 33-20-806, MCA, is amended to read:

15 **"33-20-806. Mitigation of responsibility.** (1) The commissioner may order:

16 (a) an insurer or insurance producer to take reasonably appropriate corrective action for any consumer  
17 harmed by the insurer's or insurance producer's violation of this part; or

18 (b) an insurance producer or independent agency that employs or contracts with another insurance  
19 producer to sell or solicit the sale of annuities to consumers to take reasonably appropriate corrective action for  
20 any consumer harmed by the other insurance producer's violation of this part.

21 (2) A violation of this part is an unfair trade practice under Title 33, chapter 18. ~~Fines~~ Penalties and  
22 procedures may be imposed pursuant to 33-1-317."

23

24 **Section 10.** Section 33-22-115, MCA, is amended to read:

25 **"33-22-115. Provider agreement limited to covered services -- dental network constraints --**  
26 **penalty -- definitions.** (1) A provider agreement entered into or renewed on or after July 1, 2013, between  
27 dentists licensed under Title 37, chapter 4, and an issuer that offers an excepted benefits plan for limited-scope  
28 dental benefits or a health benefit plan that includes covered services may not:

29 (a) require the dentist to provide dental services to an individual covered under the excepted benefits  
30 plan or health benefit plan at a fee set by or subject to the approval of the issuer unless the dental services are

1 covered services; or

2 (b) prohibit the dentist from offering or providing to an individual covered under the excepted benefits  
3 plan or health benefit plan any dental services that are not covered services. The fee for the noncovered services  
4 may be determined only under terms or conditions set by the dentist or negotiated by the dentist with the  
5 individual covered under the excepted benefits plan or health benefit plan.

6 (c) provide minimal coverage for covered services under the provider agreement for the sole purpose  
7 of avoiding the requirements of this section.

8 (2) A business entity that owns a network of health care providers and markets access to that network  
9 may not circumvent the terms of this section by making available to an issuer of an excepted benefits plan for  
10 limited-scope dental benefits or a health benefit plan that includes covered services any dentists in that network  
11 if the business entity sets dental services fees in its network for any services except covered services.

12 (3) An issuer of an excepted benefits plan for limited-scope dental benefits or a health benefit plan that  
13 includes covered services is subject to a fine or other procedure as provided in 33-1-317 for a violation of this  
14 section.

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

16 (a) "Covered services" means dental care services provided under a plan for limited-scope dental  
17 benefits or a health benefit plan for which a payment is available subject to the application of contractual terms,  
18 including but not limited to annual or lifetime maximums, deductibles, copayments, coinsurance, waiting periods,  
19 frequency limitations, or alternative benefit reimbursement.

20 (b) "Issuer" includes an insurer, a health service corporation, or a third-party administrator that offers or  
21 administers an excepted benefits plan for limited-scope dental benefits or a health benefit plan that includes  
22 covered services."  
23

24 **Section 11.** Section 33-38-108, MCA, is amended to read:

25 **"33-38-108. Pharmacy discount card supplier requirements.** (1) A pharmacy discount card supplier  
26 that sells, markets, promotes, or distributes, for a consideration, a pharmacy discount card in Montana:

27 (a) shall clearly and conspicuously disclose on all advertising, marketing materials, and enrollment  
28 materials that discounts offered through the use of a pharmacy discount card are not insurance and are not  
29 intended as a substitute for insurance;

30 (b) shall clearly and conspicuously disclose on all pharmacy discount cards that discounts offered

1 through the use of the pharmacy discount card are not insurance;

2 (c) shall disclose, when a pharmacy discount card is sold in combination with a group limited  
3 supplemental insurance policy, that discounts offered through the use of the pharmacy discount card are not  
4 insurance;

5 (d) may not, in the advertising or offering of the pharmacy discount card, use terms or phrases commonly  
6 associated only with insurance products that could lead a prospective purchaser or user of the card to believe  
7 that the pharmacy discount card is composed of insurance products or is a substitute for insurance, despite  
8 disclaimers to the contrary by the pharmacy discount card supplier;

9 (e) shall ensure that each prescription drug provider claimed by the pharmacy discount card supplier to  
10 offer a discount in conjunction with the pharmacy discount card is contractually bound to provide that discount  
11 to the purchaser or user;

12 (f) may not make misleading, deceptive, or fraudulent representations regarding a discount or range of  
13 discounts available through the use of a pharmacy discount card;

14 (g) shall provide to each prospective purchaser or user prior to purchase reasonable access to a list of  
15 the benefits and services provided through the use of a pharmacy discount card;

16 (h) shall provide a prospective purchaser or user prior to purchase access to a list of any prescription  
17 drug providers in the prospective purchaser's or user's service area;

18 (i) shall disclose in all enrollment materials that a pharmacy discount card purchaser or user has 30 days  
19 to cancel a pharmacy discount card as provided in 33-38-104;

20 (j) shall make available to each pharmacy discount card user continuously after purchase of a pharmacy  
21 discount card, through a toll-free telephone number, the internet, and in writing upon request, the name, address,  
22 and telephone number of each prescription drug provider in the user's service area, including mail order  
23 prescription drug providers, that are bound by contract to offer prescription drugs in accordance with the terms  
24 and conditions of the pharmacy discount card; and

25 (k) shall designate and provide the commissioner with the name, address, and telephone number of a  
26 pharmacy discount card compliance officer responsible for ensuring compliance with the provisions of this part  
27 applicable to pharmacy discount cards and pharmacy discount card suppliers.

28 (2) A person violating the provisions of subsection (1) is subject to the fine or other procedures provided  
29 for in 33-1-317."  
30

1            NEW SECTION. **Section 12. Effective date.** [This act] is effective on passage and approval.

2

3            NEW SECTION. **Section 13. Applicability.** [This act] applies to all orders entered on or after [the  
4 effective date of this act], including orders relating to acts or practices that occurred before [the effective date of  
5 this act].

6

- END -