

SENATE BILL NO. 492

INTRODUCED BY S. FITZPATRICK

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A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS RELATING TO THE RECOVERY OF COSTS IN AN ACTION FOR WHICH AN INSURER HAS BEEN FOUND TO NOT OWE A DUTY TO DEFEND THE INSURED; PROHIBITING AN INSURER FROM RECOVERING CERTAIN COSTS; PROVIDING AN EXCEPTION ALLOWING AN INSURER TO RECOVER CERTAIN COSTS; AND PROVIDING EXCEPTIONS TO APPLICABILITY."

WHEREAS, in *Travelers Casualty and Surety Company v. Ribi Immunochem Research*, 2005 MT 50, 326 Mont. 174, 108 P.3d 469, the Montana Supreme Court held that an insurer may recover defense costs when the insurer did not have a duty to defend any of the asserted claims; and

WHEREAS, in subsequent cases, including *Horace Mann Insurance Company v. Hanke*, 2013 MT 320, 372 Mont. 350, 312 P.3d 429, the Montana Supreme Court affirmed its decision to allow an insurer to recover defense costs when the insurer was determined to have no duty to defend an insured.

THEREFORE, this act generally prohibits insurers from recovering costs in an action for which the insurer has been found to not owe a duty to defend, but also provides an exception for actions in which certain conditions are met.

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

NEW SECTION. Section 1. Insurer costs prohibited -- duty to defend -- exception. (1) Except as provided in [section 2] and subsection (2) of this section, an insurer may not recover costs of defending an insured against claims asserted against the insured if the insurer is subsequently determined to not owe a duty to defend the insured.

(2) An insurer may recover costs of defending an insured against claims asserted against the insured when the insurer is subsequently determined to not owe a duty to defend the insured if:

(a) the insurance policy or contract contains language giving the insurer the right to seek

1 reimbursement or recover those costs from the insured;

2 (b) the insurer provides written notice to the insured that the insurer may seek reimbursement or
3 recovery of those costs from the insured at the time the insurer assumes the defense of the claim or when an
4 insurer discovers facts that lead the insurer to question whether a claim is covered, whichever is later; and

5 (c) the insurer institutes an action to determine whether the insurer owes the insured a duty to
6 defend within 120 days of determining whether a question exists as to whether a claim is covered under the
7 policy.

8 (3) The insured has the right to recover, or seek reimbursement of, those costs from a third party
9 pursuant to a contract or agreement or as otherwise provided by law, but only to the extent an insurer has
10 recovered those costs.

11 (4) Nothing in this section compromises an insurer's right to seek recovery or reimbursement of
12 costs under this section from any party other than the insured against whom the claim has been asserted.

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14 NEW SECTION. Section 2. Exceptions to applicability. [Section 1] does not apply and an insurer
15 may seek reimbursement from an insured for any amount paid by the insurer in defending any claim asserted
16 against an insured if:

17 (1) the insured made fraudulent or material misrepresentations or concealed or omitted facts or
18 information in the application for insurance, and the insurer, in good faith, would not have issued the policy or
19 contract if the true facts had been made known to the insurer;

20 (2) the insured made fraudulent or material misrepresentations or concealed or omitted facts or
21 information in the submission of the claim; or

22 (3) the insurance policy or contract is a professional liability insurance policy or contract.

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24 NEW SECTION. Section 3. Codification instruction. [Sections 1 and 2] are intended to be codified
25 as an integral part of Title 33, chapter 18, part 1, and the provisions of Title 33, chapter 18, part 1, apply to
26 [sections 1 and 2].

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