

HOUSE BILL NO. 179
INTRODUCED BY G. MATTHEWS
BY REQUEST OF THE STATE AUDITOR

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE LAWS RELATING TO CAPTIVE INSURANCE COMPANIES; PROVIDING FOR SPONSORED CAPTIVE INSURANCE COMPANIES; ALLOWING RECIPROCAL INSURERS TO BE AN ASSOCIATION CAPTIVE INSURANCE COMPANY; ALLOWING AN ASSOCIATION CAPTIVE INSURANCE COMPANY OR INDUSTRIAL INSURED GROUP FORMED AS A STOCK OR MUTUAL CORPORATION TO CONVERT TO OR MERGE WITH A RECIPROCAL INSURER; ALLOWING A CAPTIVE INSURANCE COMPANY TO PROVIDE EXCESS WORKERS' COMPENSATION INSURANCE COVERAGE; REQUIRING A CAPTIVE INSURANCE COMPANY TO OBTAIN A CERTIFICATE FROM THE COMMISSIONER OF INSURANCE BEFORE ITS FORMATION; AMENDING SECTIONS 33-28-101, 33-28-102, 33-28-104, 33-28-105, AND 33-28-207, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

NEW SECTION. Section 1. Sponsored captive insurance company. (1) One or more sponsors may form a sponsored captive insurance company.

(2) A sponsored captive insurance company formed or licensed under the provisions of this chapter may establish and maintain one or more protected cells to insure risks of one or more participants, subject to the following conditions:

(a) The shareholders of the sponsored captive insurance company must be limited to its participants and sponsors.

(b) Each protected cell must be accounted for separately on the books and records of the sponsored captive insurance company to reflect the financial condition and result of operations of the protected cell, including but not limited to the net income or loss, dividends or other distributions to participants, and any other factor provided in the participant contract or required by the commissioner.

(c) The assets of a protected cell may not be chargeable with liabilities arising from any other insurance business of the sponsored captive insurance company.

(d) A sale, exchange, or other transfer of assets may not be made by a sponsored captive insurance

company among any of its protected cells without the consent of the participants of each affected protected cell.

(e) A sale, exchange, transfer of assets, dividend, or distribution may not be made from a protected cell to a sponsor or a participant without the commissioner's prior written approval, which may not be given if the sale, exchange, transfer, dividend, or distribution would result in insolvency or impairment with respect to the protected cell.

(f) Each sponsored captive insurance company shall file annually with the commissioner any financial reports required by the commissioner and shall include, without limitation, accounting statements detailing the financial experience of each protected cell.

(g) Each sponsored captive insurance company shall notify the commissioner in writing within 20 business days from the time that a protected cell has become impaired or insolvent or is otherwise unable to meet its claim or expense obligations.

(h) A participant contract may not take effect without the commissioner's prior written approval.

(i) An addition of each new protected cell or the withdrawal of any participant of an existing protected cell constitutes a change in the business plan of the sponsored captive insurance company and may not be effective without the commissioner's prior written approval.

(j) The business written by a sponsored captive insurance company, with respect to each cell, must be:

(i) fronted by an insurance company licensed under the laws of any state;

(ii) reinsured by a reinsurer authorized or approved by the commissioner; or

(iii) secured by a trust fund in the United States for the benefit of policyholders and claimants, which must be funded by an irrevocable letter of credit or other asset that is acceptable to the commissioner, and with the following requirements:

(A) the amount of the security provided by the trust fund may not be less than the reserves associated with the liabilities that are not fronted or reinsured, including but not limited to reserves for losses that are allocated for loss adjustment expenses, incurred but not reported losses, and unearned premiums for business written through the participant's protected cell;

(B) the commissioner may require the sponsored captive insurance company to increase the funding of any trust;

(C) if the form of security in the trust is a letter of credit, the letter of credit must be established, issued, or confirmed by a bank chartered in this state, a member of the federal reserve system, or a bank chartered by another state if that state-chartered bank is acceptable to the commissioner; and

(D) the trust and trust instrument must be in a form and with terms approved by the commissioner.

NEW SECTION. Section 2. Qualification of sponsors. (1) A sponsor of a captive insurance company must be an insurer licensed under the laws of any state, a reinsurer licensed under the laws of any state, or a captive insurance company formed or licensed under this chapter.

(2) A risk retention group may not be either a sponsor or a participant of a sponsored captive insurance company.

NEW SECTION. Section 3. Delinquency of sponsored captive insurance company. If delinquency proceedings have been taken against a sponsored captive insurance company:

(1) the assets of a protected cell may not be used to pay any expenses other than those attributable to the protected cell; and

(2) the capital and surplus of the sponsored captive insurance company must be available at all times to pay expenses of or claims against the sponsored captive insurance company.

NEW SECTION. Section 4. Participants in sponsored captive insurance companies. (1) An association, corporation, limited liability company, partnership, trust, or other business entity may be a participant in a sponsored captive insurance company.

(2) A sponsor may be a participant in a sponsored captive insurance company.

(3) A participant is not required to be a shareholder of a sponsored captive insurance company or its affiliate.

(4) A participant shall insure only its own risks through a sponsored captive insurance company.

NEW SECTION. Section 5. Excess workers' compensation insurance -- reinsurance of self-insured plans. (1) A captive insurance company may provide excess workers' compensation insurance to its parent and affiliated companies, unless the laws of the state having jurisdiction over the transaction prohibit providing the insurance.

(2) A captive insurance company may reinsure workers' compensation of a qualified self-insured plan of its parent and affiliated companies.

NEW SECTION. Section 6. Conversion to or merger with reciprocal insurer. (1) An association captive insurance company or industrial insured group formed as a stock or mutual corporation may be converted to or merged with a reciprocal insurer in accordance with the provisions of this section.

(2) A plan for conversion or merger must:

(a) be fair and equitable to the shareholders, in the case of a stock insurer, or the policyholders, in the case of a mutual insurer; and

(b) provide for the purchase of the shares of any nonconsenting shareholder of a stock insurer or the policyholder interest of any nonconsenting policyholder of a mutual insurer.

(3) In order to convert to a reciprocal insurer, the conversion must be accomplished under a reasonable plan and procedure approved by the commissioner. The commissioner may not approve the plan unless it:

(a) provides for a hearing upon notice to the insurer, directors, officers, and stockholders or policyholders who have the right to appear at the hearing, unless the commissioner waives or modifies the requirements for the hearing;

(b) provides for the conversion of the existing stockholder or policyholder interests into subscriber interests in the resulting reciprocal insurer proportionate to stockholder or policyholder interests;

(c) (i) in the case of a stock insurer, is approved, by a majority of the shareholders who are entitled to vote and who are represented at a regular or special meeting at which a quorum is present either in person or by proxy; or

(ii) in the case of a mutual insurer, by a majority of the voting interests of the policyholders who are represented at a regular or special meeting at which a quorum is present either in person or by proxy; and

(d) meets the requirements of 33-28-105.

(4) If the commissioner approves a plan of conversion, the certificate of authority for the converting insurer must be amended to state that it is a reciprocal insurer. The conversion is effective and the corporate existence of the converting entity ceases to exist upon the date on which the amended certificate is issued to the attorney-in-fact of the reciprocal insurer. The resulting reciprocal insurer shall notify the secretary of state of the conversion.

(5) The commissioner may not approve a plan for a merger unless it:

(a) meets the requirements of:

(i) 33-3-217, with respect to the merger with a captive stock insurer; or

(ii) 33-3-218, with respect to the merger with a captive mutual insurer; and

(b) meets the requirements of 33-28-105.

Section 7. Section 33-28-101, MCA, is amended to read:

"33-28-101. Definitions. As used in this chapter, unless the context requires otherwise, the following

definitions apply:

(1) "Affiliated company" means any company in the same corporate system as a parent, an industrial insured, or a member organization by virtue of common ownership, control, operation, or management.

(2) "Association" means any legal association of sole proprietorships, corporations, partnerships, limited liability companies, or associations that has been in continuous existence for at least 1 year, the member organizations of which collectively, or the association itself:

(a) owns, controls, or holds with power to vote all of the outstanding voting securities of an association captive insurance company incorporated as a stock insurer; ~~or~~

(b) has complete voting control over an association captive insurance company incorporated as a mutual insurer; or

(c) constitutes all of the subscribers of an association captive insurance company formed as a reciprocal insurer.

(3) "Association captive insurance company" means any company that insures risks of the member organizations of an association and their affiliated companies.

(4) "Captive insurance company" means any pure captive insurance company, association captive insurance company, sponsored captive insurance company, or industrial insured captive insurance company formed or licensed under the provisions of this chapter.

(5) "Excess workers' compensation insurance" means, in the case of an employer that has insured or self-insured its workers' compensation risks in accordance with applicable state or federal law, insurance that is in excess of a specified perincident or aggregate limit established by the commissioner.

~~(5)(6)~~ "Industrial insured" means an insured:

(a) who procures the insurance of any risk or risks by use of the services of a full-time employee acting as an insurance manager or buyer;

(b) whose aggregate annual premiums for insurance on all risks total at least \$25,000; and

(c) who has at least 25 full-time employees.

~~(6)(7)~~ "Industrial insured captive insurance company" means any company that insures risks of the industrial insureds that comprise the industrial insured group and their affiliated companies.

~~(7)(8)~~ "Industrial insured group" means any group of industrial insureds that collectively:

(a) owns, controls, or holds with power to vote all of the outstanding voting securities of an industrial insured captive insurance company incorporated as a stock insurer; or

(b) has complete voting control over an industrial insured captive insurance company incorporated as

a mutual insurer.

~~(8)~~(9) "Member organization" means a sole proprietorship, corporation, partnership, or association that belongs to an association.

~~(9)~~(10) "Parent" means a corporation, partnership, or individual that directly or indirectly owns, controls, or holds with power to vote more than 50% of the outstanding voting securities of a pure captive insurance company.

(11) "Participant" means an entity, as enumerated in [section 4], and any affiliates of the entity that are insured by a sponsored captive insurance company in which the losses of the participant are limited through a participant contract to the participant's pro rata share of the assets of one or more protected cells identified in the participant contract.

(12) "Participant contract" means a contract by which a sponsored captive insurance company insures the risks of a participant and limits the losses of each participant in the contract.

(13) "Protected cell" means a separate account established by a sponsored captive insurance company formed or licensed under the provisions of this chapter, in which assets are maintained for one or more participants in accordance with the terms of one or more participant contracts to fund the liability of the sponsored captive insurance company with respect to the participants as set forth in the participant contracts.

~~(10)~~(14) "Pure captive insurance company" means any company that insures risks of its parent and affiliated companies.

(15) "Sponsor" means any entity that meets the requirements of [sections 1 and 2] and is approved by the commissioner to provide all or part of the capital and surplus required by the applicable law and to organize and operate a sponsored captive insurance company.

(16) "Sponsored captive insurance company" means any captive insurance company:

(a) in which the minimum capital and surplus required by applicable law are provided by one or more sponsors;

(b) that is formed or licensed under the provisions of this chapter;

(c) that insures the risks of separate participants through participant contracts; and

(d) that funds its liability to each participant through one or more protected cells and segregates the assets of each protected cell from the assets of other protected cells and from the assets of the sponsored captive insurance company's general account."

Section 8. Section 33-28-102, MCA, is amended to read:

"33-28-102. Licensing -- authority. (1) A captive insurance company, when permitted by its articles of incorporation, charter, or other organizational document, may apply to the commissioner for a license to provide property and casualty insurance, except that:

(a) a pure captive insurance company may not insure any risks other than those of its parent and affiliated companies;

(b) an industrial insured captive insurance company may not insure any risks other than those of the industrial insureds that comprise the industrial insured group and their affiliated companies;

(c) an association captive insurance company may not insure any risks other than those of the member organizations of its association or their affiliated companies; ~~and~~

(d) a captive insurance company may not:

(i) provide personal lines of insurance, including but not limited to motor vehicle or homeowner's insurance coverage or any component of those coverages;

(ii) accept or cede reinsurance except as provided in 33-28-203; or

(iii) provide health or disability insurance or life insurance; ~~or~~ and

~~(iv) provide workers' compensation insurance in any manner or form.~~

(e) a sponsored captive insurance company may not insure any risks other than those of its participants.

(2) A captive insurance company may not do any insurance business in this state unless:

(a) it first obtains from the commissioner a license authorizing it to do insurance business in this state;

(b) its board of directors or a reciprocal insurer's subscribers' advisory committee holds at least one meeting each year in this state; and

(c) it maintains its principal place of business in this state.

(3) (a) Before receiving a license, a captive insurance company shall:

(i) with respect to a captive insurance company formed as a corporation:

(A) file with the commissioner a certified copy of its charter and bylaws, a statement under oath of its president and secretary showing its financial condition, and any other statements or documents required by the commissioner; and

~~(B)~~ (B) submit to the commissioner for approval a description of the coverages, deductibles, coverage limits, and rates, together with any additional information that the commissioner may reasonably require;

(ii) with respect to a captive insurance company formed as a reciprocal insurer:

(A) file with the commissioner a certified copy of the power of attorney of its attorney-in-fact, a certified copy of its subscribers' agreement, a statement under oath of its attorney-in-fact showing its financial condition,

and any other statements or documents required by the commissioner; and

(B) submit to the commissioner for approval a description of the coverages, deductibles, coverage limits, and rates, together with any additional information that the commissioner may reasonably require.

(b) In the event of any subsequent material change in any ~~item~~ of the items in the description provided for in subsection (3)(a)(~~ii~~), the captive insurance company shall submit to the commissioner for approval an appropriate revision and may not offer any additional kinds of insurance until a revision of the description is approved by the commissioner. The captive insurance company shall inform the commissioner of any change in rates within 30 days of the adoption of the change.

(c) In addition to the information required by subsections (3)(a) and (3)(b), each applicant captive insurance company shall file with the commissioner evidence of the following:

(i) the amount and liquidity of its assets relative to the risks to be assumed;

(ii) the adequacy of the expertise, experience, and character of the person or persons who will manage it;

(iii) the overall soundness of its plan of operation;

(iv) the adequacy of the loss prevention programs of its parent, member organizations, or industrial insureds as applicable; and

(v) any other factors considered relevant by the commissioner in ascertaining whether the proposed captive insurance company will be able to meet its policy obligations.

(d) In addition to the information required by this section, each applicant that is a sponsored captive insurance company shall file with the commissioner the following:

(i) a business plan demonstrating how the applicant will account for the loss and expense experience of each protected cell at a level of detail found to be sufficient by the commissioner and how it will report the experience to the commissioner;

(ii) a statement acknowledging that all financial records of the sponsored captive insurance company, including records pertaining to any protected cells, must be made available for inspection or examination by the commissioner or the commissioner's designated agent;

(iii) all contracts or sample contracts between the sponsored captive insurance company and any participants; and

(iv) evidence that expenses will be allocated to each protected cell in a fair and equitable manner.

~~(d)~~(e) Information submitted pursuant to this subsection (3) must remain confidential and may not be made public by the commissioner or an employee or agent of the commissioner without the written consent of

the company, except that:

(i) the information may be discoverable by a party in a civil action or contested case to which the captive insurance company that submitted the information is a party, upon a showing by the party seeking to discover the information that the information sought is relevant to and necessary for the furtherance of the action or case, the information sought is unavailable from other nonconfidential sources, and a subpoena issued by a judicial or administrative officer of competent jurisdiction has been submitted to the commissioner;

(ii) the commissioner may, in the commissioner's discretion, disclose the information to a public officer having jurisdiction over the regulation of insurance in another state or to a public official of the federal government, as long as the public official agrees in writing to maintain the confidentiality of the information and the laws of the state in which the public official serves, if applicable, require the information to be and to remain confidential.

(4) (a) Each captive insurance company shall pay to the commissioner a nonrefundable fee of \$200 for the examining, investigating, and processing of its application for license, and the commissioner is authorized to retain legal, financial, and examination services from outside the department, the reasonable cost of which may be charged to the applicant.

(b) The provisions of Title 33, chapter 1, part 4, apply to examinations, investigations, and processing conducted under the authority of this section. In addition, each captive insurance company shall pay a license fee for the year of registration and a renewal fee for each subsequent year of \$300.

(5) If the commissioner is satisfied that the documents and statements that the applicant captive insurance company has filed comply with the provisions of this chapter and applicable provisions of Title 33, the commissioner may grant a license authorizing the company to do insurance business in this state. The license is effective until March 1 of each year and may be renewed upon proper compliance with this chapter."

Section 9. Section 33-28-104, MCA, is amended to read:

"33-28-104. Minimum capital surplus -- letter of credit. (1) A captive insurance company may not be issued a license unless it possesses and maintains unimpaired paid-in capital and surplus of:

(a) in the case of a pure captive insurance company, not less than \$250,000;

(b) in the case of an industrial insured captive insurance company, not less than \$500,000; ~~and~~

(c) in the case of an association captive insurance company, not less than \$750,000, except for an association captive insurance company organized as a reciprocal insurer, not less than \$1 million; and

(d) in the case of a sponsored captive insurance company, not less than \$1 million.

(2) The commissioner may require additional capital and surplus based upon the type, volume, and nature of insurance business transacted.

(3) Capital and surplus may be in the form of cash or an irrevocable letter of credit issued by a bank chartered by the state of Montana or a member bank of the federal reserve system and approved by the commissioner."

Section 10. Section 33-28-105, MCA, is amended to read:

"33-28-105. Formation of captive insurance companies. (1) A pure captive insurance company or a sponsored captive insurance company must be incorporated as a stock insurer with its capital divided into shares and held by the stockholders.

(2) An association captive insurance company or an industrial insured captive insurance company may be:

(a) incorporated as a stock insurer with its capital divided into shares and held by the stockholders; ~~or~~
 (b) incorporated as a mutual insurer without capital stock, the governing body of which is elected by the member organizations of its association or associations; or

(c) organized as a reciprocal insurer under Title 33, chapter 5.

(3) A captive insurance company incorporated or organized in this state may not have less than three incorporators, at least one of whom must be a resident of this state.

(4) ~~(a) A captive insurance company shall deliver to the commissioner a draft of its proposed articles of incorporation. The commissioner shall examine the proposed articles of incorporation, and if the commissioner finds that the proposed articles comply with this chapter and the applicable provisions of Title 33, the commissioner shall approve, in writing, the draft articles~~ In the case of a captive insurance company formed as a corporation and before the articles of incorporation are transmitted to the secretary of state, the incorporators shall file a copy of the proposed articles of incorporation and a petition with the commissioner requesting the commissioner to issue a certificate that finds that the establishment and maintenance of the proposed corporation will promote the general good of the state. In reviewing the petition, the commissioner shall consider:

(i) the character, reputation, financial standing, and purposes of the incorporators;
(ii) the character, reputation, financial responsibility, insurance experience, and business qualifications of the officers and directors; and

(iii) any other factors that the commissioner considers appropriate.

(b) If the commissioner does not issue a certificate or finds that the proposed articles of incorporation

of the captive insurance company do not meet the requirements of the applicable laws, including but not limited to 33-2-112, the commissioner shall refuse to approve the draft of the articles of incorporation and shall return the draft to the proposed incorporators, together with a written statement explaining the refusal.

(c) ~~The~~ If the commissioner issues a certificate and approves the draft articles of incorporation, the commissioner shall forward the certificate and an approved draft of articles of incorporation to the proposed incorporators. The incorporators shall prepare two sets of the approved articles of incorporation and shall file one set of articles of incorporation with the secretary of state as required by the applicable law and one set with the commissioner.

(5) The capital stock of a captive insurance company incorporated as a stock insurer may be authorized with no par value.

(6) At least one of the members of the board of directors of a captive insurance company must be a resident of this state.

(7) (a) A captive insurance company formed as a corporation has the privileges and is subject to the provisions of general corporation law, as well as the applicable provisions contained in this chapter.

(b) In the event of conflict between the provisions of general corporation law and this chapter, the provisions of this chapter control.

(8) (a) With respect to a captive insurance company formed as a reciprocal insurer, the organizers shall petition and request that the commissioner issue a certificate that finds that the establishment and maintenance of the proposed association will promote the general good of the state. In reviewing the petition, the commissioner shall consider:

(i) the character, reputation, financial standing, and purposes of the organizers;

(ii) the character, reputation, financial responsibility, insurance experience, and business qualifications of the attorney-in-fact; and

(iii) any other factors that the commissioner considers appropriate.

(b) The commissioner may either approve the petition and issue the certificate or reject the petition in a written statement of the reasons for the rejection.

(c) A captive insurance company formed as a reciprocal insurer has the privileges and is subject to the provisions of Title 33, chapter 5, in addition to the applicable provisions of this chapter. If there is a conflict between Title 33, chapter 5, and this chapter, the provisions of this chapter control. If a reciprocal insurer is determined to be subject to other provisions of Title 33, chapter 5, the other provisions of chapter 5 are not applicable to a reciprocal captive insurance company formed under this chapter unless those provisions of

chapter 5 are expressly made applicable to captive insurance companies.

(d) The subscribers' agreement or other organizing document of a captive insurance company formed as a reciprocal insurer may authorize a quorum of a subscribers' advisory committee to consist of at least one-third of the number of its members.

~~(e)~~(9) The Except as provided in [section 6], the provisions of Title 33 pertaining to mergers, consolidations, conversions, mutualizations, and redomestications apply in determining the procedures to be followed by captive insurance companies in carrying out any of those transactions."

Section 11. Section 33-28-207, MCA, is amended to read:

"33-28-207. Applicable laws. (1) The provisions relating to supervision, rehabilitation, and liquidation of insurance companies as provided for in Title 33, chapter 2, part 13, and the provisions of 33-18-201, 33-18-203, 33-18-205, and 33-18-242 apply to captive insurance companies.

(2) This chapter may not be construed as exempting a captive insurance company, its parent, or affiliated companies from compliance with the laws governing workers' compensation insurance.

(3) Except as expressly provided in this chapter, the provisions of Title 33 do not apply to captive insurance companies."

NEW SECTION. **Section 12. Codification instruction.** [Sections 1 through 6] are intended to be codified as an integral part of Title 33, chapter 28, and the provisions of Title 33, chapter 28, apply to [sections 1 through 6].

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

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