MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON PUBLIC HEALTH, WELFARE AND SAFETY

Call to Order: By **CHAIRMAN JERRY O'NEIL,** on March 24, 2003 at 3:38 P.M., in Room 317-A Capitol.

ROLL CALL

Members Present:

Sen. Jerry O'Neil, Chairman (R)
Sen. Duane Grimes, Vice Chairman (R)
Sen. John C. Bohlinger (R)
Sen. Brent R. Cromley (D)
Sen. Bob DePratu (R)
Sen. John Esp (R)
Sen. Dan Harrington (D)
Sen. Trudi Schmidt (D)
Sen. Emily Stonington (D)

Members Excused: None.

Members Absent: None.

Staff Present: Dave Bohyer, Legislative Branch
Andrea Gustafson, Committee Secretary

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: HB 695, 3/10/2003; HB 205, 3/10/2003; HB 384, 3/10/2003
Executive Action:

HEARING ON HB 695

Sponsor: **REP. ROY BROWN, HD 14, Billings**

Proponents: **REP. DON ROBERTS, HD 10, Billings**
Joe Erpelding, Montana Orthopedic Society
Frederick Kahn, Rocky Mountain Health Network
John Wilson, Orthopedic Surgeon
Lance Parks, Anesthesiologist
Susan Good, Surgical Specialist (?)
Mona Jamison, The Doctors' Company
Pat Melby, MT Medical Association
Mark Taylor, MT Hospital Association
Tom Countway, Physician, Billings
Mike Foster, St. Vincent's Hospital, St. James Hospital, Holy Rosary Hospital

Opponents: **Craig Daue, Attorney, Missoula**
Larry Riley, Attorney, Missoula
Al Smith, Montana Trial Lawyer's Association

Opening Statement by Sponsor:

REP. ROY BROWN, HD 14, Billings, handed out a packet of news articles. **EXHIBIT(phs62a01)** He said physicians across the country had been in the news lately for going through extreme lengths to protest medical mal-practice insurance rates that are forcing them to raise their fees, but more important, limit the care they give to their patients. In Florida more than 800 doctors who were all from the same county walked off the job to protest skyrocketing insurance rates. In Georgia, one out of five doctors were abandoning high risks but medically necessary procedures because of high rates. Among those doctors were obstetricians. Connecticut and New York physicians were joining their colleagues in New Jersey in wide ranging fix ups. In Pennsylvania more than 900 doctors had left the state siting high insurance costs. In West Virginia two dozen surgeons walked out forcing some hospitals to transfer patients to neighboring states. Congress had started to deal with this critical issue. A bill had passed the House which provided non-economic damage caps assignment of liability, statute of limitations and sliding scale legal fee limits. Medical malpractice reform was a top priority for **SEN. FRISK** the new Senate Majority Leader. **REP. BROWN** said what doctors across the country were facing right now was beginning to surface in some medical specialities in Montana. Montana's neurosurgeons and orthopedic surgeons were the first to feel the crunch but they were assuredly not the last. Other

specialities were next in line for double digit increases. He said Montana had some great reform measures already in place but more needed to be done. Doctors across the county were staging strikes and walk outs while physicians in Montana stick with it, treating patients carefully and keeping one eye on the expenses as they grow at a very rapid pace. High malpractice rates were passed on to everyone. It was not just the doctor. The main reason that people did not have health insurance was that it was too expensive, which did not stop them from getting treatment. Treatment just often went unpaid. He said he set up a meeting with **REP. DON ROBERTS** who was an oral surgeon in Billings, to discuss the issue and expected a meager turnout. 13 doctors from varying practices showed up and many of them were speaking for their whole growth of doctors. They were very concerned about that and if they could even continue providing services much longer. The bill put guidelines for expert witness testimony and it was a small step to help with malpractice rates. Insurance companies did not need another reason not to come to Montana. It sets up standards and qualifications for expert medical testimony. It was one area Congress and other statutes were silent on and it was a big concern for doctors across the state. **REP. BROWN** said he hoped HB 695 could do a little bit to stabilize those rates. There were concerns about the wording of the version in the House and therefore the language had been changed and an amendment would be available.

Proponents' Testimony:

REP. DON ROBERTS, HD 10, Billings HB 695, provided expert witness qualification standards to testify in medical malpractice cases. He said Montana had lost half its medical malpractice insurers down from eight to four in the past two years. Lack of competition meant higher premiums. 30 states had variations of the witness' qualification standards. At the National Governors Conference, Best Practices Health Committee sited that the most important characteristics of expert testimony qualification were: Licensed Practitioner, Board Certified, Practice speciality, currently practicing and practicing within a set schedule from the date of injury or certified by the court as an expert. The U.S. Department of Health and Human Services publication, September 25, 2002 entitled Update on the Medical Litigation Crisis Not the Result in the Insurance Cycle Fact 2 stated that crisis was a result of litigation excesses. The same publications stated that the costs showed nearly $25,000 was used to defend against the case that never goes to court. The case was filed and looking at the chart, it was $25,000 just to investigate. At the same time, medical malpractice lawsuits had risen over the years. Jury awards and medical malpractice claims jumped 43% in one year from $700,000 in 1999 to $1 million in the

year 2000. Currently it was $1.4 million. Juries were compensating plaintiffs more generously than in the past. From 1994 to 2000, jury verdict research found that more than half of medical malpractice jury awards were for more than $500,000.

Joe Erpelding, Montana Orthopedic Society, said his association had 112 orthopedic surgeons in the state of Montana. Last fall he went to a national meeting and these issues were discussed. One thing that came out of the meeting was that Montana ranked number two in the country for malpractice insurance premiums for orthopedics. That was higher than 49 other states including Washington, D.C. He sent a survey out to the members and asked what was the biggest problem they were faced with and what they were struggling with. The number one response was malpractice premiums escalating. On an average in the state there was a 40% increase in the last two years and some companies had left the state. There were only two Class A providers in the state that would take new customers so doctors were restricted to applying to one or the other for malpractice premiums and if they had to change carriers, their premiums skyrocketed. **Mr. Erpelding** said he talked to a family doctor in Hardin who sat on the Board of Lake Montana Memorial Hospital who said two years ago the premium for the hospital was $34,000. That insurance company FICO left the state so they had to get some bids. They could get only one company to bid and their rates went to $197,000 in one year. Then the next year they found another provider available but they had to buy a tail to cover in case there was an event during that year that came up later, their tail coverage was $357,000 to try to switch to another company. This puts places like that in jeopardy of losing all services for the community. There were two things that dictated medical liability costs and one was the claims rate and the second was claim severity. He said fortunately in Montana there was an economic cap of $250K and it has been in place for many years and had never gone to the Supreme Court, but based on the national agenda that was going on, it was likely it would not end in that arena. The claims rate was six per capita, which was a high claims rate in Montana. He said it was a problem and the people he represented asked him to make sure the state was aware.

Frederick Kahn, Rocky Mountain Health Network, said the network was a physician hospital organization based in Billings, that partnered with St. Vincent Hospital and represented more than 300 medical providers for hospitals and many auxiliary providers who provided medical care for all of Eastern Montana and Northern Wyoming. He said his organization was in strong support of HB 695 and that they were already seeing the crises in Billings. In Billings they went through their physician hospital organization that was a contract organization. They currently contracted for roughly 90,000 patients who were covered with a variety of

insurance carriers. To be able to do that they needed a full panel of providers and in the last six months, two obstetricians dropped out. Many providers were looking at the rising rates of providing care. One cost was providing malpractice coverage and it was starting to threaten access to care in Billings. He said they could not sustain 20%, 30%, or 40% rate hikes. The hikes were passed on to customers and the insurance premium hikes in Montana were almost paralleling the rate hikes. They were founded on a few principles such as providing quality care, access to care, getting patients in and providing good quality care. He said he did not know how they were going to sustain the organizational foundation that they had and for those reasons they were in strong support of the bill.

John Wilson, Orthopedic Surgeon said he had a private practice in Billings where he worked with eight other orthopedic surgeons, podiatrists and currently, three physician assistants. He thought malpractice had become a major problem and that the reforms were necessary. In 2002 his group paid $224,000 for malpractice coverage. They had four companies bid on the contract then. Physicians Company left the state at the end of that year and they had to seek a new bid. Two more companies made bids and their rate now was $448,000. Their overhead had gone from a 38% to 45% and half that was for increases for malpractice. He said it was going to affect access, and physicians had started to do less of the difficult procedures and they had less desire to take care of patients who had difficult problems that could lead to potential litigation. He said it was common for him to get an MRI on patients for a potential knee problem that was not 100% typical for the problem he thought it was. Each of those MRI's was between $600-$1,000 and safe medicine could not be practiced without getting an MRI on those patients. He strongly supported the expert witness bill. He said it made sense that a Board certified practicing physician provided the expert testimony necessary that would help one differentiate between a bad result being cause of the malpractice or the bad result simply being a bad result.

Lance Parks, Anesthesiologist, said until last year he had practiced full time as a cardiovascular anesthesiologist in the heart surgery program at St. Vincent's Hospital. He was there to represent the anesthesiologists of Billings, unofficially. He supported the bill and he wanted to see greater malpractice reform. Mr. Parks said he was nearing the end of his practice and was finding forces pushing him closer to retirement. One force was the threat of malpractice, although in the 29 years he had practiced he had never been mentioned in a law suit, yet every day he entered an operating room, he wondered if this person were going to be the patient who did it to him. He believed he practiced good medicine. They saw an increase in

malpractice suits and they were not just economic problems, it was harassment. In spite of a legal malpractice panel and in spite of limits on pain and suffering. They were seeing more lawsuits and also increased premiums in spite of the restrictions they had. A colleague of his was sued along with his hospital and he was found not guilty. It took 30 days to defend his lawsuit, which was 30 days away from a practice of anesthesia, thus creating a hardship for the hospital and the hospital's patients and the surgeons and all the providers as well. There was a significant legal precedent for control of this malpractice problem. The oldest limitation on recovery essentially in English common law which was adapted by the U.S. law. He said an employee could not sue an employer for ordinary negligence. Because the United States Legal code adopted this, worker's compensation was set up to provide for injuries for ordinary negligence such as any injury on the job. Whole systems were set up for worker's compensation with specific limitations about how much a worker could recover for an injury for whatever. In addition, the U.S. military, in Section 38 in the U.S. military code, Section 1114, Chapter 38 United States Code, gave serious restrictions on compensation for veterans and the limitations had compensation and were compared with what is in the private sector. Long ago the government decided not to remove prohibition against employee suits because the practice would cause massive business closings and unemployment. He contended that the federal and state government could make those decisions based on the health, safety, and welfare of its citizens, i.e., our patients, to limit the scope of malpractice liability. The bill was one small way of helping that to prevent massive reduction in the state. The shape of the state should apply the same standards for the medical profession it did to its employers and employer's relationships. He proposed a different kind of system of medical malpractice that would set up medical compensation insurance because medical malpractice, and he found the term heinous, because it implied that they were intentionally harming patients. He guaranteed that no one in the room and none of his colleagues who were under strict constant surveillance by all other colleagues were intentionally harming the patient anytime. There were accidents and they could set up medical compensation insurance much like workers compensation where premiums were paid by health care providers and patients.

Susan Good, Surgical Specialist, said it was a contentious bill in the House. Many controversies were surrounding it from over transmittal and different people had gotten to work on it. She had an amendment. She said some would say that everything was working well but there were seven issues noted by the National Council of State Legislatures as essential for a complete malpractice insurance package. There were seven items on the list and Montana had five of them. Montana did not have the

expert witness qualification which was what the source of the amendment was and the second one was tax on attorney fees. She said those two remained and one was in HB 695 regarding the expert witness.

Mona Jamison, The Doctors' Company, said The Doctor's Company was a doctor owned and a doctor-covered insurance company. They were out of California and were the largest physician owned medical malpractice insurance company in the country. They had been insuring Montana Physicians for years and would continue to do so. In 1995, then **REP. GRIMES,** was the sponsor of what they considered major in the form of **HB 309.** It established the $250K cap on non-economic damages. It was patterned after MICRA, the California Statute, which had been responsible and could be documented for being responsible for keeping rates down or stabilized. No solution to any problem was black and white, but they believed that the bill passed in 1995 along with other provisions in the bill had a major impact on insurance rates. The Doctor's company felt that passage of 309 and the cap on economic damages had definitely stabilized the rates in Montana. She said she had several articles to support that and could provide the committee with them. There was a 2002 U.S. Department of Public Health study that compared states that had caps and no caps. In states where there was a $250,000 cap on non-economic damages, the average increase was 15%. In Montana the average increase was 21%. States without caps on non-economic damages showed a 44% increase in rates. The caps were a big piece of that pie and they were a major one. She said for this bill it was a piece of the pie. They were looking at different elements in terms of court reform that came into play of the stabilization of rates. Although the expert witness of use that is occurring in other states was not occurring at nearly the same degree. In Montana they felt it was time and that was why they strongly support the bill to complete that package of total reform. Ms. Jamison said it was reasonable and it was good. Many states had it and they urged support. They thought it good public policy and believed it would help flush out the rest of that court reform.

{Tape: 1; Side: A}

Pat Melby, MT Medical Association, said the physician members of the Montana Medical Association supported HB 695 and urged the committee's concurrence in the bill. However, they were concerned about the effects of the bill on several of its members as the bill was currently drafted. **Mr. Melby** said the amendments that **REP. BROWN** mentioned and that **Susan Good** mentioned would solve the problem. Currently there were several psychiatrists in the state who served as expert witnesses in many court cases,

both for plaintiffs and defendants and those in civil and criminal cases. One of the psychiatrists would be precluded under the current language of the bill from serving as an expert witness because that individual retired from active practice more than five years ago. Under the current bill they would no longer be able to serve as an expert witness. There was another one in Billings who retired from seeing patients two years ago and in three years would be precluded from continuing to serve as an expert witness. Therefore, they supported the adoption of the amendments that **REP. BROWN** referenced and if they were the ones he had seen earlier, those individuals could continue to practice forensic psychiatry.

Mark Taylor, MT Hospital Association (MHA), said MHA and its hospitals had seen in the last year facilities that had experienced an excess of 400% increases in med-mal insurance and that was without any claims history. He said that was significant. **Mr. Taylor** said it was a tool in the belt because addressing from what was seen in other states, stabilization of professional liability and it was something that was not unusual. He had recently received an e-mail that talked about the package of reforms that just passed in West Virginia. It was similar to what was in Montana and expert qualifications were a significant part of that package.

Tom Countway, Podiatrist, Billings, said he practiced with a group of orthopedic surgeons. He said some of his concerns had already been expressed and was there to support the bill. He had witnessed the same increase in premiums over the past year. He said he had been a past president of the State Podiatry Association, although he was not there officially to represent them but, they had many concerns within their association also. They were not as critical as orthopedic or neurosurgeons, but the felt they were running in excess. It would eventually drive practitioners out of the state shortly and would not attract new ones.

Mike Foster, St. Vincent's Hospital, St. James Hospital, Holy Rosary Hospital, said the three Sisters of Charity Hospitals appreciated **REP. BROWN** coming forward with the bill because it was a national problem and it had serious implications for Montana. **Mr. Taylor** talked about the effect on hospitals for the premiums they paid for liability insurance and saw tremendous increases in premium costs. They realized the bill was a small piece of a very large puzzle, but they appreciated the step that was being taken in addressing the issue because it was affecting the health care industry in Montana.

Opponents' Testimony:

Craig Daue, Attorney, Missoula, said he had practiced law for the past 26 years in Montana. For the last 15 years, his practice had been limited almost exclusively to medical malpractice cases. For the first 10 of those last 15 years he defended doctors, hospitals, nurses, dentists, other health care providers. For the last five years, he represented patients in the Medical Malpractice Association. He agreed with all the testimony heard up to wanting safe guards. There was a serious problem with medical malpractice insurance rates. **Mr. Daue** said he was there to speak against this bill because it would do nothing to help the problem, but rather it was a major step into unintended consequences. He said that first, the bill addressed a problem that did not exist in Montana, that was the testimony of unqualified expert witnesses against our Montana doctors. If there were such a problem, testimony or submission of example after example of cases would have been received in which unqualified experts were coming here to testify against Montana doctors and it had not been submitted and the reason was that Montana had in place now, rules of evidence and case laws that already prohibited that from taking place. Numerous Montana Supreme Court cases threw out Montana Medical Malpractice cases, since there were no expert witnesses or that there was an unqualified expert. We had rules of evidence that specifically limited the type of opinion that could be given and what needed to be done to qualify as an expert witness. He said he was not suggesting that there were not unscrupulous doctors who did not have proper qualifications who were prepared to come and testify if given the chance. He did suggest that there were members of his profession who would hire somebody and attempt to get away with that. The fact was they already had in place effective rules of evidence in case law that kept that from happening. There were fundamental flaws with the bill that created enormous problems. For instance, the bill would exclude from testimony, exclude from qualification, certain doctors who were critical to both the defense and prosecution of med-mal cases. He had a case when he was defending a physician, in which it was alleged the obstetrician delayed the delivery of a child and it had negligently resulted in the child being deprived of oxygen for some period, suffering brain damage. **Mr. Daue** brought in an expert witness who was a geneticist who could say that based on examination of the child's genetic profile, she unfortunately had a very serious inherited chromosomal disorder that caused her problems. The bill would not allow a geneticist to come in and give that testimony. The only witnesses that would be allowed then under the bill would be other obstetricians, people who did not have the expertise to make some of those kinds of conclusions. The bill would expose legitimate witnesses to

intimidation and abuse. The way that could happen in looking at the language in the bill, it set up requirements for time an expert must have spent working in the field of the defendant, the doctor's speciality to qualify. It said the healthcare provider could not give testimony unless the provider had at least five years of practice before testifying. He asked how to determine who was qualified under the terms of the language if a doctor chose to have an expert come in and say he met the qualifications, and had worked for five years before the event: at least half his time was in the same speciality as the defendant. Our unscrupulous attorneys on both sides of this were going to say, "well let's find out about that . . . let me see your tax returns for the last five years." They will want to see who subpoenaed who at work in the office, to find out whether indeed the person had the practice in half the defendant's time in the speciality. Finding expert witnesses to testify was already difficult for patients and finding witnesses to testify was difficult for doctors. If expert witnesses were legitimate ones, the ones with good practices, the teachers of medical schools were going to be exposed to that kind of oppressive abuse, nothing was going to be able to prevent it. They were not going to want to be involved in the case. **Mr. Daue** said the bill had other problems. It would prevent a better expert from testifying sometimes. An example was a case he had for a family practitioner who allegedly had been negligent in working up a breast lump and it resulted in supposedly a delay in diagnosis of breast cancer. His expert witness then was not another Family Practitioner, but a breast cancer surgeon. The breast cancer surgeon said he specialized in that kind of case and he said that if the woman had been his patient he would not have treated her differently and it did not make any difference the period of time the delay occurred. **Mr. Daue** said under the bill if he were defending that doctor again he could not call that breast surgeon because he would be over qualified. He would have to call a family practitioner and he would be denied on both sides the opportunity to call a better expert. This bill was going to provoke litigation about its terms and it required the expert have spent at least half her or his professional time in practice. He posed a hypothetical situation of a mostly retired physician who worked one day a month at a clinic where she used to practice full time, the rest of the time she spent fishing. She spent 100% of her professional time practicing. Nevertheless, it was only one day a month, so this would be a difficulty faced when applied in court, in cases where experts were being offered who was going to be able to testify or not. There was going to be much litigation of what the term meant "practicing in the same or substantially the same practice as the defendant." Lawyers would have a field day with it.

SEN. STONINGTON apologized for interrupting and asked **Mr. Daue** if he had seen the amendments. **Mr. Daue** said he had seen the drafted amendments. He was asked to look at the bill and he had the same thought that it had enormous problems. It created many unintended consequences. It was a hammer trying to put in a screw and it did not accomplish what it intended to do. He was asked if it could be fixed and he said it could be improved thus the amendments, but he did not think the amendments made it necessary, nor did he think as amended it would be beneficial. At best, the amendments would say, "okay, if we were going to limit the experts to these kinds of qualifications only those experts would be testifying on what we called the standard care applicable to that individual obstetrician, neurosurgeon, orthopedic surgeon." He said there should still be the ability to bring in experts from other specialities to prove other points in the case because if it were a delayed diagnosis of cancer and it was a family practitioner who made the diagnosis, an oncologist was the most knowledgeable expert about what effect that had in a six-month delay and how it affected the patient. The question would be asked if she would lose a chance for a better outcome, and her expert then should be an oncologist on that issue. **Mr. Daue** said the amendments dealt specifically with requirements restricted to standard care experts. The amendments would allow better experts. None the less he was still opposed to the bill because he though it a simplistic approach to what was a complex and dynamic process and that was the way a law suit was prepared and tried. He said they all agreed that infection control was a good thing in hospitals but the last thing they wanted were some lawyers trying to tell doctors and hospitals how to prevent infection. He said he did not hear any of the physicians say it was going to solve the problem of outrageous malpractice rates in Montana. What it was going to do was result in many cases on both side of the family defendant going out and hiring another expert to cover the requirement of this and then going forward in the line of experts used now. The unqualified expert was already subject to challenge. He was unaware of large verdicts or settlements in Montana attributed to an unqualified doctor offering herself or himself as a witness and not being torn to shreds by the defense attorney. He said **Mr. Larry Riley** was there and that he used to work with him. They were partners in a firm and **Mr. Riley** was the most experienced medical malpractice defense lawyer in the state. He had tried more cases than many malpractice defense lawyers and **Mr. Riley** taught him the business. He currently ran the trial practice at the law school and taught young men and women how to try those cases. He had another generation of young lawyers in his law firm that he was training to defend those cases. **Mr. Daue** was interested to hear **Mr. Riley's** thoughts whether defense lawyers feel they needed it. From the prospective of representing patients it did not help

them. It created many problems and it did not help the defendants nor does it properly address the issue of increased insurance rates.

Larry Riley, Attorney, Missoula, passed out three pages concerning instructions and Article VII Opinions and Expert Testimony. **EXHIBIT(phs62a02)** At the invitation of the Montana Medical Association since 1994, they had written a complimentary advice column each month in their publication dealing with a broad variety of medical legal issues. He said he was very conflicted about being there. One prominent defense lawyer in this state, who was asked to come here today said he was not going to come because he did not want to be seen as anti-doctor or anti-hospital. There was nobody in the state who had devoted more of his life professionally to try to help doctors and hospitals in the state. Mr. Riley said he was not anti-doctor or hospital, he was anti-unnecessary bill, however. He had given it a great deal of thought before coming and he said erroneous information had been given and he hoped to correct that. First, the hearing was confusing. He said the hearing was for a bill that dealt with expert witnesses. Almost everybody who had testified had talked about the insurance crisis and how bad and awful medical malpractice claims were. In 1999 and 2000, American Psychiatric Association invited him to Chicago and to New York to speak at their meetings regarding medical malpractice. He was very conscious of that, and knew it was one of the worst things that could happen to a health care provider. However, the bill was about expert witnesses and they were getting the two mixed up. He said to single them out so whatever decision was made could be based on reliable information and background rather than unreliable information. He referred to the Montana Rule Book's civil procedure rules and others including the Montana Rules of Evidence. The rules that governed how cases were tried and how judges allowed or disallowed evidence that came in. He also brought the current pattern of jury instructions for the state of Montana. This was a committee appointed by the Montana Supreme Court with lawyers on both sides of the cases. They spent a great deal of time looking at an approved way stating the law to the jury during a jury trial. On the first page of the handout he gave, down at the bottom, Section 3.01 Professional negligence, general duty of a board-certified doctor. This and above it were Montana cases that had gone and were tried through a district court in the lower court, had gone to the Montana Supreme Court and been approved by the Supreme Court. It said an expert had to be somebody in the same speciality or they were not allowed to testify. The same thing HB 695 was saying. There were a few doctors who were not Board certified. He explained that Board Certification was a test that doctors had to take after they

began to practice. There was a written and oral component. On the next page of the hand out, Section 3.02, the part that applied to non-board certified physicians, and the case law supporting it, Mr. Riley said it had been in Montana forever, very good laws that came out of its courts saying that unqualified experts could not testify. The third page of the hand out, under Rule 701, which was not a court decision but a legislative enactment, where the legislature had adopted the Montana Rules that applied to the trial case. Article 7, Opinions and Expert Witnessing, under 702, testimony by experts and it went on to say that *"if the scientific technical or other specialized knowledgeable will assist the trier of fact to understand the evidence or determine a fact in issue, the witness qualified as an expert by knowledge, skill, experience, training, or education may testify there to in the form of opinion or otherwise."* The specific Rules of Evidence and the case decisions were specific laws that the judge applied in terms of who was allowed to testify. He admired the people who came and voiced a concern about what was going on in the medical arena. He said he was greatly concerned about it and he did not know how we could be in a bigger crisis, in terms of premiums and doctors leaving. He said the bill was not going to touch premiums going up. This bill was not going to do anything about that. All the bill would do was complicate law that had been on the books forever and it was unnecessary. He said we had the law, it applied, it worked, and it did not need to be tinkered with. He said he respected the work **Susan Good** did and that she came with a good heart, but had been fed some misinformation. She said Montana was listed as one of the states that did not have any regulation of expert witnesses and the publication was incorrect. He said as for the other issue, the Montana Legislature in 1975, in cooperation with the Montana Medical Association, passed the Montana Medical Screening Template and they did so to do away with frivolous lawsuits. No other person in the state of Montana had to go through a screening panel if they wanted to file a law suit, if they wanted to get a divorce, if they were in an automobile accident, or if they had a contract dispute. They could go to a lawyer and go into court. In 1975 the legislative body enacted a law that said before a person could file a malpractice claim he had to file an application to review that before the Montana Medical Screening Template. There were about 200 of those cases heard every year and they were heard in Helena. They took a few hours as opposed to a few weeks. They were quick and the results were confidential. He said frivolous law suits did not get beyond there. He had been before the panel numerous times each month and at any given time he had 30 to 40 medical malpractice cases he was defending and had done that for the better part of the last 20 years of his 37 years of practice. He got to see it up close and personal and the bill did not have

anything to do with that. He hoped **Craig Daue**, if **Mr. Riley** ever had to try a case against him, called an unqualified expert. **Mr. Riley** hoped it was the expert he identified with because the judge was not going to let him testify. **Mr. Riley** said he would show the jury instructions and site Rule 703 to the judge and the judge would not allow him to testify. He said he settled more than 200 malpractice claims and not one of those claims was there an unqualified expert that had anything to do with evaluation of that claim. **Mr. Riley** wanted to close by addressing the insurance premium issue. In Montana there had been three medical malpractice insurance crises. There was one in the 70's, one in the mid 80's and there was one now. In Montana's economic history, the insurance premium crisis coincided very directly with a drop in the market. In the year 2000 and 2001 in Atlanta and in San Diego, attending medical malpractice meetings, Vice Presidents of major insurance companies in the country testified that medical malpractice insurance companies could operate, have a loss of 5% or 10% since the market was doing well. That meant for every dollar premium they took in, they could spend out and pay out a $1.05 to $1.10 in claims running their insurance companies. It was because the balance of the premium they invested in the market and if the market were doing well enough they were profitable. Mr. Riley said the current medical malpractice crisis did not relate to HB 695. It related to two things. It related to what happened in the country on September 11, 2001. The reason that was important was because many of those people who lost much money had what was called reinsurance. They were insured to a certain amount and they reinsure the rest of the losses. Reinsurers lost their shirt on 9/11, and right on the heels of 9/11, the market went to hell. Insurance companies could no longer invest in the market to make up the difference in premiums. In the 90's, 10 different malpractice insurance companies were selling insurance in the state and when the market went bad most of them went away. Some went bankrupt, such as the biggest insurer of hospitals in the county, FICO. He thought MICRA laws passed by California was a good model. Some of it was passed in Montana, but he was not aware of anything in MICRA, and he said he read it very closely, that had anything to do with this kind of expert witness bill. They had the same kind of expert witness law that Montana currently had. It was well covered in Montana, well regulated in Montana.

{Tape: 1; Side: B}

Al Smith, Montana Trial Lawyer's Association, passed out Amendment HB069506.ajm. **EXHIBIT(phs62a03)** Mr. Smith said they worked with the doctors and the hospitals, and **Susan Good** and others, to come up with the amendments. It made it workable. He said the bill as was heard by **Mr. Riley**, was not going to

bring down medical malpractice rates. It was not going to happen. The entire health care cost in the United States was about $1.15 trillion and $6.05 billion was spent on medical malpractice insurance, which was less than 1% of total health care costs. He said that even if medical malpractice were wiped out altogether there was not going to be a decrease in health care costs. He pointed out in **Ms. Good's** testimony that Montana already had five of the seven magic silver bullets for medical malpractice toward reform but it was also heard from the doctors that insurance rates were going up and the reason for that was as **Mr. Riley** testified, was the insurance reform. Each time there was a crisis, there had been a crisis in the stock market as well. Insurance companies made their money predominately by investing people's premiums in the market. When the market was down things got hard. The other thing that was in his handout, was from the Wall Street Journal, from Business Week, and from other med-mal insurance carriers that said the insurance crisis was self inflicting. It was business practices, underpriced policies throughout the 90's, not pricing them appropriately for what their actual risk was because it could make the money on the market. From 1988 to 1998 and the problem we have had with numbers was that we were two to three years behind the numbers of insurance policies that came out. From 1988 to 1998, healthcare costs went up 74%, med-mal premiums went up 5.7% that was part of the problem. It was a gradual increase over the years and there was a precipitous increase now. He said the one thing that really worked in California was MICRA. MICRA was in effect for eight years and the premium rates kept escalating all those years. The magic thing that happened after that 8-year time was insurance reform. When that insurance reform went through in California, which was when the insurance premium rates actually came down and then stayed level for many years. Mr. Smith said they did not think the bill was necessary, but if there was a need to pass the bill, the amendments would clear up any confusion.

Informational Testimony: None.

Questions from Committee Members and Responses:

Ms. Good wanted to respond to **Mr. Riley's** comment that it was perhaps an error when I talked about the five out of seven. She said her information came from the National Council of State Legislatures when they had seven statutes, not rules as **Mr. Riley** sited, but actual statutes that were essential to a complete malpractice reform package.

SEN. DUANE GRIMES, SD 20, Clancy asked **Mr. Riley** about his earlier comments, if he had the same or different conclusion concerning the $250,000 caps the legislature passed in 1995, that

it had nothing to do with the insurance premium increases. **SEN. GRIMES** asked if he would say the same for the caps. **Mr. Riley** said no. The $250,000 cap was significant, and the big unknown was what the Supreme Court was going to do about it. Whether it would be declared unconstitutional and if they knew solidly it was going to be upheld would make a difference.

SEN. GRIMES asked about the two of the seven things, one was that there were no caps on attorney fees and would that make a difference in med-mal practice premiums. **Mr. Riley** said yes, he thought it would.

SEN. GRIMES said **Mr. Riley's** conclusion was that expert witness qualifications would not make a difference because it was already in the rules of evidence. **Mr. Riley** said yes, by rules of evidence and by the many cases that had gone to the Montana Supreme Court and decided the issue. He saw it every day in his practice. A case was dismissed recently because the expert was not qualified. They filed a motion for summary judgement and the judge threw the case out because the person was not a qualified expert. It worked.

SEN. GRIMES asked if he knew that insurance companies would not consider firm expert witness statutes like this one in their considerations of medical malpractice premiums. **Mr. Riley** said he did not think it was going to make any difference to them because it is not going to change anything for medical malpractice insurance companies. A sub speciality of trial lawyers was defending med-mal claims. It was a specialized area and only a handful of defense lawyers and a handful of plaintiff lawyers worked in the area always. He did not know if any of those lawyers had been consulted with about the bill. It was unfortunate if they had been because whoever proposed the bill would have heard many bills that could be introduced, but do not introduce one that was not going to solve anything that did not already address the problems.

SEN. GRIMES said NCSL, ALEC and others rated this very high in the ability to offset med-mal premiums. There must be a reason for that and he wondered if **REP. BROWN** had an anecdote or other static that came from the organization that would support that.

REP. BROWN said NCSL and ALEC and other organizations had gone through all the states and identified seven statutes that all go into MICRA to make a difference as far as states go. Montana had done a good job of filling those except two and those were attorney fees and expert witness rules. He asked the county commissioner whether they had expert witness rules that could define what expert witness qualifications could be and he said

yes. They had tried to do that in the past, but it was not well defined. **REP. BROWN** said he would not have brought the bill forward if he did not think it was a problem. He said that some doctors he had spoken to said that people that were not qualified have testified on various malpractice cases that they had been involved in and so they felt it was necessary. When reading the words "may testify," it let other people get involved when using the word "may." He thought it would make a difference in regards to insurance companies.

SEN. GRIMES asked **Mr. Riley** to respond to that. **Mr. Riley** said the "may," meant when a person went to trial, he had a judge who decided what evidence could be presented, which was as old as the history of jurisprudence. When a case was presented, witnesses testified and exhibits were introduced. The judge decided which of those were relevant and so the "may" meant that it was up to the judge to decide. He said we had qualified district judges.

SEN. GRIMES said a code commissioner worked with the codes every day and that the civil rules of the Montana Rules and Procedures were the domains of the Supreme Court, all of which was in code. This was why there was an expert available. The code commissioner, told the sponsor there was some ambiguity. **SEN. GRIMES** said he should ask one of the representatives from the company if that actually was creating a problem for them. **Mr. Riley** said the problem might be that people said there was not a specific legislative act, i.e., a code section. There were the Rules of Evidence and there was a Supreme Court decision. If a code section was wanted, take 701 through 705 and make it a code section. That solved the problem which was what they had been working with for years.

SEN. GRIMES asked if he would be a proponent if they did that in the code as it had been originally with caps on attorney fees. **Mr. Riley** said yes, particularly if they followed the MICRA laws concerning the attorneys' fee caps. It was the only workable law he was aware of.

SEN. BRENT CROMLEY, SD 9, Billing, asked if there was any support from an attorney who supported the bill. **REP. BROWN** believed some worked with the proponents and the opponents that came up with the amendment.

SEN. CROMLEY asked if there was anyone he could call.

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Mr. Taylor said speaking for the Montana Hospital Association, he worked with **Pat Melby** who was also a lawyer for the Montana Medical Association and others.

SEN. CROMLEY asked if anyone was there who represented hospitals, doctors, or medical providers in med-mal cases that supported the bill. **Mr. Taylor** said to the extent that those issues would be raised in support of the bill it would be through the association and its representatives there, but there were not any lawyers.

SEN. CROMLEY asked if under Montana's current rules was there a certain amount of standardization which was comparable to rules used in other states. **Mr. Riley** said very much so.

SEN. CROMLEY asked to suppose Montana adopted the bill which mostly made up its own rules, what might that do to insurance rates in the state. **Mr. Riley** said it would create confusion to adopt the bill, confusion that was not now injected in the system we had. It would do nothing to the premiums.

SEN. EMILY STONINGTON, SD 15, Bozeman, asked **REP. BROWN** why he felt the need to go from rules of evidence to statute. **REP. BROWN** said when he met with the doctors, they told him that it was a problem and that evidently the rules seen now were not working as far as the expert witness situation went. It was at that point this was put together because we felt sideboards on the expert witness qualifications were needed and it made sense to put it in statute so there would not be any questions about it. He saw where there could be situations due to the fact that there were no side boards in the statute that court cases could last a lot longer because there was this question about whether a person was qualified to testify, which added to the cost of malpractice.

SEN. STONINGTON asked whether he had statistics or actual evidence of places where the Rules of Evidence had not worked in qualifying an expert witness. **REP. BROWN** said he did not, that all he had were discussions with doctors who said it had been a problem.

SEN. STONINGTON asked whether the doctors had specific situations or cases, in which it had been a problem. She thought **Mr. Riley** was clear that judges heard a witness and judges determined whether the person was qualified to testify. **Mr. Riley** said it would create confusion even with the amendments. **REP. BROWN** said all he knew was what doctors have told him that it was a problem. Several neurosurgeons from Billings told him that in some particular cases they had been involved in where people who had never been in neurosurgery before were testifying on that case.

SEN. JOHN ESP, SD 13, Big Timber, asked if the expert witness in his trial had been sued. **Dr. Kahn** said he was sued once in his 17 years of practice. That happened last year alleging a mis diagnosis of asthma where he diagnosed asthma. He was trained in pulmonary medicine and two other Billings Doctors diagnosed asthma and another physician in Nation Jewish Medical Center, which was a premier hospital that diagnosed asthma. The retired internist, not a pulmonologist in California, was alleging mis-diagnosis and mistreatment. He said he would take issue with **Mr. Riley** whether it would come to trial, it may be thrown out by a judge, but the time away from work, the expense to the medical system of defending it was accessive and it may get to trial. The judge may say well the witness was not qualified but this case was causing much damage in our health care system.

SEN. ESP asked if he thought the bill would prevent the allegations of his case. **Dr. Kahn** said he did not know if it would prevent the allegation, but he believed something needed to be done to tighten the playing field because right now the judge gets the latitude to decide who was qualified and who was not. If he knew it was a Board certified or eligible pulmonary specialist to review the case there might be a different outcome.

SEN. ESP asked if the retired physician in his case had seen a judge yet. **Dr. Kahn** said he had not.

Joe Erpelding, Physician, MT Orthopedic Society, said one of the big worries they had was there may be an occasion where an outside source was used to provide testimony. As doctors, their concern was they could not really investigate the degree of whether that person was an expert or not. The concern was if they thought the person was not an expert, did they have time to take it all the way to the Supreme Court. He said he did not want to ever have to go before the Supreme Court. He did not have time to do that and none of his colleagues had time to do that. He said they thought if they had Rules of Evidence that addressed this and it was further defined by legislative activities, they felt it would benefit the patients and themselves down the road if they wanted other issues to address.

SEN. ESP asked if in court, who would be a qualified expert witness. **Dr. Erpelding** said in the one experience he had, he felt that the expert did not qualify as an expert. That was his personal opinion. He said there was no way he could adequately research that and when his carrier said it was going to cost $200,000 to go to court and wanted them to settle, if they would take $150,000. He would be forced to do something that he did not feel was right but a month out of his practice cost a lot of money. He still had overhead and people he had to pay for, as

well as his malpractice premiums. To take six weeks out of practice was very difficult and that was their concern.

SEN. TRUDI SCHMIDT, SD 21, Great Falls asked if the key were to tighten up the playing field so the judge did not sit on the key expert witness. **REP. BROWN** said it was a way to put some side boards on who qualified as an expert witness. It would be made perfectly clear that they had to have certain qualifications.

SEN. SCHMIDT asked if that were what he wanted clarified, that the judge did not need to decide. **REP. BROWN** said the judge could still decide if the person was qualified but it would have to be within the boundaries of the statute.

SEN. SCHMIDT asked **Mr. Riley** if he foresaw any problems with tightening that up. **Mr. Riley** thought it was a mistake. It was hard to appreciate the complexity of a trial. He said if we did not trust our district judges to decide because of the Rules of Evidence and court decisions, then he did not know what we could rely on. He said if sideboards were put on, the questions needed to be asked: what were the ramifications of that and what was it going to introduce. **Mr. Riley** said it would introduce much more litigation and many more cases would go to the Supreme Court. He referred to **Dr. Kahn's** comment about not being able to investigate what the qualifications are. That was not accurate. When a lawsuit was filed, one of the things done in a med-mal practice case, was that a Rule 26 disclosure statement had to be filed and the disclosure statement had to say what the expert was going to testify to. A copy of the expert's credentials and experience had to be given, after which they could take the expert's deposition. They could put the expert under oath and ask him what his experience had been. **Mr. Riley** said there was a simple way to handle **Dr. Kahn's** case where a pulmonary specialist had an opinion offered against him by an internist. He needed to file a Rule 56 motion for summary judgement that the person was not qualified under the Rules of Evidence and the judge would not allow the person to testify. It was complex but the system worked well and tinkering with it was going to make it more complex.

SEN. JOHN BOHLINGER, SD 7, Billings, said he saw this as an attempt to reign in the continuing escalating cost of medicine. If the National Conference of State Legislators suggested that if Montana were to add to present law or practice what the qualifiers would be for an expert witness, we just could probably reign in some cost. He asked if that were a fair assessment. **REP. BROWN** said that summed it up well.

SEN. BOHLINGER asked if he heard him correctly to say that co-commissioner **Mr. Petesch** suggested there was some ambiguity in the Rules of Evidence as it related to expert witnesses. **REP. BROWN** said there was some discussion about whether they should mess with what was called Rule 702 of the Montana Rules of Evidence and that whether the state should be passing statutes at all. The co-commissioner put together a 4-page report discussing whether the statute could be changed and sideboards be put up. **Mr. Petesch** said he was unable to see any conflict between HB 695 and Rule 702 of the Montana Rules of Evidence that if a witness may be qualified as an expert by knowledge, skill training or education. It was not unusual for the legislature to enact or amend statutes in reaction to court ruling and the legislature had enacted several statutes that addressed expert witness testimony, therefore he sited statutes suggesting that addressing the issue of experts in litigation was not unusual. The bill was not a clear violation of any constitutional provision and basically what he said was that he did not feel there was a problem with putting in sideboards to better qualify people as expert witnesses.

SEN. STONINGTON said that when a statute was written, it set a policy and then rules generally defined the policy. She said it almost sounded as if he were going the other direction. She asked if he were saying the rules were too general and this was going to define them. **REP. BROWN** said yes.

SEN. STONINGTON asked why he would do that. **REP. BROWN** said it was because he felt the rules were not working properly to protect people such as doctors.

SEN. CROMLEY asked how to distinguish among the one retired internist from California who had not yet testified and the retired psychiatrist in Billings who was qualified to testify under this bill.

(TAPE: 2; SIDE: B)

REP. BROWN said qualifications of the expert witness included knowledge about the standards applicable of a defendant's practice. For primary practice it required healthcare providers practice or primary practice. He said a person that had been out of neurosurgery for ten years was in a whole different world and he did not see that anyone that had not done neurosurgery in ten years should be qualified as expert witnesses. As a psychiatrist who has been in primary practice at one time or another and had equal to or greater educational experience, they would be qualified.

SEN. CROMLEY asked if they were retired for 10 years they would not be qualified. **REP. BROWN** said no.

SEN. SCHMIDT said the problem was that doctors were at the lawyers' mercy and if they did not get a lawyer that knew how to get an expert witness they were in trouble. **REP. BROWN** thought that was a problem and they were in trouble if they could not find a good lawyer and witness.

SEN. BOHLINGER asked if **REP. BROWN** had an opportunity to give thought to the grey bill that **Mr. Smith** provided. **REP. BROWN** said he had a copy in front of him.

SEN. BOHLINGER asked him to share his thoughts on it. **REP. BROWN** said all it did was take the amendments offered, one through 10 and put them in and take out all the things stricken. He said he would leave that up to the committee on how they would like to present it.

SEN. JERRY O'NEIL, SD 42, Columbia Falls asked **Dr. Erpelding** if the witness was prepared to testify in the case he was defending and the bill was amended, would that prevent him from testifying. **Dr. Erpelding** said he believed it would.

SEN. O'NEIL asked why. **Dr. Erpelding** said it was his understanding that a general surgeon who was not an orthopedist; although he had some expertise in the field that he was prepared to testify on, it certainly would not be an orthopedic venue and the problem that had developed was primarily an orthopedic problem.

Closing by Sponsor:

REP. BROWN said it was an important issue and it needed a close look. He said if the bill were not needed why had some so strenuously opposed it and why had he heard from so many doctors that something needed to be done to put side boards on. It gave another tool in the tool box. He said it only made sense that people who testified as expert witnesses be qualified on all the latest factors in their practice. A person who had not been active in their field for the last 5 to 10 years, were light years away from what was currently going on in their medical field. If the bill were to pass, it put another tool in the tool box to help us get to where we want to be and to have a better system in the state.

HEARING ON HB 205

Sponsor: REP. EVE FRANKLIN, HD 42, Great Falls

Proponents: Jill Gerdrum, State Auditor's Office
Tanya Ask, Blue Cross Blue Shield of Montana
Denise Pizzini, New West Health Services, MT Health Connection
Jacqueline Lenmark, American Insurance Association, American Council for Life Insurance

Opponents: None.

Opening Statement by Sponsor:

REP. EVE FRANKLIN, HD 42, Great Falls, read and submitted her written opening testimony. EXHIBIT(phs62a04)

Proponents' Testimony:

Jill Gerdrum, State Auditor's Office, said Montana had in place a privacy act regarding insurance since 1982 because of the nature of the kind of information required to be given out in the process of the insurance business. In 1999 the act that was in place since 1982 underwent some changes and there were some concerns with that. It came back in 2001 and addressed some concerns and in 2001 brought everyone into compliance with the Gramm-Leach-Bliley Act (GLBA). The Montana Privacy Act was more protected than the federal GLBA and a direct policy decision was made last session to keep those protections in place because of all of the important information, including financial information. Medical information was mentioned but as companies were doing more business in securities and insurance passing over, financial information was also shared with the insurance company and could sometimes be shown to other entities, so they kept in place some important protections that were above those that the federal government put in place when they did electronic filing. HB 205 tweaked that because the insurance industry came to them after the 2000 session and said they had concerns with being able to work through and comply with the act as they were trying to comply with other acts in all the other states. They started through a process of weighing those industry concerns of being able to comply against consumer privacy that they thought was their duty to protect. She said most of what was done in the bill were industry requests to make it easier for them to comply and she believed they had worked out all the disagreements in the House. Section 1 is just the definition Section. A couple of changes were requested by the industry on Page 3, Line 17-18, the

definition of insurance function was used throughout the Act and was really central to it and the industry wanted to be sure that fraud prevention was a part of that definition. They agreed to that. They also asked for a little more broadening of that in that it was technical and administrative type of service. The other change in definitions was on Page 5, Lines 24 and 25, more clarification for the industry. Section 2 was the bulk of the bill. Main components of HB 205 and what Section 2 did was beyond the Gramm-Leach-Bliley Act. The federal government passed HIPPA. The health insurers were now in the process of trying to comply with HIPPA and because it was very different from the GLBA, it was very expensive for them to comply with and sometimes it was more protective. So, Section 2 was allowed those entities and they were mainly health insurers who were subject to the HIPPA privacy rules to have an exemption to the Montana law so they were not trying to comply with two very different things. A Sunset provision was put on that so that they could reexamine it after the federal government had the opportunity to try to regulate privacy for health insurers and make sure they were protecting consumer privacy. Section 3 was the section that required the insurers to provide notice and that was on Pages 7-10. One of the main changes last time was to require consumers to sign an authorization form when they went to purchase their insurance. It said they were authorized to collect and show, which was a problem so they got rid of that in 2001 but had to replace that and to comply with Gramm-Leach-Bliley they had to require further significant notices so that when the consumer purchased the insurance they no longer had to sign some authorizations. The consumers did however, have to be told what kind of information could be collected and shown without their authorization. Section 3 was somewhat minor to that, where the department requested cleanup changes. On Page 10 in Subsection 9 was the real substitute change where they believed there was a mistake in the last law. They allowed companies to use two notices if they had a national and state form. They thought that if they had an agreement last time and used two forms, the National form, which was much less protected usually, referred to the state form so that consumers were pointed to the form that was usually more relevant to their privacy rights. She said they came to some consensus language on that which was found in Subsection 9: that companies were required to refer to a state specific form if they used two forms. Section 4 was the section of Privacy Act that dealt with the consumers right to access and manage their personal information and to receive information about medical records that had been disclosed about them. They moved the medical record information into the section. At the request of the industry, they made it more clear and precise of what types of medical record disclosures were needed to be individually tracked so when the consumer called the insurer and

asked who their medical information was given to, there were certain kinds of disclosures they would need to have. Section 5 started on Page 13 and these were mostly industry changes. It was Section 33-19-306 of the Privacy Act and it went through the disclosures allowed without an authorization so that the company could do without getting separate copies to consumers. She pointed out a few things on Page 17, Subsection 20, Line 4 and Subsection 21, Line 12. Those were requested by the industry as additional disclosure exceptions they felt were necessary to be able to do in their everyday business. Section 20 allowed them to disclose information to lien holders and mortgage use if they had an interest in the policy. Section 21 allowed them to disclose guaranteed funds. A guaranteed fund was really going to only come into place if a company in liquidation could tell all their policy holders that they did have to disclose the information to the guaranteed fund. There were other entities in the bill such as attorneys, accountants, and auditors whose disclosures needed to be tracked and they made the concession to the industry after careful consideration of the language. They were two extra disclosures allowed in 306. Section 6 was the marketing section. Some things were allowed to use in marketing insurance and financial products limited and there was not much change to that except on Page 18, Line 21 where the word monitor of request of industry was stricken because what they asked them to do was

{Tape: 3; Side: A}

not in the their line of business to monitor other third parties. The last section was the effective date and there was an amendment in the House done after some negotiating to make the section that gave the health insurers the exemption effective date immediately but made the rest of the sections effective later.

Tanya Ask, Blue Cross Blue Shield of Montana said **Frank Cody** who represented the **Health Insurance Association of America** wanted her to also add his concurrence with her testimony. She said they strongly supported the legislation. The Health Insurance Portability and Accountability Act or HIPPA regulation that was going to go into effect in a few weeks was a massive undertaking for most health carriers around the United States and particularly for those in the state of Montana. The exemption for HIPPA compliance was extremely important for those who did write health insurance and the immediate effective date given that the HIPPA rates were going to become effective April 14th were extremely important as well.

Denise Pizzini, New West Health Services, MT Health Connection, said she concurred with **Ms. Ask's** testimony. She said they were two health carriers and they strongly supported the bill. They needed the exemption for HIPPA compliance.

Jacqueline Lenmark, American Council of Life Insurers, American Insurance Association, American Council for Life Insurance, said they were a trade association of property and casualty insurers. She said she was also speaking for a few others: **Sue Weingartner, Alliance of American Insurers,** another trade association of property casualty insurers; **John Metropolis, National Association of Independent Insurers and Farmers Insurance Group; Greg Van Horsen, State Farm Insurance Company.** They, who had worked on the bill were appreciative for the effort of the department. Montana did have stronger privacy protection in law by virtue of the constitution and that was unique in the United States. They wanted to support that policy but it had been a challenge to find methods of operation or methods of stating the compliance requirements in a way that their operations were in compliance in all 50 states. They worked with the department and believed they had agreed on how to go forward together to honor the privacy policy of Montana and still operate their businesses in a way that was necessary. It appeared that there was an oversight in the problem. She said the sponsor was aware of it and they had a brief conversation with **Mr. Bohyer** about the problem who had spoken to **Mr. Petesch** about it. **Mr. Petesch** suggested the administrative method of correcting the title problem and they urged the committee to give the bill a Do Concur recommendation and they strongly resisted any attempt to amend the bill.

Opponents' Testimony: None.

Informational Testimony: None.

Questions from Committee Members and Responses: None.

Closing by Sponsor:

REP. FRANKLIN said the bill represented much work and she appreciated how all parties worked hard together to come to a compromise.

HEARING ON HB 384

Sponsor: REP. JOE MCKENNEY, HD 49, Great Falls

Proponents: Denise Pizzini, New West Health Services, MT Health Connection

Colleen Senterfitt, New West Health Services
Robert Shepard, Physician, Helena
Claudia Clifford, State Auditor
Jean Branscum, Governor's Office
Keith Colbo, North West Health Services
Riley Johnson, National Federation of Independent Business NFIB
Tanya Ask, Blue Cross Blue Shield of Montana
Mary Allen, Montana Association of Insurance and Financial Advisors MTAIFA

Opponents: None.

Opening Statement by Sponsor:

REP. JOE MCKENNEY, HD 49, Great Falls, said HB 384 was an act allowing a demonstration project offering a limited benefit health care insurance plan to the uninsured. During the last interim period he chaired a legislative study committee examining the reasons for the rise in cost of health care insurance and the reasons for the high rate of uninsured Montanans. The reasons were many: an aging population, new expense of technologies, high cost of new wonder drugs, mandated benefits, cost shifting of Medicaid and Medicare, and low wages. He said Montana was a state of small businesses and therefore low profits and often unable to afford insurance for employees. The committee met with standing room only crowds as during the interim period and there was wide spread interest. There were more than 100 people at each meeting. The committee made three short term recommendations to address the problem: one, expand the CHIP program; two, consider a multi-state prescription drug purchasing pool; three, tax credits for individuals in small businesses. Some of these were in legislation currently, but the committee also asked the health care industry to think outside the box and strive for market based solutions. The bill now was just that. It was a market based solution and it created legislation that would allow a limited benefit plan at a low cost to bridge the gap of the uninsured. It was a pilot program and there were people there that came up with the idea.

Proponents' Testimony:

Denise Pizzini, New West Health Services, MT Health Connection New West Health Services, said New West was the entity, after participating in the interim committee, who proposed the bill and had a demonstration project outlying ready to go. She said recent estimates were shown that 18% of Montanans or approximately 165,000 Montanans were uninsured. The HB 384 was

intended specifically to relieve insurance carriers from some mandatory benefit requirements in the state of Montana to offer demonstration project products and to offer health insurance coverage to the uninsured. They were specifically limited types of products. She pointed out that it was clearly the intent of the bill to provide benefits to uninsured residents of Montana where coverage was not necessarily available but not taken advantage of and the purpose of that demonstration project was to provide coverage where coverage did not exist. In new Section 2 it allowed the commissioner to approve a 12-month demonstration project offered by a health carrier with specific criteria. The plan had to include specific outpatient services and not consist of any patient benefits on line. The department was concerned that a plan might come along and offer a hospital only type of coverage under the mandate free plan and that would not happen because it was prohibited from happening here. The plan could be offered to a Montana resident who had been uninsured for the previous 90 days. A demonstration project would be approved for a 12-month term and make extended or additional 12 month terms for up to five years. The statute as a whole had a sunset provision on June 30, 2009, which at that point the department would be in a position to determine whether demonstration projects had been useful in providing coverage to uninsured Montanan's. Based on the information gathered through the demonstration project, presumably and hopefully on New West's part, you would see them again in 2009. Mandatory benefit provisions existing in Montana law currently, were specifically set from which demonstration projects under the proposed bill would be accepted to be able to provide lower cost primary care type of coverage to uninsured Montanans. She said it was very important to start thinking creatively outside the box, ways of providing health care coverage to those Montanans who were currently uninsured. It would continue to be a collaboration of the department in designing the product, getting it approved, and providing this type of coverage to uninsured Montanans. She hoped to have good information available when the demonstration project was over regarding the efficacy of primary care types of coverage to uninsured Montanan's.

Colleen Senterfitt, New West Health Services, read and submitted her written testimony. EXHIBIT(phs62a05)

Robert Shepard, Physician, Helena, said he was in favor of the bill. He said he did not need to revisit all fixed and increasing costs, but the practice of medicine and the operation of a hospital resulted in a very high fixed cost. There were certain sources of revenue, such as Medicare and Medicaid which accounted for anywhere between 30-50%. There was the 20% of the population that was uninsured. The remaining percentage of

people that varied from another 30% to 50% who were insured and to them we pass all of the increases in cost and all of the fixed costs because they could not get coverage from the uninsured, and only partial payment from Medicare and Medicaid. He said since he continued to pass his cost onto the insured, things were going to be fine, but it was obvious what the result was going to be. Gradually, the cost of insurance was going to continue to go up. As the cost of insurance went up, fewer people could afford insurance. What the bill did was critically important and that was to have more people covered. It also provided a very important opportunity for prevention which had been mentioned. For example, there was a study done just recently that showed that intensively managed diabetics had a 50% lower heart attack rate than diabetics who were not intensively managed. That was outpatient care. What it required was if a person had diabetes, he would need to get in to see a doctor, afford medication and team work from a doctor. In diabetics, the risk of heart disease could be reduced by 50% by better controlling their disease. He said he could give similar examples in well-child care, prenatal care, and mental health where doctors could keep people out of the hospital and that was the most expensive part of what they did. Family practice was about 8 cents on the health care dollar. The point was that more outpatient medicine doctors could do, the less high end services were going to be required. The point of the bill was to take the opportunity to put together a pilot program to decide that it would be a relatively small program of about 1,000 people to show that it worked. He had talked to **Mr. Avery**, the CEO of New West, and he was told a similar program was done in Nebraska for a short period of time and while it was there it was a popular program and it did well. He thought it was a reasonable approach to try to give substantial opportunity to get some savings in health care cost by being able to practice preventive medicine.

{Tape: 4; Side: A}

Claudia Clifford, State Auditor, said she was very concerned about Montana's high uninsured rate. There was approximately 20% or more Montanans under the age of 65 without insurance, so trying to do some small experiments was worthwhile such as this program. The bill was not going to solve the problem, but trying it to provide some level of coverage to insure people was worthwhile.

Jean Branscum, Governor's Office, read and submitted her written testimony. EXHIBIT(phs62a06)

Keith Colbo, North West Health Services, said it was time, in the state of Montana to address the problems of the uninsured and the bill would give them an opportunity to do that.

Riley Johnson, NFIB, said small businesses were finding more that health insurance was a very important part of keeping and maintaining employees and good trained workers. They were active in working with any health insurance proposals that were going to lower the cost of health care itself and to lower the cost of premiums of health insurance. Their surveys showed more than 85% did not offer health insurance. It did make a difference in getting good trained people and often, they saw well-trained people leave small businesses and go to work for the State because of health insurance benefits. NFIB offered their support and wanted to see that it worked.

Tanya Ask, Blue Cross Blue Shield of Montana, said she wanted to specifically echo the comments **Ms. Pizzini, Ms. Senterfitt** and **Doctor Shephard** shared about the importance of primary and preventive health care and basic health care benefits. What they were proposing was an innovative program, which allowed them to look at health care in a different fashion. She said they supported this type of innovation and they thought that being responsive to the uninsured was important for the insurance market and especially to try to help more people with those basic health benefits. She said BCBS had been involved in a somewhat comparable program for many years but operated it a little bit differently through a foundation. She believed that innovation worked and she thought it was a very good step forward.

Mary Allen, MTAIFA, appreciated the bill because of the uninsured problem and from an agent's point of view, it was a different product with which to walk.

Opponents' Testimony: None.

Informational Testimony: None.

Questions from Committee Members and Responses:

SEN. CROMLEY asked how many were uninsured. **Dr. Shepard** said it varied a little bit from physician to physician. An internal medicine specialist might have 70% of the people who take Medicare, in which case the doctors received 50 cents on the dollar for those 70%. In his practice he took care of a broader spectrum of people including younger people. His break down was more like 10% to 15% uninsured, 20% Medicaid, 10% Medicare and the rest of it was insured. So it varied, speciality by

speciality. Within primary care, whether as in his case, more Medicaid and less Medicare. With a general internist there was more Medicare because of the nature of the work that they did, they were still looking at anywhere from 30% to 50% of what they took care of, was government insured at 50 cents on the dollar and 20% of that was uninsured and the rest of it was a smattering of insurance that paid the rest of the program.

SEN. BOHLINGER asked for more information where the pilot project would be entered into, how it would be set up, and where it would be set up. Which 1,000 people would be eligible for participation. **REP. MCKENNEY** said there were no limitations on where the pilot project could be set up or which private companies could do the pilot project. They would have to go through the State Auditors office and get approval and at the current time there was one company looking at doing it, which was New West. They anticipated 1000 people participating in the pilot project, mostly in the Helena and Billings area.

SEN. BOHLINGER asked for more information about the program's funding source. **REP. MCKENNEY** said **Ms. McCall** was talking about a Health Care Study, a statewide study being funded by a federal grant of about $700,000. That was not related to the bill. HB 205 was strictly in the private sector and there was no cost to the general fund or any state or federal fund.

SEN. BOHLINGER asked what sort of premium cost would a person anticipate if they would enroll in the program. **REP. MCKENNEY** said the plan would cover preventive care, disease management, and outpatient care, including outpatient mental health, non-emergency services or hospitalization. He was told it would be 25 cents on the dollar of a full blown mandated Cadillac plan. A 75% savings, but said a more accurate number could come from New West.

SEN. O'NEIL asked how much the plan was going to cost. **Ms. Pizzini** said **REP. MCKENNEY** was accurate in what the cost would be.

SEN. O'NEIL asked **Ms. Senterfitt** how much the plan was going to cost. **Ms. Senterfitt** said their estimates at that point were based on age only. The premiums would vary from by product more than $20.00 a month for those under age 18, up to a maximum of a private stage category of right at or under a $100.00 a month.

SEN. ROBERT DEPRATU, SD 40, Whitefish, asked if a supplemental would be in the plan for those who were on Medicare. **Ms. Senterfitt** said their particular plan was a carve out for under

age 65 because those individuals were eligible for Medicare and their company offered a supplemental policy so that and any of their policies would be made available to individuals.

SEN. DEPRATU asked if they had a basic package supplemental that would reflect the coverages done in the pilot program being talked about. **Ms. Senterfitt** said they did not currently have plans for such a model. They hoped the demonstration project would give them more information to know what to look for.

Closing by Sponsor:

REP. MCKENNEY asked for a Do Concur.

{Tape: 4; Side: B}

ADJOURNMENT

Adjournment: 6:25 P.M.

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SEN. JERRY O'NEIL, Chairman

_____
ANDREA GUSTAFSON, Secretary

JO/AG

EXHIBIT(phs62aad)