

1999 DRAFTING REQUEST

Senate Amendment (SA-SB350)

Received: **02/23/2000**

Received By: **kahlepj**

Wanted: **As time permits**

Identical to LRB:

For: **Charles Chvala (608) 266-9170**

By/Representing: **Doug Burnett**

This file may be shown to any legislator: **NO**

Drafter: **kahlepj**

May Contact:

Alt. Drafters: **nelsorp1**

Subject: **Insurance - health**

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

Limitation on immunity related to independent review decisions

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	kahlepj 02/24/2000	chanaman 02/24/2000		_____			
/P1	kahlepj 03/01/2000	chanaman 03/01/2000	kfollet 02/24/2000	_____	lrb_docadmin 02/24/2000		
/P2	kahlepj 03/01/2000	chanaman 03/01/2000	martykr 03/01/2000	_____	lrb_docadmin 03/01/2000		
/1			jfrantze 03/02/2000	_____	lrb_docadmin 03/02/2000	lrb_docadmin 03/02/2000	

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/P2		cmh 3/1 /	martykr 03/01/2000		lrb_docadmin 03/01/2000		
FE Sent For:			Self 3/2				

<END>

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1/?	kahlepj	<i>cmst</i> /p1	<i>KJF</i> 2/24	<i>KJF/km</i> 2/24			
FE Sent For:		<i>2/24</i>		<END>			



State Senator
Chuck Chvala
SENATE MAJORITY LEADER

FAX COVER SHEET

TO: Pam Kahler

FROM: Doug Burnett

RE: _____

PAGES: 2 (Including Cover)

DATE: 2-23-00

NOTES

Let another try on the liability provisions of SB350. I have asked the Trial Lawyers for a written description of their intent - I understand it to be to limit the immunity to treatment order coverage by the review organization.

State Capitol, Post Office Box 7882, Madison, WI 53707-7882 ■ Phone: (608) 266-9170 ■ Fax: (608) 266-5087

Legislative Hotline (Toll-Free) 1-800-362-WISC (9472) ■ E-Mail: chuck.chvala@legis.state.wi.us

World Wide Web: <http://www.legis.state.wi.us/senate/sen16/sen16.html>

Page 17, paragraph (b) shall be amended to read,

(b) A health benefit plan that is the subject of an independent review and the insurer that issued the health benefit plan shall not be liable ~~in~~ for damages to any person ~~for complying~~ attributable exclusively to the coverage of treatment as ordered by the independent review organization if the health care plan and or insurer complies with any decision, requiring coverage of a treatment, rendered by a certified review organization during or at the completion of an independent review.



State Senator
Chuck Chvala
SENATE MAJORITY LEADER

FAX COVER SHEET

TO: Pam Kahler

FROM: Doug Burnett

RE: _____

PAGES: 2 (Including Cover)

DATE: 2-23-00

NOTES

Here's a memo spelling out
our intent w/ the
most recent amendment
request.
Thanks Pam!

PRESIDENT
Kevin Lonergan, Appleton

PRESIDENT-ELECT
M. Angela Dentice, Brookfield

VICE-PRESIDENT
Keith R. Clifford, Madison

SECRETARY
Susan Rosenberg, Milwaukee

TREASURER
Bruce R. Bachhuber, Green Bay

IMMEDIATE PAST PRESIDENT
Randall E. Reinhardt, Milwaukee



EXECUTIVE DIRECTOR
Jane E. Garrott
44 E. Mifflin Street, Suite 103
Madison, Wisconsin 53703-2897
Telephone: 608/257-5741
Fax: 608/255-9285

MEMORANDUM

To: Wisconsin State Senators

From: Paul Sicula

Re: Senate Bill 350

Date: Feb. 23, 2000

The Wisconsin Academy of Trial Lawyers currently opposes SB 350 because of its inclusion of broad immunity language in section 632.835(7)(b) on page 17. We suggest paragraph (b) shall be amended to read,

(b) A health benefit plan that is the subject of an independent review and the insurer that issued the health benefit plan shall not be liable in for damages to any person for ~~complying~~ attributable exclusively to the coverage of treatment as ordered by the independent review organization if the health care plan and or insurer complies with any decision, requiring coverage of a treatment, rendered by a certified review organization during or at the completion of an independent review.

This amendment narrows the immunity granted to health benefit plans and insurers to preserve the Supreme Court decision of *McEvoy v. Group Health Cooperative of Eau Claire*, 213 Wis. 2d 507, 570 N.W.2d 397 (1997).

In *McEvoy* the Wisconsin Supreme Court held the tort of bad faith applies to HMOs making out-of-network decisions. The broad immunity language in section 632.835(7)(b) of the original bill may have been construed to prevent a patient from suing the health benefit plan in bad faith or for any tort action.

This amendment narrows the scope of the immunity. Immunity is only provided for damages attributable exclusively to the coverage of treatment at issue, which is the subject of the independent review and if the health benefit plan is required by the independent review organization to provide coverage. This should preserve a patient's right to sue in all other circumstances.

has seems to be saying they want to reserve the
right to sue for denying of coverage
in the first place

are they saying:

can't be sued for providing coverage

but can be sued for

not providing coverage before review?



State Senator
Chuck Chvala
SENATE MAJORITY LEADER

FAX COVER SHEET

TO: Pam Kahler

FROM: Doug Barnett

RE: SB350

PAGES: 3 (Including Cover)

DATE: 2-24-00

NOTES

More background on our intent w/ the amendment. However, ignore the drafting instructions at the end of the memo.

MEMORANDUM

To: Rep. Gregg Underheim
Sen. Alice Clausing

From: Paul Sicula

Re: Senate Bill 350

Date: Feb. 1, 2000

We have two concerns with SB 350. First, the decision of the independent review organization is "binding" on the insured and the insurer. (SSA 1, page 9, lines 10-11) What does the word "binding" mean? Does it mean there is no right to appeal an unfavorable ruling? Under one interpretation a "binding" decision arguably takes away the right to hold an HMO liable for a bad faith claim as announced by the Supreme Court in *McEvoy v. Group Health Cooperative of Eau Claire*, 213 Wis. 2d 507, 570 N.W.2d 397 (1997). Coupled with a grant of immunity to the health plan subject to the independent review, (SSA 1, page 15, lines 5-8) it appears SB 350 gives consumers far fewer rights than they have now under the *McEvoy* decision.

In *McEvoy* the Wisconsin Supreme Court held the tort of bad faith applies to HMOs making out of network decisions. In the case, a 13-year-old girl, Angela McEvoy, who was a member of Group Health Cooperative of Eau Claire (GHC), was being treated for anorexia nervosa. GHC referred her to an out-of-network provider at the University of Minnesota Hospital (UMH). Angela was treated for 6 weeks of in-patient care. (42 days). The GHC policy authorized in-patient psychological care for up to 70 days. After 6 weeks, the GHC Medical Director decided to discontinue coverage at UMH. Both Angela's treating physician and her psychiatrist at UMH opposed the decision because she hadn't met her treatment goals. Angela was discharged, but relapsed immediately and had to be readmitted to treatment at UMH.

Angela and her mother commenced action in the circuit court of Eau Claire alleging GHC breached the insurance policy in bad faith and "denied and threatened to deny Angela McEvoy coverage for her treatment and failed to authorize appropriate treatment." GHC moved to dismiss the complaint on the grounds this was a malpractice action and governed by Wisconsin Statutes Chapter 655. The trial court agreed and dismissed the complaint. The McEvoy's appealed and the court of appeals reversed. The

Supreme Court reviewed the decision and also reversed the trial court finding bad faith claims may properly be maintained against HMOs.

Under SB 350, would the tort action for bad faith be disallowed if the McEvoy's had followed the independent review procedures outlined in the bill? If the McEvoy's had availed themselves of the right to an independent review under SB 350, the decision is "binding." Does that mean the McEvoy's couldn't sue the HMO for bad faith? Does that mean if the independent reviewer had ruled against the McEvoy's and denied additional treatment, the health care plan would be immune from damages for Angela's injuries?

Because the independent review process is voluntary, if the injured patient doesn't use the independent review process, would he or she still be able to sue the health plan for bad faith? This may confuse consumers and create a trap for the unwary. For example, if the consumer believes the HMO is wrong in denying treatment, what should he or she do? Should he or she use the independent review system to resolve disputes with HMOs in a timely manner or forego treatment to retain possible legal remedies? Most consumers won't know they have to make this choice. In fact, many HMOs may promote resolution of claims through the internal review process. Most people will be unaware they may be giving up their right to damages if they use the process and there is a bad outcome — death or serious injury.

We recommend the following amendment to preserve the *McEvoy* decision.

Assembly Amendment to Senate Substitute Amendment 1 to Senate Bill 350

- 1 At the locations indicated, amend the substitute amendment as follows:
- 2 Page 11, line 11, insert after "insurer." "This decision does not prohibit an
- 3 insured from bringing an action in tort against the insurer health benefit plan for a
- 4 bad faith denial of coverage."
- 5 Page 17, delete lines 5-8.



State of Wisconsin
1999 - 2000 LEGISLATURE

LRBa1450/PI
PJK.....
cm it

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION
SENATE AMENDMENT,
TO 1999 SENATE BILL 350

today (this)
D-note

1 At the locations indicated, amend the bill as follows:

2 1. Page 17, line 5: delete lines 5 to 8 and substitute:

text
+ treat

3 "(b) If a health benefit plan that is the subject of an independent review and
4 the insurer that issued the health benefit plan comply with a decision of the certified
5 independent review organization in that review to provide coverage of a treatment,
6 the health benefit plan and insurer shall not be liable for damages to any person that
7 are solely attributable to that coverage of the treatment."

8 (END)

D-note

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRBa1450/dn P1
PJK.....

cmH

Doug:

1. This amendment "gives" an insurer immunity from liability for damages attributable to providing coverage of a treatment. I gather from the memo you sent me that the trial lawyers want to be able to sue for the original denial of coverage, even though coverage is later provided as a result of an independent review. Perhaps a very inventive, creative trial lawyer could make providing coverage the basis for a lawsuit, but neither Bob Nelson nor I can think of a legitimate situation in which damages would be attributable to *providing coverage*.

Another factor for you to consider is that the bill makes the decision of the independent review organization binding on both parties (see s. 632.835 (3) (f)). A court would not hold a party liable for doing what it is bound, by statute, to do. A party is by definition not negligent or acting in bad faith if it complies with a legal, statutory duty.

The point is that the immunity left in this amendment is meaningless. It is immunity from liability that cannot occur. Having the provision just causes confusion. It would be better simply to take out the immunity provision (s. 632.835 (7) (b)) altogether.

Please give me a call about this if you have any questions.

Pamela J. Kahler
Senior Legislative Attorney
Phone: (608) 266-2682
E-mail: Pam.Kahler@legis.state.wi.us

2. I just got the latest memo by fax. We seem to have a bit of a moving target here. Why don't you take this amendment and drafter's note under advisement, as well as the concerns expressed in the memo, and let me know what you want to

accomplish related to immunity and the binding nature of reviews decisions.

(t)

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRBa1450/P1dn
PJK:cmh:kjf

February 24, 2000

Doug:

1. This amendment "gives" an insurer immunity from liability for damages attributable to providing coverage of a treatment. I gather from the memo you sent me that the trial lawyers want to be able to sue for the original denial of coverage, even though coverage is later provided as a result of an independent review. Perhaps a very inventive, creative trial lawyer could make providing coverage the basis for a lawsuit, but neither Bob Nelson nor I can think of a legitimate situation in which damages would be attributable to *providing coverage*.

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Please give me a call about this if you have any questions.

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Senior Legislative Attorney
Phone: (608) 266-2682
E-mail: Pam.Kahler@legis.state.wi.us



State of Wisconsin
1999 - 2000 LEGISLATURE

LRBa1450/P2
PJK:cmh:kjf
+RPN
w m not run

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION
SENATE AMENDMENT,
TO 1999 SENATE BILL 350

needed today

1 At the locations indicated, amend the bill as follows:

2 1. Page 17, line 5: delete lines 5 to 8 and substitute:

3 "(b) If a health benefit plan that is the subject of an independent review and
4 the insurer that issued the health benefit plan comply with a decision of the certified
5 independent review organization in that review to provide coverage of a treatment,
6 the health benefit plan and insurer shall not be liable for damages to any person that
7 are solely attributable to that coverage of the treatment."

8

(END)

Insert 1-7

1999-2000 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBa1450/Plins
PJK & RPN:cmh:kjf

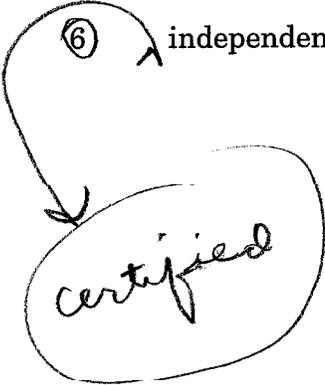
INSERT 1-7

text
treat

1 “(b) A health benefit plan and the insurer that issued the health benefit plan ✓
2 are immune from civil liability for injuries to any person arising out of the health
3 benefit plan’s or insurer’s compliance with a decision rendered by a certified ✓
4 independent review organization. This immunity does not apply to injuries arising
5 out of the matter that is the subject of an independent review that occur ✓ before the
6 independent review organization renders a decision.” ✓

(END OF INSERT 1-7)

⑥



certified



State of Wisconsin
1999 - 2000 LEGISLATURE

LRBa1450/P4
PJK:cmh:kjf

W m not run

~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~

SENATE AMENDMENT
TO 1999 SENATE BILL 350

WPO - please check for marker

(go back to P1 version for "/1")

*Thurs. a.m.
D-note*

Note that this is the P1 version of the amendment which is now a P2.

1 At the locations indicated, amend the bill as follows:

2 1. Page 17, line 5: delete lines 5 to 8 and substitute:

3 "(b) If a health benefit plan that is the subject of an independent review and
4 the insurer that issued the health benefit plan comply with a decision of the certified
5 independent review organization in that review to provide coverage of a treatment,
6 the health benefit plan and insurer shall not be liable for damages to any person that
7 are solely attributable to that coverage of the treatment."

8 (END)

D-note
This is the P1 version as the introducible "/1".

PJK

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBa1450/1dn
PJK:cmh:jf

March 2, 2000

This is the P1 version as the introducible "1".

Pamela J. Kahler
Senior Legislative Attorney
Phone: (608) 266-2682
E-mail: Pam.Kahler@legis.state.wi.us

Kahler, Pam

From: Burnett, Douglas
Sent: Wednesday, February 23, 2000 1:47 PM
To: Kahler, Pam
Subject: RE: Another SB 350 amendment

Yes...a p-draft is fine. I have to run it by WATL.

-----Original Message-----

From: **Kahler, Pam**
Sent: Wednesday, February 23, 2000 1:46 PM
To: Burnett, Douglas
Subject: RE: Another SB 350 amendment

Yes, Doug. I did receive the fax. I have drafted the amendment and want to have Bob Nelson review it first, too. Do you think it should be a preliminary so that the persons who want it can sign off on it first?

-----Original Message-----

From: Burnett, Douglas
Sent: Wednesday, February 23, 2000 1:34 PM
To: Kahler, Pam
Subject: Another SB 350 amendment

...and I swear this is the last one I will ask for!

I faxed a draft over this morning. I just wanted to make sure you got it.

Kahler, Pam

From: Burnett, Douglas
Sent: Friday, February 25, 2000 3:53 PM
To: Kahler, Pam; Nelson, Robert P.
Subject: LRBa1450/P1 to SB 350

I have shared the drafters note you prepared on the amendment to SB 350 with WATL. Kevin Lonergan (a trial lawyer from Appleton with WATL) will be calling on Monday to discuss the note with you. Thanks!

Kahler, Pam

From: Burnett, Douglas
Sent: Monday, February 28, 2000 4:33 PM
To: Kahler, Pam
Subject: RE: Immunity amendment to SB 350

That sounds great Pam. Draft a P2, and we will see if that works. Thanks.

-----Original Message-----

From: Kahler, Pam
Sent: Monday, February 28, 2000 4:10 PM
To: Burnett, Douglas
Subject: Immunity amendment to SB 350

Doug:

I spoke with Kevin Lonergan about the amendment. He explained the very limited situation in which this immunity might apply and, frankly, Bob Nelson and I still can't quite fathom that there would ever actually be any liability in the situation he posed, but I suggested that I try my hand at an amendment that would base immunity on the *time* at which a cause of action arises, i. e., either before or after independent review. In other words, there would be no immunity for a cause of action that arose before independent review (such as a bad faith action), but there would be immunity for any cause of action that arises after independent review as a result of compliance with the decision in the review. I could do a P2 version and they could decide which, if either of them, they like better. Obviously, the second amendment would provide broader immunity than the first one. Kevin said that was fine with him and that if you agreed, he would like you to send a copy of the second amendment to WATL. Let me know what you think. Thanks.

Pam

++++
Pamela J. Kahler
Legislative Attorney
Legislative Reference Bureau
(608) 266-2682

Kahler, Pam

From: Burnett, Douglas
Sent: Wednesday, March 01, 2000 5:11 PM
To: Kahler, Pam
Subject: RE: a1450/P1 to SB 350

Thanks.

-----Original Message-----

From: Kahler, Pam
Sent: Wednesday, March 01, 2000 5:02 PM
To: Burnett, Douglas
Subject: RE: a1450/P1 to SB 350

Okay. I'll have the P1 changed to a "slash 1" and sent out with stripes.

-----Original Message-----

From: Burnett, Douglas
Sent: Wednesday, March 01, 2000 4:58 PM
To: Kahler, Pam
Subject: a1450/P1 to SB 350

We've settled on LRBa1450/P1 as our preferred alternative on the amendment to SB 350.