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NANCY SWEENEY  
CLERK DISTRICT COURT  
FILED BY LISA RABBITO  
DEPUTY  
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**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

<p>INVESTMENT COMPANY INSTITUTE, a Delaware corporation,  Plaintiff,  v.  MONICA LINDEEN, STATE AUDITOR and Ex-Officio Securities Commissioner of Montana,  Defendant.</p>	<p>Cause No. BDV-2010-1122  <b>ORDER ON REQUEST FOR DECLARATORY JUDGMENT</b></p>
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An amended complaint was filed in this matter on July 7, 2011. In its amended complaint, Plaintiff Investment Company Institute (ICI) seeks declaratory judgment and an alternative writ of prohibition. Hearing on ICI's request was held on August 29, 2011.

ICI is a national organization of investment companies, including sellers of mutual funds. Prior to the 2007 Montana legislature, Section 30-10-209(1)(d), MCA, provided as follows:

//////

1           Each series, portfolio, or other subdivision of an investment  
2           company or similar issuer is treated as a separate issuer of securities. The  
3           issuer shall pay a portfolio notice filing fee to be calculated as provided  
4           in subsections (1)(a) through (1)(c). The portfolio notice filing fee  
5           collected by the commissioner must be deposited in the state special  
6           revenue account provided for in 30-10-115. The issuer shall pay a fee of  
7           \$50 for each filing made for the purpose of changing the name of a  
8           series, portfolio, or other subdivision of an investment company or  
9           similar issuer.

10          Through House Bill 125 (HB 125), the 2011 legislature altered the statute to read as  
11          follows:

12                 Each series, portfolio, or other subdivision of an investment  
13                 company or similar issuer is treated as a separate issuer of securities.  
14                 The issuer shall pay a ~~portfolio~~ notice filing fee to be calculated as  
15                 provided in subsections (1)(a) through (1)(c). The ~~portfolio~~ notice filing  
16                 fee collected by the commissioner must be deposited in the state special  
17                 revenue account provided for in 30-10-115. The issuer shall pay a fee of  
18                 \$50 for each filing made for the purpose of changing the name of a  
19                 series, portfolio, or other subdivision of an investment company or  
20                 similar issuer.

21          HB 125 became effective on April 20, 2011.

22                 Prior to the amendment of Section 30-10-209(1), MCA, Defendant  
23          Montana Commissioner of Securities and Investment (CSI) interpreted the statute to  
24          only require a fee on each portfolio of a mutual fund. Exhibit A attached to CSI's  
25          response brief filed August 5, 2011 shows a hypothetical mutual fund. Below the  
26          portfolio level of mutual funds, mutual funds are often divided into various classes.  
27          These are the various classes of mutual funds that a consumer would actually purchase.  
28          Each class has its own separate management fee and stock symbol. Prior to HB 125,  
29          the notice fee was placed only on the portfolio level of the various funds.

30                 The first count of ICI's complaint seeks a declaratory judgment that HB  
31          125 illegally imposes a tax, is in violation of the Montana Constitution for not properly  
32          describing the subject of the bill, and by violating the one subject rule prohibited by the  
33          Montana Constitution. Count I also seeks a declaration that the CSI cannot collect

1 filing fees on mutual funds at the class level. Count II seeks a declaratory ruling that  
2 fees collected on mutual funds at the class level are illegal, and Count III seeks an  
3 application, temporary restraining order, or a writ of prohibition.

4           Involved in the determination of these matters is Article V, section 11(3),  
5 of the Montana Constitution, which provides:

6           Each bill, except general appropriation bills and bills for the  
7 codification and general revision of the laws, shall contain only one  
8 subject, clearly expressed in its title. If any subject is embraced in any  
9 act and is not expressed in the title, only so much of the act not so  
10 expressed is void.

11           The change to Section 30-10-209, MCA, came about as a result of a  
12 letter from the legislative auditor in 2010, wherein the auditor held:

13           **Security Fees**

14           Section 30-10-209, MCA, specifies the various security fees the  
15 office is required to collect from brokerage firms, investment advisory  
16 firms, and individuals working for those firms. Collectable security fees  
17 are defined as series, portfolio, or other subdivisions of an investment  
18 company. Currently the office only collects security fees at the series  
19 and portfolio levels. Other subdivision fees include classes of securities  
20 within each portfolio which the office is required to collect per state law.  
21 Noncollection of subdivision fees costs the General Fund an estimated  
22 \$750,000 to \$1,000,000 annually.

23 (Compl. Declar. J. & Application Alternate. Writ. Prohibition, Attach. 2, at 1.)

24 Thereafter, the CSI, by letter dated October 12, 2010, indicated its intention to comply  
25 with the legislative auditor's determination. (Compl. Declar. J. & Application  
Alternate. Writ. Prohibition, Attach. 1.) This suit resulted. However, after the suit was  
filed, the legislature enacted HB 125, mentioned above.

          The title to HB 125 reads as follows:

· AN ACT GENERALLY REVISING SECURITIES AND INSURANCE  
LAWS; PROVIDING CONSISTENCY WITH THE MONTANA  
ADMINISTRATIVE PROCEDURE ACT FOR JUDICIAL REVIEW  
OF A SECURITIES COMMISSIONER'S ORDER; INCLUDING  
CONFIDENTIAL DOCUMENTS RECEIVED FROM ANOTHER

1 STATE AGENCY AS AMONG THOSE MAINTAINED AS  
2 CONFIDENTIAL BY THE INSURANCE COMMISSION;  
3 REMOVING REGULATION OF EXCESS DEPOSITS BY  
4 INSURERS; REVISING THE DEFINITION OF "INSURER"  
5 RELATING TO CAPTIVE RISK RETENTION GROUPS; APPLYING  
6 RISK-BASED CAPITAL REPORTING REQUIREMENTS TO  
7 CAPTIVE RISK RETENTION GROUPS; INCLUDING A TREND  
8 TEST FOR RISK-BASED CAPITAL REPORTING FOR PROPERTY  
9 AND CASUALTY INSURERS; REVISING THE SMALL BUSINESS  
10 HEALTH INSURANCE PURCHASING POOL AND TAX CREDIT  
11 PROGRAM; REVISING LAWS RELATING TO CAPTIVE  
12 INSURANCE COMPANIES; ELIMINATING A PENALTY  
13 PROVISION; ELIMINATING CERTAIN REQUIREMENTS FOR  
14 BASIC AND STANDARD HEALTH BENEFIT PLANS; AMENDING  
15 SECTIONS 15-30-2368, 15-31-130, 30-10-115, 30-10-209, 30-10-308,  
16 33-1-311, 33-2-601, 33-2-1501, 33-2-1903, 33-2-1904, 33-4-309, 33-18-  
17 605, 33-22-508, 33-22-1803, 33-22-1821, 33-22-2002, 33-22-2004, 33-  
18 22-2006, 33-22-2008, 33-28-102, 33-28-107, 33-28-108, AND 33-28-  
19 207, MCA; REPEALING SECTIONS 33-2-609, 33-22-103, 33-22-1827,  
20 AND 33-22-1828, MCA; AND PROVIDING AN IMMEDIATE  
21 EFFECTIVE DATE.

22 One of the issues raised by ICI is that the additional money raised by HB  
23 125 is a tax as opposed to a fee. Although this issue is raised, the Court is unsure of  
24 the significance of the distinction given the current state of the pleadings. ICI has not  
25 cited this Court to any authority that would invalidate HB 125 because the proceeds  
raised were a tax and not a fee.

The real issue before the Court is whether HB 125 violates the Montana  
Constitution — specifically, does HB 125 contain more than one subject clearly  
expressed in its title? First, general revision bills are exempt from the requirement that  
only one subject be clearly expressed in the title. After reviewing HB 125, this Court  
is of the view that it is, in fact, a general revision bill. Reference to HB 125 shows that  
it addresses many sundry issues under the jurisdiction of the CSI. Of particular import  
here is this Court's view that HB 125, insofar as it made a change to Section 30-10-  
209, MCA, only did so as a point of clarification. Although ICI had interpreted  
Section 30-10-209, MCA, to only apply to a fee being imposed at the portfolio level,

1 the legislative auditor found that such an interpretation was against the very provisions  
2 of Section 30-10-209, MCA, even before HB 125.

3 Referring to the prior version of Section 30-10-129, MCA, the first  
4 sentence indicates that each subdivision of an investment company is treated as  
5 separate issuer of securities. Thus, a class of a mutual fund would be considered a  
6 separate issuer. After making that determination of who is a separate issuer of  
7 securities, the legislature, in Section 30-10-209, MCA, goes on to say that each of  
8 those issuers, necessarily including a class of mutual fund, shall pay a fee called a  
9 portfolio notice filing fee. The use of the word "portfolio" is only a description of the  
10 nature of the fee and does not classify who is to pay the fee. The word "portfolio" is  
11 not a limitation on who pays the fee (which has been determined to be any subdivision  
12 of an investment company), but is merely a label placed on the fee collected. Thus,  
13 HB 125 is merely a housekeeping measure or a general revision of the existing law.  
14 The portions of the HB 125 that deal with the statute here under consideration were  
15 meant to clarify the issues presently before this Court. As will noted below, this Court  
16 is obligated to interpret statutes in an attempt to find them constitutional. The  
17 interpretation just made by this Court is done under such a standard of review. Thus,  
18 this Court concludes that HB 125 is a general revision of the securities and insurance  
19 laws and thus not violative of Article V, section 11(3), of the Montana Constitution.

20 Even if this were not so, the Court would rule that there is no violation of  
21 the constitution that has occurred in this case. The current version of Article V, section  
22 11(3), of the Montana Constitution existed in 1889 Montana Constitution as Article V,  
23 section 23. It has been interpreted on many occasions by the Montana Supreme Court,  
24 but perhaps the most cited review occurred in *State v. Driscoll*, 101 Mont. 348, 54 P.2d  
25 571 (1936). The *Driscoll* case is helpful on two different levels on the analysis of the

1 facts before this Court. First, it give the Court general guidance in reviewing the  
2 constitutionality of any act. The *Driscoll* court held:

3 In the case of *State ex rel. Tipton v. Erickson*, 93 Mont. 466, 19  
4 P.2d 227, 228, this court declared: "In the determination of the question  
5 of the constitutionality of any Act, a statute, if possible, will be construed  
6 so as to render it valid. (*Hale v. County Treasurer*, 82 Mont. 98, 105,  
7 265 P. 6.) It is presumed to be constitutional, and all doubts will be  
8 resolved in favor of its validity if it is possible so to do. (*State ex rel.*  
9 *Toomey v. State Board of Examiners*, 74 Mont. 1, 238 P. 316, 320.) The  
10 invalidity of a statute must be shown beyond a reasonable doubt before  
11 the court will declare it to be unconstitutional. (*Herrin v. Erickson*, 90  
12 Mont. 259, 2 P.2d 296.) And a statute will not be held unconstitutional  
13 unless its violation of the fundamental law is clear and palpable. (*Hill v.*  
14 *Rae*, 52 Mont. 378, 158 P. 826, L.R.A. 1917A, 495, Ann. Cas. 1917E,  
15 210.)"

16 *Driscoll*, 101 Mont. at 355, 54 P.2d at 574. As noted above, this Court has used the  
17 standard just quoted in determining that HB 125 was a general revision of the laws.

18 In addition, *Driscoll* sets forth specific standards to be used by a court in  
19 looking at possible violation of Article V, section 11(3), of the Montana Constitution:

20 In the case of *State ex rel. Normile v. Cooney*, 100 Mont. 391, 47  
21 P.2d 637, 644, it is written: "The purpose of section 23, Article V, so far  
22 as it provides that the subject shall be clearly expressed in the title of an  
23 Act, was stated by this court in the case of *State ex rel. Cotter v. District*  
24 *Court*, 49 Mont. 146, 140 P. 732, 734, as follows: 'The prohibition is  
25 aimed at ordinary legislation with the subject of which the members of  
the legislative body and the public are not supposed to be familiar. Its  
purpose is: "First, to prevent hodge-podge or 'log-rolling' legislation;  
second, to prevent surprise or fraud upon the legislature by means of  
provisions in bills of which the titles gave no intimation, and which  
might therefore be overlooked and carelessly and unintentionally  
adopted; and, third, to fairly apprise the people, through such publication  
of legislative proceedings as is usually made, of the subjects of  
legislation that are being considered, in order that they may have  
opportunity of being heard thereon, by petition or otherwise, if they shall  
so desire.'" [Cooley Const. Lim., p. 205.]" This statement is quoted with  
approval in the case of *State ex rel. Bonner v. Dixon*, 59 Mont. 58, 195 P.  
841."

By this constitutional provision it is intended that the Act shall be  
germane to the subject expressed in the title. (*Arps v. State Highway*  
*Commission*, 90 Mont. 152, 300 P. 549, 557; *State v. Anaconda Copper*  
*Min. Co.*, 23 Mont. 498, 59 P. 854, 855.) "Germane" means in close  
relationship, appropriate, relevant, pertinent. (*State ex rel. Normile v.*

1        *Cooney, supra; Durland v. Prickett*, 98 Mont. 399, 39 P.2d 652, 656;  
2        *State ex rel. Nagle v. Leader Co.*, 97 Mont. 586, 37 P.2d 561; *Hale v.*  
3        *Belgrade Co.*, 74 Mont. 308, 240 P. 371.) It is not necessary that the title  
4        shall embody the exact method of application or procedure where the  
5        general object is plainly expressed. (*Arps v. State Highway Commission*,  
6        *supra; Evers v. Hudson*, 36 Mont. 135, 92 P. 462.) Where the degree of  
7        particularity necessary to be expressed in the title of the Act is not  
8        indicated by the Constitution itself, as here, the courts should not  
9        embarrass legislation by technical interpretations based on mere form or  
10       phraseology. (*Arps v. State Highway Commission, supra; State v.*  
11       *Anaconda Copper Min. Co.*, *supra; Evers v. Hudson, supra.*) The test is  
12       whether the title is of such a character as to mislead the public or  
13       members of the legislature as to the subject embraced in the Act. (*Arps*  
14       *v. State Highway Commission, supra; Evers v. Hudson, supra.*) The court  
15       has no right to hold the title void because in its opinion a better one  
16       might have been used. (*Arps v. State Highway Commission, supra; State*  
17       *v. McKinney*, 29 Mont. 375, 74 P. 1095, 1 Ann. Cas. 579.) "The title is  
18       generally sufficient if the body of the Act treats only, directly or  
19       indirectly, of the subjects mentioned in the title, and of other subjects  
20       germane thereto, or of matters in furtherance of or necessary to  
21       accomplish the general subjects of the bill, as mentioned in the title.  
22       Details need not be mentioned." (*Arps v. State Highway Commission*,  
23       *supra; State v. McKinney, supra; Barbour v. State Board of Education*, 92  
24       Mont. 321, 13 P.2d 225; *State ex rel. Boone v. Tullock*, 72 Mont. 482,  
25       234 P. 277.)

      In the case of *State v. Anaconda Copper Min. Co.*, *supra*, it was  
said: "The objections should be grave, and the conflict between the  
statute and the constitution palpable, before the judiciary should  
disregard a legislative enactment upon the sole ground that it embraced  
more than one object, or, if but one object, that it was not sufficiently  
expressed by the title." (*Montclair v. Ramsdell*, 107 U.S. 147, 155, 2 S.  
Ct. 391, 27 L. Ed. 431; *Powell v. Supervisors of Brunswick County*, 88  
Va. 707, 14 S.E. 543.)" (*Evers v. Hudson, supra.*)

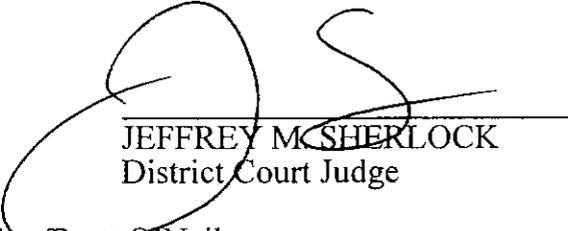
*Driscoll*, 101 Mont. at 353-54, 54 P.2d at 573-74.

      Of particular interest is that *Driscoll* held that even if an act imposes  
license fees and those fees are not disclosed in the title of the act, such an omission  
does not render the act vulnerable to the contention that the title does not clearly  
express the subject mentioned in the act. *Driscoll*, 101 Mont. at 356, 54 P.2d at  
574. Here, one of ICI's contentions is that the increase in fees that comes about as a  
result of HB 125 is not specified in the title. However, the *Driscoll* court indicated that  
such an omission is not a constitutional flaw.

1 In reviewing the title of HB 125, it is clear that the legislature intended a  
2 revision of Section 30-10-209, MCA, and that is clearly stated in the title of the act.  
3 Further, the exact nature of the revision came as an absolute surprise to no one, since it  
4 is clear that the bill's proponents at the legislature clearly informed the legislature that  
5 the portion of the bill amending the statute here in question was a result of this lawsuit.  
6 Further, it is clear that ICI was well aware of the provisions of HB 125, since it's  
7 agents apparently appeared at several hearings where the bill came up. Thus, HB 125  
8 did not create any surprise or fraud upon the legislature by "logrolling" that body so  
9 that a provision would be somehow "snuck in" of which they would not be aware.  
10 Reviewing the standards set forth in *Driscoll*, the Court finds that HB 125 do not  
11 violate the constitution as suggested here.

12 In the view of this Court, a determination that HB 125 did not violate the  
13 constitution ends this case. Absent such a violation, the Court feels it has no authority  
14 to issue an injunction, writ of prohibition, or declaratory judgment. Therefore,  
15 Plaintiff's request for declaratory judgment is DENIED, and this case is DISMISSED.

16 DATED this 26 day of September 2011.

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JEFFREY M. SHERLOCK  
District Court Judge

20 pcs: Murry Warhank  
21 Jesse Laslovich/Jameson C. Walker/Brett O'Neil

22 T/JMS/investment co v lindeen ord mot declar j.wpd  
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