WEST VIRGINIA CODE CHAPTER 33 ARTICLE 44

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§33-44-1. Short title.

This article may be cited as the "Unauthorized Insurers Act".

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§33-44-2. Purpose of enactment of provisions regarding unauthorized insurers.

The purpose of this article is to subject certain persons and insurers to the jurisdiction of the commissioner and to the courts of this state in suits by or on behalf of the state. The Legislature declares that it is concerned with the protection of residents of this state against unscrupulous acts by insurers not authorized to transact an insurance business in this state. It is the intent of the Legislature to maintain fair and honest insurance markets, to protect authorized insurers which are subject to regulation from unfair competition by unauthorized insurers, and to protect against the evasion of the insurance regulatory laws of this state. The Legislature declares that it is a subject of concern that certain insurers, while not licensed to transact insurance in this state, are soliciting the sale of insurance and selling insurance to residents of this state, thus presenting the Insurance Commissioner with the problem of resorting to courts of foreign jurisdictions for the purpose of enforcing the insurance laws of this state for the protection of our citizens. The Legislature declares that it is also a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers not licensed to transact insurance in this state, thus presenting to the residents the often insurmountable obstacle of resorting to distant fora for the purpose of asserting legal rights under these policies. In furtherance of the state interest, the Legislature herein provides a method of substituted service of process upon the insurers and declares that in so doing it exercises its powers to protect its residents and to define, for the purpose of this article, what constitutes transacting insurance in this state.

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§33-44-3. Definitions.

(a) "Administrator" or "third-party administrator" means, as used in this article unless otherwise indicated, a person who for residents of this state, or for residents of another jurisdiction from a place of business in this state, performs administrative functions including claims administration or payment, marketing, premium accounting, premium billing, coverage verification, underwriting authority or certificate issuance in regard to insurance.

(b) "Assist" means to aid, counsel, represent, opine, administer or, in any capacity, to help another.

(c) "Commissioner" means the Insurance Commissioner for the State of West Virginia.

(d) "Effectuating" means to bring about; to effect.

(e) "Foreign decree" means any decree or order of a court located in a reciprocal state or other state including a court of the United States located therein, against any insurer incorporated or authorized to do business in this state or against any unauthorized insurer with its principal place of business located in this state.

(f) "Insurance" is a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies.

(g) "Insured" means, as used in this article unless otherwise indicated, any individual, member, named insured, beneficiary, subscriber or group who has obtained insurance from an unauthorized insurer or who is insured under a contract of insurance obtained from an unauthorized insurer.

(h) "Insurer" means, as used in this article unless otherwise indicated, any person engaged in the transaction of insurance.

(i) "Negotiation" means, as used in this article unless otherwise indicated, the deliberation, discussion or conference upon the terms of a proposed agreement; it is that which passes between parties or their agents in the course of or incident to the making of a contract; to conduct communications or conferences with a view to reaching an agreement.

(j) "Person" means, as used in this article unless otherwise indicated, any natural person or entity, including, but not limited to, individuals, partnerships, associations, bona fide associations, trusts, trustees, companies, insurers, unauthorized insurers, organizations, societies, reciprocals, syndicates, administrators, third-party administrators, agents, producers, advertisers, customer service representatives, promoters, officers, directors, lawyers, incorporators or any other legal entity.

(k) "Principal place of business" means the single state in which the policy for the direction, control and coordination of the operations of the insurer as a whole are primarily exercised,

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with consideration being given to, but not limited to:

(1) The state in which the primary executive and administrative headquarters of the entity is located;

(2) The state in which the principal office of the chief executive officer of the entity is located;

(3) The state in which the board of directors (or similar governing body) of the entity conducts the majority of its meetings;

(4) The state in which the executive or management committee of the board of directors (or similar governing body) of the entity conducts the majority of its meetings; and

(5) The state from which the management of the overall operations of the entity is directed.

(l) "Procure" means to cause a thing to be done, to instigate, contrive, bring about, effect or cause; to persuade, induce or prevail upon; it is the act of obtaining, attainment or acquisition.

(m) "Qualified party" means a state regulatory agency acting in its capacity to enforce the insurance laws of its state.

(n) "Reciprocal state" means any state or territory of the United States the laws of which contain procedures substantially similar to those specified in this section for the enforcement of decrees or orders issued by courts located in the states or territories of the United States, against any insurer incorporated or authorized to do business in such state or territory or any unauthorized insurer with its principal place of business in such state or territory.

(o) "Solicitation" and "solicit" mean attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular company, including without limitation, providing rate comparisons of various insurers based on information provided by the person.

(p) "Transaction of insurance" means that for purposes of this article, any of the following acts in this state effected by mail or otherwise is considered to constitute the transaction of an insurance business in or from this state:

(1) The making of or proposing to make an insurance contract;

(2) The making of or proposing to make, as guarantor or surety, any contract of guaranty or suretyship as a vocation and not merely incidental to any other legitimate business or activity of the guarantor or surety;

(3) The taking or receiving of an application for insurance;

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(4) The receiving or collection of any premium, commission, membership fees, assessments, dues or other consideration required for obtaining or renewing insurance;

(5) The issuance or delivery in this state of certificates or contacts of insurance to residents of this state or to persons authorized to do business in this state;

(6) The solicitation, negotiation, procurement or effectuation of insurance or renewals thereof;

(7) The dissemination of information as to coverage or rates, or forwarding of applications, or delivery of policies or contracts, or inspection of risks, the fixing of rates or investigation or adjustment of claims or losses or the transaction of matters subsequent to effectuation of the contract and arising out of it, or any other manner of representing or assisting a person or insurer in the transaction of insurance with respect to any risk or exposure located or to be performed in this state;

(8) The transaction of any kind of insurance business specifically recognized as transacting an insurance business within the meaning of the statutes relating to insurance;

(9) The offering of insurance or the transacting of insurance business; or

(10) Offering an agreement or contract which purports to alter, amend or void coverage of an insurance contract.

(q) "Unauthorized insurer" means a person or insurer engaged in the transaction of insurance without a license in force pursuant to the laws of this state unless exempted by the insurance laws of this state, or any person assisting an unauthorized insurer.

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§33-44-4. Unlawful transaction of insurance.

(a) It is unlawful for any person to engage in any act which constitutes the transaction of insurance under the provisions of this article unless authorized by a license in force pursuant to the laws of this state, or unless exempted by the insurance laws of this state. Any person or insurer engaged in any act which constitutes the unauthorized transaction of insurance shall be subject to the provisions contained in chapter thirty-three of the code and the provisions and penalties set forth in this article.

(b) It is unlawful for any person to, directly or indirectly, represent, aid, counsel, opine, administer, assist in any manner or capacity or otherwise act as an agent for or on behalf of an unauthorized insurer in the unauthorized transaction of insurance. Any person who represents, aids or assists, in any manner or capacity, an unauthorized insurer in violation of this article shall be subject to the provisions and penalties set forth in this article.

(c) An unauthorized insurer shall be bound by the terms of the insurance contract, certificate or agreement as if the contract, certificate or agreement were legally procured under the insurance laws of this state.

(d) This article does not apply to: (i) Any transaction for which a license is not required pursuant to section one, article three of this chapter, including the lawful transaction of surplus lines insurance and reinsurance by insurers; (ii) transactions in this state relative to a policy issued or to be issued outside this state involving insurance on cargo vessels, their craft or hulls, their cargoes, marine builder's risk, commercial marine protection and indemnity or other risk, including strikes and war risks commonly insured under ocean marine forms of policy; (iii) transactions in this state involving group life insurance, group accident and sickness insurance or group annuities providing coverage under policies that are recognized under articles fourteen and sixteen, respectively, of this chapter where: (1) The master policy of such groups was lawfully issued and delivered in and pursuant to the laws of a state in which the insurer was authorized to do an insurance business, to a group organized for purposes other than the procurement of insurance, and where the policyholder is domiciled or otherwise has a bona fide situs; and (2) except for group annuities, the insurer complies with section thirty-five, article six of this chapter. The commissioner may require the insurer which has issued such master policy to submit such information as the commissioner requires in order to determine if probable cause exists to convene a hearing to determine whether the total charges for the insurance to the persons insured are reasonable in relation to the benefits provided under such policy.

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§33-44-5. Service of process on unauthorized insurers.

(a) Any act of transacting insurance by any unauthorized insurer is equivalent to and constitutes an irrevocable appointment by an unauthorized insurer, binding upon him or her, his or her executor or administrator, or successor in interest, of the Secretary of State or his or her successor in office, to be the true and lawful attorney of an unauthorized insurer upon whom may be served all lawful process in any action, suit or proceeding in any court by the commissioner, the state or an insured and upon whom may be served any notice, order, pleading or process in any proceeding before the commissioner and which arises out of transacting an insurance business in this state by such an insurer. Any act of transacting insurance in this state by any unauthorized insurer or any person acting in furtherance of an unauthorized insurer's business, signifies the agreement of the person or unauthorized insurer that any lawful process in such a court action, suit or proceeding or any notice, order, pleading or process in an administrative proceeding before the commissioner so served is of the same legal force and validity as personal service or process in this state upon an insurer.

(b) Service of process in an action must be made by delivering to and leaving with the Secretary of State, or some person in apparent charge of his or her office, two copies thereof and by payment to the Secretary of State the fee prescribed by section two, article one, chapter fifty-nine of this code together with any other fees prescribed by law. Service upon the Secretary of State as attorney is service upon the principal.

(c) Upon receipt by the Secretary of State of two copies of the process to be served, and the payment of all relevant fees, the Secretary of State shall cause the process to be served in the manner prescribed in subsection (d) of this section.

(d) The Secretary of State shall forward a copy of the process by registered or certified mail to the unauthorized insurer or any person acting in furtherance of an unauthorized insurer's business at its last-known principal place of business and shall keep a record of all process so served upon the person or unauthorized insurer. Service of process is sufficient, provided notice of service and a copy of the process are sent within ten days thereafter by or on behalf of the moving party to the responding party, at its last-known principal place of business by registered or certified mail with return receipt requested. The moving party shall file with the clerk of the court in which the action is pending, or with the judge or magistrate of the court in case there be no clerk, or in the official records of the commissioner if an administrative proceeding before the commissioner, an affidavit of compliance herewith, a copy of the process and either a return receipt purporting to be signed by the defendant or responding party or a person qualified to receive its registered or certified mail in accordance with the rules and customs of the post-office department; or, if acceptance was refused by the defendant or responding party or an agent thereof, the original envelope bearing a notation by the postal authorities that receipt was refused. Service of process so made is considered to have been made within the territorial jurisdiction of any court in this state.

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(e) In addition to the manner provided in subsection (d) of this section, service of process in any action, suit or administrative proceeding shall be valid if served upon any person who engages in any act which constitutes the transaction of unauthorized insurance: Provided, That notice of service and a copy of process are sent within ten days thereafter, by or on behalf of the moving party to the responding party at the last-known principal place of business of the responding party, by registered or certified mail with return receipt requested. The moving party shall file with the clerk of the court in which the action is pending, or with the judge or magistrate of the court in case there be no clerk, or in the official records of the commissioner if an administrative proceeding before the commissioner, an affidavit of compliance herewith, a copy of the process and either a return receipt purporting to be signed by the responding party, or a person qualified to receive its registered or certified mail in accordance with the rules and customs of the post-office department; or, if acceptance was refused by the responding party or an agent thereof, the original envelope bearing a notation by the postal authorities that receipt was refused. In the instance that service of process is refused by the responding party or an agent thereof, service shall be considered sufficient to bestow jurisdiction on the tribunal in which the action was filed.

(f) The papers referred to in subsections (d) and (e) of this section shall be filed within thirty days after the return receipt or other official proof of delivery or the original envelope bearing a notation of refusal, as the case may be, is received by the moving party. Service of process shall be complete ten days after the process and the accompanying papers are filed in accordance with this section.

(g) Nothing contained in this section shall limit or abridge the right to serve any process, notice or demand upon any unauthorized insurer or upon any person engaged in the transaction of insurance in any other manner now or hereafter permitted by law.

(h) For the purposes of this section, "process" in an action in a court includes only a summons or the initial documents served in an action. The Secretary of State is not required to serve any documents in an action after the initial service of process.

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§33-44-6. Injunctive relief.

(a) Whenever the commissioner believes, from evidence satisfactory to him or her, that any insurer is violating or is about to violate the provisions of this article, in addition to the administrative remedies available in this article, the commissioner may cause a complaint to be filed in any appropriate circuit court of this state seeking to enjoin and restrain the insurer from continuing the violation or engaging therein or doing any act in furtherance thereof.

(b) The circuit court shall have jurisdiction of the proceeding and have the power to make and enter an order or judgment awarding preliminary or final injunctive relief as in its judgment is proper. The commissioner may elect to file a complaint in any circuit where transactions have occurred or in the circuit court of Kanawha County.

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§33-44-7. Administrative relief.

(a) Any person engaged in any act which constitutes the unauthorized transaction of insurance as set forth in this article may, after notice and hearing pursuant to section thirteen, article two of this chapter, be fined by the commissioner a sum not to exceed $20,000 for each unauthorized act or transaction of unauthorized insurance.

(b) Any person engaged in any act which constitutes the unauthorized transaction of insurance as set forth in this article may be assessed restitution by the Insurance Commissioner in an amount sufficient to reimburse any and all insureds for the unpaid claims, if, after notice and hearing pursuant to section thirteen, article two of this chapter, the commissioner finds that the unauthorized insurer has failed to pay claims of its insureds in accordance with the terms of the contracts.

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§33-44-8. Civil relief.

(a) No insurance contract entered into in violation of this article shall preclude the insured from enforcing his or her rights under the contract in accordance with the terms and provisions of the contract and the laws of this state against any unauthorized insurer or any person assisting the unauthorized insurer to the same degree those rights would have been enforceable had the contract been lawfully procured.

(b) No insurance contract entered into in violation of this article shall preclude a provider of health care services from enforcing the rights of the insured under the contract in accordance with the terms and provisions of the contract and the laws of this state against any unauthorized insurer or any person assisting the unauthorized insurer pursuant to an assignment of rights executed between the insured and the health care provider.

(c) In an action against an unauthorized insurer upon a contract of insurance issued or delivered to a resident of this state or to a corporation authorized to do business in this state, if the trier of fact finds by a preponderance of the evidence that the unauthorized insurer has failed to make payment in accordance with the terms of the contract, the trier of fact shall award to the insured or the health care provider:

(1) Contract damages in accordance with the terms and provisions of the contract and the laws of this state to the same degree those rights would have been enforceable had the contract been lawfully procured;

(2) Simple interest at a rate of prime plus one percent on the total amount awarded as restitution, accruing from the date payment was due;

(3) If in addition to a finding that the unauthorized insurer has failed to make payment in accordance with the terms of the contract, the trier of fact finds by a preponderance of the evidence that failure to make payment was without reasonable cause, the trier of fact shall award the plaintiff a reasonable attorney fee and include the fee in any judgment that may be rendered in the action. The fee shall not exceed thirty-three percent of the amount that the trier of fact finds the plaintiff is entitled to recover against the unauthorized insurer;

(4) If in addition to a finding that the unauthorized insurer has failed to make payment in accordance with the terms of the contract, the trier of fact further finds that failure to make payment was willful, wanton and malicious, the trier of fact may award the plaintiff punitive damages in an amount that the trier of fact finds the plaintiff is entitled to recover against the insurer.

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§33-44-9. Criminal penalties.

Any unauthorized insurer who violates the provisions of this article is guilty of a felony and, upon conviction thereof, may be fined not more than $20,000 per each unauthorized act or transaction of unauthorized insurance or confined in the state correctional facility not less than one nor more than five years, or both fined and imprisoned.

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§33-44-10. Defense of action or proceeding by unauthorized insurer; bond requirements.

(a) Before any unauthorized insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, or any notice, order, pleading or process in an administrative proceeding before the commissioner instituted against the insurer, the unauthorized insurer shall either:

(1) Deposit with the clerk of the court in which the action, suit or proceeding is pending, or with the commissioner in an administrative proceeding, cash or securities or file with the clerk or the commissioner a bond with good and sufficient sureties, to be approved by the court or the commissioner, in an amount to be fixed by the court or commissioner sufficient to secure the payment of any final judgment which may be rendered in the action or administrative proceeding; or

(2) Deposit with the clerk of the court in which the action, suit or proceeding is pending, or with the commissioner in an administrative proceeding, cash or securities or file with the clerk or the commissioner a bond with good and sufficient sureties, to be approved by the court or the commissioner, in an amount required to procure a license to transact insurance in this state pursuant to the provisions contained within article three of this chapter.

(b) The court or the commissioner in any action, suit or proceeding in which service is made in the manner provided in subsection (d) or (e), section five of this article, may, in its, his or her respective discretion, order the postponement as may be necessary to afford the responding party reasonable opportunity to comply with the provisions of subsection (a) of this section and thereafter to defend the action or proceeding.

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§33-44-11. Person providing specified coverage; proof of regulation by a federal government agency.

(a) Any person who transacts insurance, transacts an insurance business or provides insurance coverage in this state for the cost of:

(1) Medical care;

(2) Surgery;

(3) Chiropractic;

(4) Physical therapy;

(5) Speech pathology;

(6) Audiology;

(7) Professional care of mental health;

(8) Dental care;

(9) Hospital care; or

(10) Ophthalmic care, whether the coverage provides for direct payment, reimbursement or any other method of payment, is subject to regulation by the commissioner and to the provisions of this code unless he or she shows that while transacting insurance, or transacting an insurance business or providing the coverage he or she is subject to regulation by an agency of the federal government.

(b) A person may show that he or she is subject to regulation by an agency of the federal government by providing the commissioner with an advisory opinion issued pursuant to ERISA Procedure 76-1, 41 Federal Register 36281 (Aug. 27, 1976).

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§33-44-12. Collection, maintenance and distribution of restitution to insureds.

All restitution ordered by the commissioner pursuant to the authority set forth in section seven of this article and received from unauthorized insurers shall be collected by the commissioner and distributed to the affected insureds on a pro rata basis. The commissioner shall maintain a record reflecting the names of each of the insureds for which the restitution was ordered, the total amount of the unpaid claims for each of the insureds to which the restitution will be paid and the actual amount of restitution to be paid to the insured. The commissioner shall likewise maintain an account into which restitution received shall be placed until it is distributed to the affected insureds.

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§33-44-13. Enforcement of foreign decrees.

(a) The commissioner may proceed in the courts of this state, any reciprocal state or any other state to enforce an order or decision in any court proceeding or in any administrative proceeding before the commissioner.

(b) The commissioner shall determine which states and territories qualify as reciprocal states.

(c) A certified copy of any foreign decree may be filed in the office of the clerk of any circuit court of this state. The clerk of the circuit court, upon verifying with the commissioner that the decree or order qualified as a foreign decree, shall treat the foreign decree in the same manner as a decree of a circuit court of this state. A foreign decree, so filed, has the same effect and is considered as a decree of a circuit court of this state, and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying a decree of a circuit court of this state and may be enforced or satisfied in like manner.

(d) At the time of the filing of the foreign decree, counsel for the commissioner shall make and file with the clerk of the circuit court an affidavit setting forth the name and last known post office address of the defendant. Promptly upon the filing of the foreign decree and the affidavit, the clerk of the circuit court shall mail notice of the filing of the foreign decree to the defendant at the address given and to the commissioner and shall make a note of the mailing in the docket. In addition, counsel for the commissioner may mail a notice of the filing of the foreign decree to the defendant and to the commissioner and may file proof of mailing with the clerk of the circuit court. Lack of mailing notice of filing by the clerk of the circuit court may not affect the enforcement proceedings if proof of mailing by the counsel for the commissioner has been filed. No execution or other process for enforcement of a foreign decree filing under this section may issue until thirty days after the date the decree is filed.

(e) If the defendant shows the circuit court:

(1) That an appeal from the foreign decree is pending or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the foreign decree until the appeal is concluded, the time for appeal expires or the stay of execution expires or is vacated upon proof that the defendant has furnished the security for the satisfaction of the decree required by the state in which it was rendered.

(2) Any ground upon which enforcement of a decree of any circuit court of this state would be stayed, the court may stay enforcement of the foreign decree.

(f) Any person filing a foreign decree shall pay to the clerk of the circuit court such fees as are required by law.

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