

RECEIVED

00 MAR 14 AM 10:14

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 2000

ENROLLED

SENATE BILL NO. 428

(By Senator CRAIG, ET AL)

PASSED MARCH 1, 2000
In Effect JULY 1, 2000 ~~Passage~~

SENATE
CLERK
OFFICE
SERIALS
SECTION
MARCH 1, 2000

ENROLLED

Senate Bill No. 428

(BY SENATORS CRAIGO, DEEM, DITTMAR, FANNING, KESSLER,
MINARD, SHARPE, SPROUSE AND WOOTON)

[Passed March 1, 2000; to take effect July 1, 2000.]

AN ACT to amend and reenact section nine, article two, chapter thirty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to providing for the payment from the commissioner's examination revolving fund of attorneys, appraisers, independent actuaries, independent certified public accountants or other professionals and specialists retained by the insurance commissioner as examiners; and requiring the insurance commissioner to recover costs paid for that purpose in certain circumstances.

Be it enacted by the Legislature of West Virginia:

That section nine, article two, chapter thirty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

ARTICLE 2. INSURANCE COMMISSIONER.

**§33-2-9. Examination of insurers, agents, brokers and solicitors;
access to books, records, etc.**

1 (a) The purpose of this section is to provide an effective
2 and efficient system for examining the activities, opera-
3 tions, financial condition and affairs of all persons trans-
4 acting the business of insurance in this state and all
5 persons otherwise subject to the jurisdiction of the com-
6 missioner. The provisions of this section are intended to
7 enable the commissioner to adopt a flexible system of
8 examinations which directs resources as may be deemed
9 appropriate and necessary for the administration of the
10 insurance and insurance related laws of this state.

11 (b) For purposes of this section, the following definitions
12 shall apply:

13 (1) "Commissioner" means the commissioner of insur-
14 ance of this state.

15 (2) "Company" or "insurance company" means any
16 person engaging in or proposing or attempting to engage
17 in any transaction or kind of insurance or surety business
18 and any person or group of persons who may otherwise be
19 subject to the administrative, regulatory or taxing author-
20 ity of the commissioner, including, but not limited to, any
21 domestic or foreign stock company, mutual company,
22 mutual protective association, farmers mutual fire compa-
23 nies, fraternal benefit society, reciprocal or inter-insur-
24 ance exchange, nonprofit medical care corporation,
25 nonprofit health care corporation, nonprofit hospital
26 service association, nonprofit dental care corporation,
27 health maintenance organization, captive insurance
28 company, risk retention group or other insurer, regardless
29 of the type of coverage written, benefits provided or
30 guarantees made by each.

31 (3) "Department" means the department of insurance of
32 this state.

33 (4) "Examiners" means the commissioner of insurance,
34 or any individual or firm having been authorized by the
35 commissioner to conduct an examination pursuant to this
36 section, including, but not limited to, the commissioner's
37 deputies, other employees, appointed examiners or other
38 appointed individuals or firms who are not employees of
39 the department of insurance.

40 (c) The commissioner or his examiners may conduct an
41 examination under this section of any company as often as
42 the commissioner in his or her discretion deems appropri-
43 ate. The commissioner or his examiners shall at least once
44 every three years visit each domestic insurer and thor-
45 oughly examine its financial condition and methods of
46 doing business and ascertain whether it has complied with
47 all the laws and regulations of this state. The commis-
48 sioner may also examine the affairs of any insurer apply-
49 ing for a license to transact any insurance business in this
50 state.

51 (d) The commissioner or his examiners shall, at a mini-
52 mum, conduct an examination of every foreign or alien
53 insurer licensed in this state not less frequently than once
54 every five years. The examination of an alien insurer may
55 be limited to its United States business: *Provided, That* in
56 lieu of an examination under this section of any foreign or
57 alien insurer licensed in this state, the commissioner may
58 accept an examination report on the company as prepared
59 by the insurance department for the company's state of
60 domicile or port-of-entry state until the first day of
61 January, one thousand nine hundred ninety-four. Thereaf-
62 ter, such reports may only be accepted if:

63 (1) The insurance department was at the time of the
64 examination accredited under the national association of
65 insurance commissioners' financial regulation standards
66 and accreditation program; or

67 (2) The examination is performed under the supervisor
68 of an accredited insurance department or with the partici-
69 pation of one or more examiners who are employed by
70 such an accredited state insurance department and who,
71 after a review of the examination work papers and report,
72 state under oath that the examination was performed in a
73 manner consistent with the standards and procedures
74 required by their insurance department.

75 (e) In scheduling and determining the nature, scope and
76 frequency of examinations conducted pursuant to this
77 section, the commissioner may consider such matters as
78 the results of financial statement analyses and ratios,
79 changes in management or ownership, actuarial opinions,
80 reports of independent certified public accountants and
81 other criteria as set forth in the examiners' handbook
82 adopted by the national association of insurance commis-
83 sioners and in effect when the commissioner exercises
84 discretion under this section.

85 (f) For purposes of completing an examination of any
86 company under this section, the commissioner may
87 examine or investigate any person, or the business of any
88 person, insofar as the examination or investigation is, in
89 the sole discretion of the commissioner, necessary or
90 material to the examination of the company.

91 (g) The commissioner may also cause to be examined at
92 such times as he or she deems necessary the books, records,
93 papers, documents, correspondence and methods of doing
94 business of any agent, broker, excess lines broker or
95 solicitor licensed by this state. For these purposes the
96 commissioner or his examiners shall have free access to all
97 books, records, papers, documents and correspondence of
98 all the agents, brokers, excess lines brokers and solicitors
99 wherever the books, records, papers, documents and
100 records are situate. The commissioner may revoke the

101 license of any agent, broker, excess lines broker or solicitor
102 who refuses to submit to such examination.

103 (h) In addition to conducting an examination, the
104 commissioner or his examiners may, as the commissioner
105 deems necessary, analyze or review any phase of the
106 operations or methods of doing business of an insurer,
107 agent, broker, excess lines broker, solicitor or other
108 individual or corporation transacting or attempting to
109 transact an insurance business in the state of West Vir-
110 ginia. The commissioner may use the full resources
111 provided by this section in carrying out these responsibili-
112 ties, including any personnel and equipment provided by
113 this section as the commissioner deems necessary.

114 (i) Examinations made pursuant to this section shall be
115 conducted in the following manner:

116 (1) Upon determining that an examination should be
117 conducted, the commissioner or his designee shall issue an
118 examination warrant appointing one or more examiners to
119 perform the examination and instructing them as to the
120 scope of the examination. In conducting the examination,
121 the examiner shall observe those guidelines and proce-
122 dures set forth in the examiners' handbook adopted by the
123 national association of insurance commissioners. The
124 commissioner may also employ any other guidelines or
125 procedures as the commissioner may deem appropriate.

126 (2) Every company or person from whom information is
127 sought, its officers, directors and agents shall provide to
128 the examiners appointed under subdivision (1) timely,
129 convenient and free access at all reasonable hours at its
130 offices to all books, records, accounts, papers, documents
131 and any or all computer or other recordings relating to the
132 property, assets, business and affairs of the company being
133 examined. The officers, directors, employees and agents of
134 the company or person shall facilitate the examination and

135 aid in the examination so far as it is in their power to do
136 so.

137 (3) The refusal of any company, by its officers, directors,
138 employees or agents, to submit to examination or to
139 comply with any reasonable written request of the exam-
140 iners shall be grounds for suspension, revocation, refusal
141 or nonrenewal of any license or authority held by the
142 company to engage in an insurance or other business
143 subject to the commissioner's jurisdiction. Any proceed-
144 ings for suspension, revocation, refusal, or nonrenewal of
145 any license or authority shall be conducted pursuant to
146 section eleven, article two of this chapter.

147 (4) The commissioner or his examiners shall have the
148 power to issue subpoenas, to administer oaths and to
149 examine under oath any person as to any matter pertinent
150 to the examination, analysis or review. The subpoenas
151 shall be enforced pursuant to the provisions of section six,
152 article two of this chapter.

153 (5) When making an examination, analysis or review
154 under this section, the commissioner may retain attorneys,
155 appraisers, independent actuaries, independent certified
156 public accountants or other professionals and specialists
157 as examiners, the cost of which shall be borne by the
158 company which is the subject of the examination, analysis
159 or review or, in the commissioner's discretion, paid from
160 the commissioner's examination revolving fund. The
161 commissioner may recover costs paid from the commis-
162 sioner's examination revolving fund pursuant to this
163 subdivision from the company upon which the examina-
164 tion, analysis or review is conducted unless the subject of
165 the examination, analysis or review is an individual,
166 described in subdivision (2), subsection (q) of this section.

167 (6) Nothing contained in this section may be construed
168 to limit the commissioner's authority to terminate or

169 suspend any examination, analysis or review in order to
170 pursue other legal or regulatory action pursuant to the
171 insurance laws of this state. The commissioner or his
172 examiners may at any time testify and offer other proper
173 evidence as to information secured during the course of an
174 examination, analysis or review, whether or not a written
175 report of the examination has at that time either been
176 made, served or filed in the commissioner's office.

177 (7) Nothing contained in this section may be construed
178 to limit the commissioner's authority to use and, if appro-
179 priate, to make public any final or preliminary examina-
180 tion report, any examiner or company workpapers or other
181 documents or any other information discovered or devel-
182 oped during the course of any examination, analysis or
183 review in the furtherance of any legal or regulatory action
184 which the commissioner may, in his or her sole discretion,
185 deem appropriate. An examination report, when filed,
186 shall be admissible in evidence in any action or proceeding
187 brought by the commissioner against an insurance com-
188 pany, its officers or agents and shall be prima facie
189 evidence of the facts stated therein.

190 (j) Examination reports prepared pursuant to the
191 provisions of this section shall comply with the following
192 requirements:

193 (1) All examination reports shall be comprised of only
194 facts appearing upon the books, records or other docu-
195 ments of the company, its agents or other persons exam-
196 ined or as ascertained from the testimony of its officers or
197 agents or other persons examined concerning its affairs
198 and any conclusions and recommendations the examiners
199 find reasonably warranted from the facts.

200 (2) No later than sixty days following completion of the
201 examination, the examiner in charge shall file with the
202 commissioner a verified written report of examination

203 under oath. Upon receipt of the verified report, the
204 commissioner shall transmit the report to the company
205 examined, together with a notice which shall afford the
206 company examined a reasonable opportunity of not more
207 than ten days to make a written submission or rebuttal
208 with respect to any matters contained in the examination
209 report.

210 (3) Within thirty days of the end of the period allowed
211 for the receipt of written submissions or rebuttals, the
212 commissioner shall fully consider and review the report,
213 together with any written submissions or rebuttals and
214 any relevant portions of the examiner's workpapers and
215 enter an order:

216 (A) Adopting the examination report as filed or with
217 modification or corrections. If the examination report
218 reveals that the company is operating in violation of any
219 law, rule or prior order of the commissioner, the commis-
220 sioner may order the company to take any action the
221 commissioner considers necessary and appropriate to cure
222 such violation; or

223 (B) Rejecting the examination report with directions to
224 the examiners to reopen the examination for purposes of
225 obtaining additional data, documentation or information
226 and refiling pursuant to subdivision (2) above; or

227 (C) Calling for an investigatory hearing with no less than
228 twenty days notice to the company for purposes of obtain-
229 ing additional documentation, data, information and
230 testimony.

231 (4) All orders entered pursuant to this subsection shall be
232 accompanied by findings and conclusions resulting from
233 the commissioner's consideration and review of the
234 examination report, relevant examiner workpapers and
235 any written submissions or rebuttals. Any order issued
236 pursuant to paragraph (A), subdivision three of this

237 subsection shall be considered a final administrative
238 decision and may be appealed pursuant to section four-
239 teen, article two of this chapter and shall be served upon
240 the company by certified mail, together with a copy of the
241 adopted examination report. Within thirty days of the
242 issuance of the adopted report, the company shall file
243 affidavits executed by each of its directors stating under
244 oath that they have received a copy of the adopted report
245 and related orders.

246 (k) Hearings conducted pursuant to this section shall be
247 subject to the following requirements:

248 (1) Any hearing conducted pursuant to this section by
249 the commissioner or the commissioner's authorized
250 representative shall be conducted as a nonadversarial
251 confidential investigatory proceeding as necessary for the
252 resolution of any inconsistencies, discrepancies or disputed
253 issues apparent upon the face of the filed examination
254 report or raised by or as a result of the commissioner's
255 review of relevant workpapers or by the written submis-
256 sion or rebuttal of the company. Within twenty days of
257 the conclusion of any such hearing, the commissioner shall
258 enter an order pursuant to paragraph (A), subdivision (3),
259 subsection (j) of this section.

260 (2) The commissioner may not appoint an examiner as an
261 authorized representative to conduct the hearing. The
262 hearing shall proceed expeditiously with discovery by the
263 company limited to the examiner's workpapers which tend
264 to substantiate any assertions set forth in any written
265 submission or rebuttal. The commissioner or the commis-
266 sioner's representative may issue subpoenas for the
267 attendance of any witnesses or the production of any
268 documents deemed relevant to the investigation whether
269 under the control of the commissioner, the company or
270 other persons. The documents produced shall be included
271 in the record and testimony taken by the commissioner or

272 the commissioner's representative shall be under oath and
273 preserved for the record. Nothing contained in this section
274 shall require the commissioner to disclose any information
275 or records which would indicate or show the existence or
276 content of any investigation or activity of a criminal
277 justice agency.

278 (3) The hearing shall proceed with the commissioner or
279 the commissioner's representative posing questions to the
280 persons subpoenaed. Thereafter the company and the
281 department may present testimony relevant to the investi-
282 gation. Cross-examination may be conducted only by the
283 commissioner or the commissioner's representative. The
284 company and the commissioner shall be permitted to make
285 closing statements and may be represented by counsel of
286 their choice.

287 (l) Adoption of the examination report shall be subject
288 to the following requirements:

289 (1) Upon the adoption of the examination report under
290 paragraph (A), subdivision (3), subsection (j) of this
291 section, the commissioner may continue to hold the
292 content of the examination report as private and confiden-
293 tial information for a period of ninety days except to the
294 extent provided in subdivision (6), subsection (i) of this
295 section. Thereafter, the commissioner may open the report
296 for public inspection so long as no court of competent
297 jurisdiction has stayed its publication.

298 (2) Nothing contained in this section may prevent or be
299 construed as prohibiting the commissioner from disclosing
300 the content of an examination report, preliminary exami-
301 nation report or results or any matter relating thereto or
302 the results of any analysis or review to the insurance
303 department of this or any other state or country or to
304 law-enforcement officials of this or any other state or
305 agency of the federal government at any time, so long as

306 the agency or office receiving the report or matters
307 relating thereto agrees in writing to hold it confidential
308 and in a manner consistent with this section.

309 (3) In the event the commissioner determines that
310 regulatory action is appropriate as a result of any exami-
311 nation, analysis or review, he or she may initiate any
312 proceedings or actions as provided by law.

313 (4) All working papers, recorded information, documents
314 and copies thereof produced by, obtained by or disclosed
315 to the commissioner or any other person in the course of an
316 examination, analysis or review made under this section
317 must be given confidential treatment and are not subject
318 to subpoena and may not be made public by the commis-
319 sioner or any other person, except to the extent provided
320 in subdivision (5), subsection (i) of this section. Access
321 may also be granted to the national association of insur-
322 ance commissioners. The parties must agree in writing
323 prior to receiving the information to provide to it the same
324 confidential treatment as required by this section, unless
325 the prior written consent of the company to which it
326 pertains has been obtained.

327 (m) No examiner may be appointed by the commissioner
328 if the examiner, either directly or indirectly, has a conflict
329 of interest or is affiliated with the management of or owns
330 a pecuniary interest in any person subject to examination
331 under this section. This section shall not be construed to
332 automatically preclude an examiner from being:

333 (1) A policyholder or claimant under an insurance policy;

334 (2) A grantor of a mortgage or similar instrument on the
335 examiner's residence to a regulated entity if done under
336 customary terms and in the ordinary course of business;

337 (3) An investment owner in shares of regulated diversi-
338 fied investment companies; or

339 (4) A settlor or beneficiary of a "blind trust" into which
340 any otherwise impermissible holdings have been placed.

341 (5) Notwithstanding the requirements of this subsection,
342 the commissioner may retain from time to time, on an
343 individual basis, qualified actuaries, certified public
344 accountants or other similar individuals who are inde-
345 pendently practicing their professions, even though these
346 persons may from time to time be similarly employed or
347 retained by persons subject to examination under this
348 section.

349 (n) Personnel conducting examinations, analyses or
350 reviews of either a domestic, foreign or alien insurer shall
351 be compensated for each day worked at a rate set by the
352 commissioner. The personnel shall also be reimbursed for
353 their travel and living expenses at the rate set by the
354 commissioner. Other individuals who are not employees
355 of the department of insurance shall all be compensated
356 for their work, travel and living expenses at rates ap-
357 proved by the commissioner, or as otherwise provided by
358 law. As used in this section the costs of an examination,
359 analysis or review means:

360 (1) The entire compensation for each day worked by all
361 personnel, including those who are not employees of the
362 department of insurance, the conduct of such examination,
363 analysis or review calculated as hereinbefore provided;

364 (2) Travel and living expenses of all personnel, including
365 those who are not employees of the department of insur-
366 ance, directly engaged in the conduct of the examination,
367 analysis or review calculated at the rates as hereinbefore
368 provided for;

369 (3) All other incidental expenses incurred by or on behalf
370 of the personnel in the conduct of any authorized exami-
371 nation, analysis or review.

372 (o) All insurers subject to the provisions of this section of
373 the code shall annually pay to the commissioner on or
374 before the first day of July, one thousand nine hundred
375 ninety-one and every first day of July thereafter an
376 examination assessment fee of eight hundred dollars. Four
377 hundred fifty dollars of this fee shall be paid to the
378 treasurer of the state to the credit of a special revolving
379 fund to be known as the "Commissioner's Examination
380 Revolving Fund" which is hereby established and three
381 hundred fifty dollars shall be paid to the treasurer of the
382 state. The commissioner may at his discretion, upon notice
383 to the insurers subject to this section, increase this exami-
384 nation assessment fee or levy an additional examination
385 assessment fee of two hundred fifty dollars. In no event
386 may the total examination assessment fee including any
387 additional examination assessment fee levied exceed one
388 thousand five hundred dollars per insurer in any calendar
389 year.

390 (p) The moneys collected by the commissioner from an
391 increase or additional examination assessment fee shall be
392 paid to the treasurer of the state to be credited to the
393 commissioner's examination revolving fund. Any funds
394 expended or obligated by the commissioner from the
395 commissioner's examination revolving fund may be
396 expended or obligated solely for defrayment of the costs of
397 examinations, analyses or reviews of the financial affairs
398 and business practices of insurance companies, agents,
399 brokers, excess lines brokers, solicitors or other individu-
400 als or corporations transacting or attempting to transact
401 an insurance business in this state made by the commis-
402 sioner pursuant to this section or for the purchase of
403 equipment and supplies, travel, education and training for
404 the commissioner's deputies, other employees and ap-
405 pointed examiners necessary for the commissioner to
406 fulfill the statutory obligations created by this section.

407 (q) The commissioner may require other individuals who
408 are not employees of the department of insurance who
409 have been appointed by the commissioner to conduct or
410 participate in the examination, analysis or review of
411 insurers, agents, brokers, excess lines brokers, solicitors or
412 other individuals or corporations transacting or attempt-
413 ing to transact an insurance business in this state to:

414 (1) Bill and receive payments directly from the insurance
415 company being examined, analyzed or reviewed for their
416 work, travel and living expenses as previously provided for
417 in this section; or

418 (2) If an individual agent, broker or solicitor is being
419 examined, analyzed or reviewed, bill and receive payments
420 directly from the commissioner's examination revolving
421 fund for their work, travel and living expenses as previ-
422 ously provided for in this section. The commissioner may
423 recover costs paid from the commissioner's examination
424 revolving fund pursuant to this subdivision from the
425 person upon whom the examination, analysis or review is
426 conducted.

427 (r) The commissioner and his examiners shall be entitled
428 to immunity to the following extent:

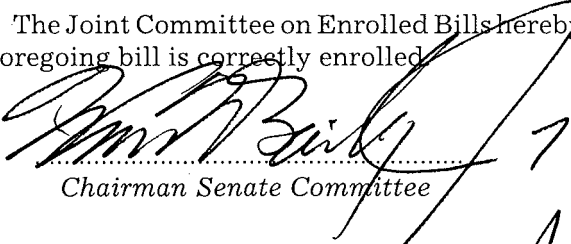
429 (1) No cause of action shall arise nor shall any liability
430 be imposed against the commissioner or his examiners for
431 any statements made or conduct performed in good faith
432 while carrying out the provisions of this section.

433 (2) No cause of action shall arise, nor shall any liability
434 be imposed against any person for the act of communicat-
435 ing or delivering information or data to the commissioner
436 or his examiners pursuant to an examination, analysis or
437 review made under this section, if the act of communica-
438 tion or delivery was performed in good faith and without
439 fraudulent intent or the intent to deceive.

440 (3) The commissioner or any examiner shall be entitled
441 to an award of attorney's fees and costs if he or she is the
442 prevailing party in a civil cause of action for libel, slander
443 or any other relevant tort arising out of activities in
444 carrying out the provisions of this section and the party
445 bringing the action was not substantially justified in doing
446 so. For purposes of this section a proceeding is "substan-
447 tially justified" if it had a reasonable basis in law or fact
448 at the time that it was initiated.

449 (4) This subsection does not abrogate or modify in any
450 way any constitutional immunity or common law or
451 statutory privilege or immunity heretofore enjoyed by any
452 person identified in subdivision (1) of this subsection.

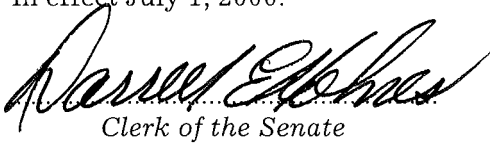
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

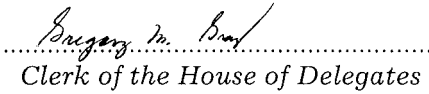

Chairman Senate Committee

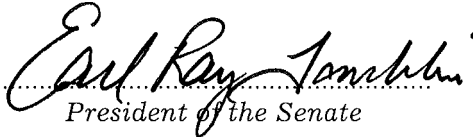

Chairman House Committee

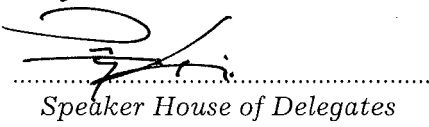
Originated in the Senate.

In effect July 1, 2000.

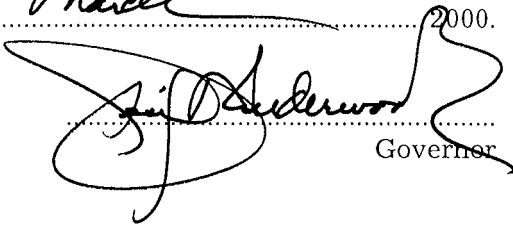

Clerk of the Senate


Clerk of the House of Delegates


President of the Senate


Speaker House of Delegates

The within.....*approved*.....this the *13th*
March
Day of2000.


Governor

PRESENTED TO THE

GOVERNOR

Date 3/8/00

Time 4:55 pm