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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

Regular Session, 2005

ENROLLED

Committee Substitute for

SENATE BILL NO. 418

(By Senators Tomblin, Mr. President, and Spradell)
By Request of the Executive

PASSED April 9, 2005

In Effect 90 days from **Passage**

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COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 418

(BY SENATORS TOMBLIN, MR. PRESIDENT, AND SPROUSE,
BY REQUEST OF THE EXECUTIVE)

[Passed April 9, 2005; in effect ninety days from passage.]

AN ACT to amend and reenact §33-2-9, §33-2-16 and §33-2-17 of the Code of West Virginia, 1931, as amended; to amend said code by adding thereto a new section, designated §33-2-15d; to amend and reenact §33-3-33 of said code; to amend said code by adding thereto a new section, designated §33-6-15a; to amend said code by adding thereto two new sections, designated §33-11-4a and §33-11-4b; to amend and reenact §33-11-6 of said code; and to amend said code by adding thereto a new section, designated §33-20-4a, all relating generally to the regulation of insurance; increasing certain fees for property and casualty insurers; limiting these certain fees upon meeting special fund funding threshold; providing that Insurance Commissioner shall conduct a study and promulgate rules relating thereto; providing that the Director of Consumer Advocacy be appointed by the Governor; requiring that the Director of Consumer Advocacy be a

licensed lawyer; expanding the authority of the Office of Consumer Advocacy; reducing a surcharge on fire and casualty insurance policies; modifying distribution of surcharge; providing for notice of savings in certain insurance policies; eliminating a cause of action for unfair claims settlement practices by third parties; establishing procedures for the filing, investigation and processing of administrative complaints by third-party claimants; defining certain terms; establishing special account to award restitution; providing for limited administrative restitution to third-party claimants in certain circumstances; providing for penalties for engaging in unfair claims settlement practices or general business practices; providing an internal contingent voiding provision; providing for judicial review of administrative process; limiting applicability of Act; and establishing that certain insurers shall submit rate filings biannually.

Be it enacted by the Legislature of West Virginia:

1 That §33-2-9, §33-2-16 and §33-2-17 of the Code of
2 West Virginia, 1931, as amended, be amended and reen-
3 acted; that said code be amended by adding thereto a new
4 section, designated §33-2-15d; that §33-3-33 of said code
5 be amended and reenacted; that said code be amended by
6 adding thereto a new section, designated §33-6-15a; that
7 said code be amended by adding thereto two new sections,
8 designated §33-11-4a and §33-11-4b; that §33-11-6 of said
9 code be amended and reenacted; and that said code be
10 amended by adding thereto a new section, designated §33-
11 20-4a, all 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 consid-
9 ered appropriate and necessary for the administration of
10 the 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 interinsurance
24 exchange, nonprofit medical care corporation, nonprofit
25 health care corporation, nonprofit hospital service associa-
26 tion, nonprofit dental care corporation, health mainte-
27 nance organization, captive insurance company, risk
28 retention group or other insurer regardless of the type of
29 coverage written, benefits provided or guarantees made by
30 each;

31 (3) "Department" means the Department of Insurance of
32 this state; and

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 or her examiners may
41 conduct an examination under this section of any company

42 as often as the Commissioner in his or her discretion
43 considers appropriate. The Commissioner or his or her
44 examiners shall at least once every five years visit each
45 domestic insurer and thoroughly examine its financial
46 condition and methods of doing business and ascertain
47 whether it has complied with all the laws and regulations
48 of this state. The Commissioner may also examine the
49 affairs of any insurer applying for a license to transact any
50 insurance business in this state.

51 (d) The Commissioner or his or her examiners shall, at a
52 minimum, conduct an examination of every foreign or
53 alien insurer licensed in this state not less frequently than
54 once every five years. The examination of an alien insurer
55 may be limited to its United States business: *Provided*,
56 That in lieu of an examination under this section of any
57 foreign or alien insurer licensed in this state, the Commis-
58 sioner may accept an examination report on the company
59 as prepared by the insurance department for the com-
60 pany's state of domicile or port-of-entry state until the
61 first day of January, one thousand nine hundred ninety-
62 four. Thereafter, the 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 supervision
68 of an accredited insurance department or with the partici-
69 pation of one or more examiners who are employed by an
70 accredited state insurance department and who, after a
71 review of the examination work papers and report, state
72 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 Com-
83 missioners 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 the times as he or she considers necessary, the books,
93 records, papers, documents, correspondence and methods
94 of doing business of any agent, broker, excess lines broker
95 or solicitor licensed by this state. For these purposes, the
96 Commissioner or his or her examiners shall have free
97 access to all books, records, papers, documents and
98 correspondence of all the agents, brokers, excess lines
99 brokers and solicitors wherever the books, records, papers,
100 documents and records are situate. The Commissioner
101 may revoke the license of any agent, broker, excess lines
102 broker or solicitor who refuses to submit to the examina-
103 tion.

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

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

117 (1) Upon determining that an examination should be
118 conducted, the Commissioner or his or her designee shall
119 issue an examination warrant appointing one or more
120 examiners to perform the examination and instructing
121 them as to the scope of the examination. The appointment
122 of any examiners pursuant to this section by the Commis-
123 sioner shall not be subject to the requirements of article
124 three, chapter five-a of this code, except that the contracts
125 and agreements shall be approved as to form and confor-
126 mity with applicable law by the Attorney General. In
127 conducting the examination, the examiner shall observe
128 those guidelines and procedures set forth in the examiners'
129 handbook adopted by the National Association of Insur-
130 ance Commissioners. The Commissioner may also employ
131 any other guidelines or procedures as the Commissioner
132 may consider appropriate;

133 (2) Every company or person from whom information is
134 sought, its officers, directors and agents shall provide to
135 the examiners appointed under subdivision (1) of this
136 subsection timely, convenient and free access at all
137 reasonable hours at its offices to all books, records,
138 accounts, papers, documents and any or all computer or
139 other recordings relating to the property, assets, business
140 and affairs of the company being examined. The officers,
141 directors, employees and agents of the company or person
142 shall facilitate the examination and aid in the examination
143 so far as it is in their power to do so;

144 (3) The refusal of any company, by its officers, directors,
145 employees or agents, to submit to examination or to
146 comply with any reasonable written request of the exam-
147 iners shall be grounds for suspension, revocation, refusal
148 or nonrenewal of any license or authority held by the
149 company to engage in an insurance or other business
150 subject to the Commissioner's jurisdiction. Any proceed-
151 ings for suspension, revocation, refusal or nonrenewal of

152 any license or authority shall be conducted pursuant to
153 section eleven of this article;

154 (4) The Commissioner or his or her examiners shall have
155 the power to issue subpoenas, to administer oaths and to
156 examine under oath any person as to any matter pertinent
157 to the examination, analysis or review. The subpoenas
158 shall be enforced pursuant to the provisions of section six
159 of this article;

160 (5) When making an examination, analysis or review
161 under this section, the Commissioner may retain attorneys,
162 appraisers, independent actuaries, independent certified
163 public accountants, professionals or specialists with
164 training or experience in reinsurance, investments or
165 information systems or other professionals and specialists
166 as examiners, the cost of which shall be borne by the
167 company which is the subject of the examination, analysis
168 or review or, in the Commissioner's discretion, paid from
169 the Commissioner's Examination Revolving Fund. The
170 Commissioner may recover costs paid from the Commis-
171 sioner's Examination Revolving Fund pursuant to this
172 subdivision from the company upon which the examina-
173 tion, analysis or review is conducted unless the subject of
174 the examination, analysis or review is an individual
175 described in subdivision (2), subsection (q) of this section;

176 (6) Nothing contained in this section may be construed
177 to limit the Commissioner's authority to terminate or
178 suspend any examination, analysis or review in order to
179 pursue other legal or regulatory action pursuant to the
180 insurance laws of this state. The Commissioner or his or
181 her examiners may at any time testify and offer other
182 proper evidence as to information secured during the
183 course of an examination, analysis or review whether or
184 not a written report of the examination has at that time
185 either been made, served or filed in the Commissioner's
186 Office;

187 (7) Nothing contained in this section may be construed
188 to limit the Commissioner's authority to use and, if

189 appropriate, to make public any final or preliminary
190 examination report, any examiner or company workpapers
191 or other documents or any other information discovered or
192 developed during the course of any examination, analysis
193 or review in the furtherance of any legal or regulatory
194 action which the Commissioner may, in his or her sole
195 discretion, consider appropriate. An examination report,
196 when filed, shall be admissible in evidence in any action or
197 proceeding brought by the Commissioner against an
198 insurance company, its officers or agents and shall be
199 prima facie evidence of the facts stated therein.

200 (j) Examination reports prepared pursuant to the
201 provisions of this section shall comply with the following
202 requirements:

203 (1) All examination reports shall be comprised of only
204 facts appearing upon the books, records or other docu-
205 ments of the company, its agents or other persons exam-
206 ined or as ascertained from the testimony of its officers or
207 agents or other persons examined concerning its affairs
208 and any conclusions and recommendations the examiners
209 find reasonably warranted from the facts;

210 (2) No later than sixty days following completion of the
211 examination the examiner in charge shall file with the
212 Commissioner a verified written report of examination
213 under oath. Upon receipt of the verified report, the
214 Commissioner shall transmit the report to the company
215 examined, together with a notice which shall afford the
216 company examined a reasonable opportunity of not more
217 than ten days to make a written submission or rebuttal
218 with respect to any matters contained in the examination
219 report;

220 (3) Within thirty days of the end of the period allowed
221 for the receipt of written submissions or rebuttals the
222 Commissioner shall fully consider and review the report,
223 together with any written submissions or rebuttals and
224 any relevant portions of the examiner's workpapers and
225 enter an order:

226 (A) Adopting the examination report as filed or with
227 modification or corrections. If the examination report
228 reveals that the company is operating in violation of any
229 law, rule or prior order of the Commissioner, the Commis-
230 sioner may order the company to take any action the
231 Commissioner considers necessary and appropriate to cure
232 the violation; or

233 (B) Rejecting the examination report with directions to
234 the examiners to reopen the examination for purposes of
235 obtaining additional data, documentation or information
236 and refileing pursuant to subdivision (2) of this subsection;
237 or

238 (C) Calling for an investigatory hearing with no less than
239 twenty days' notice to the company for purposes of
240 obtaining additional documentation, data, information
241 and testimony;

242 (4) All orders entered pursuant to this subsection shall be
243 accompanied by findings and conclusions resulting from
244 the Commissioner's consideration and review of the
245 examination report, relevant examiner workpapers and
246 any written submissions or rebuttals. Any order issued
247 pursuant to paragraph (A), subdivision (3) of this subsec-
248 tion shall be considered a final administrative decision and
249 may be appealed pursuant to section fourteen of this
250 article and shall be served upon the company by certified
251 mail, together with a copy of the adopted examination
252 report. Within thirty days of the issuance of the adopted
253 report the company shall file affidavits executed by each
254 of its directors stating under oath that they have received
255 a copy of the adopted report and related orders.

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

258 (1) Any hearing conducted pursuant to this section by
259 the Commissioner or the Commissioner's authorized
260 representative shall be conducted as a nonadversarial
261 confidential investigatory proceeding as necessary for the

262 resolution of any inconsistencies, discrepancies or disputed
263 issues apparent upon the face of the filed examination
264 report or raised by or as a result of the Commissioner's
265 review of relevant workpapers or by the written submis-
266 sion or rebuttal of the company. Within twenty days of the
267 conclusion of any hearing, the Commissioner shall enter an
268 order pursuant to paragraph (A), subdivision (3), subsec-
269 tion (j) of this section;

270 (2) The Commissioner may not appoint an examiner as
271 an authorized representative to conduct the hearing. The
272 hearing shall proceed expeditiously with discovery by the
273 company limited to the examiner's workpapers which tend
274 to substantiate any assertions set forth in any written
275 submission or rebuttal. The Commissioner or the Commis-
276 sioner's representative may issue subpoenas for the
277 attendance of any witnesses or the production of any
278 documents considered relevant to the investigation
279 whether under the control of the Commissioner, the
280 company or other persons. The documents produced shall
281 be included in the record and testimony taken by the
282 Commissioner or the Commissioner's representative shall
283 be under oath and preserved for the record. Nothing
284 contained in this section shall require the Commissioner to
285 disclose any information or records which would indicate
286 or show the existence or content of any investigation or
287 activity of a criminal justice agency;

288 (3) The hearing shall proceed with the Commissioner or
289 the Commissioner's representative posing questions to the
290 persons subpoenaed. Thereafter, the company and the
291 department may present testimony relevant to the investi-
292 gation. Cross-examination may be conducted only by the
293 Commissioner or the Commissioner's representative. The
294 company and the Commissioner shall be permitted to
295 make closing statements and may be represented by
296 counsel of their choice.

297 (l) Adoption of the examination report shall be subject to
298 the following requirements:

299 (1) Upon the adoption of the examination report under
300 paragraph (A), subdivision (3), subsection (j) of this
301 section, the Commissioner may continue to hold the
302 content of the examination report as private and confiden-
303 tial information for a period of ninety days except to the
304 extent provided in subdivision (6), subsection (i) of this
305 section. Thereafter, the Commissioner may open the
306 report for public inspection so long as no court of compe-
307 tent jurisdiction has stayed its publication;

308 (2) Nothing contained in this section may prevent or be
309 construed as prohibiting the Commissioner from disclosing
310 the content of an examination report, preliminary exami-
311 nation report or results or any matter relating thereto or
312 the results of any analysis or review to the insurance
313 department of this or any other state or country or to law-
314 enforcement officials of this or any other state or agency
315 of the federal government at any time, so long as the
316 agency or office receiving the report or matters relating
317 thereto agrees in writing to hold it confidential and in a
318 manner consistent with this section;

319 (3) In the event the Commissioner determines that
320 regulatory action is appropriate as a result of any exami-
321 nation, analysis or review, he or she may initiate any
322 proceedings or actions as provided by law;

323 (4) All working papers, recorded information, documents
324 and copies thereof produced by, obtained by or disclosed
325 to the Commissioner or any other person in the course of
326 an examination, analysis or review made under this
327 section must be given confidential treatment and are not
328 subject to subpoena and may not be made public by the
329 Commissioner or any other person, except to the extent
330 provided in subdivision (5), subsection (i) of this section.
331 Access may also be granted in accordance with section
332 nineteen of this article. The parties must agree in writing
333 prior to receiving the information to provide to it the same
334 confidential treatment as required by this section unless

335 the prior written consent of the company to which it
336 pertains has been obtained.

337 (m) The Commissioner may require any examiner to
338 furnish a bond in such amount as Commissioner may
339 determine to be appropriate and the bond shall be ap-
340 proved, filed and premium paid, with suitable proof
341 submitted to the Commissioner, prior to commencement of
342 employment by the Commissioner. No examiner may be
343 appointed by the Commissioner if the examiner, either
344 directly or indirectly, has a conflict of interest or is
345 affiliated with the management of or owns a pecuniary
346 interest in any person subject to examination under this
347 section. This section shall not be construed to automati-
348 cally preclude an examiner from being:

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

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

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

355 (4) A settlor or beneficiary of a "blind trust" into which
356 any otherwise impermissible holdings have been placed;

357 (5) Notwithstanding the requirements of this subsection,
358 the Commissioner may retain, from time to time, on an
359 individual basis qualified actuaries, certified public
360 accountants or other similar individuals who are inde-
361 pendently practicing their professions even though these
362 persons may, from time to time, be similarly employed or
363 retained by persons subject to examination under this
364 section.

365 (n) Personnel conducting examinations, analyses or
366 reviews of either a domestic, foreign or alien insurer shall
367 be compensated for each day worked at a rate set by the
368 Commissioner. The personnel shall also be reimbursed for
369 their travel and living expenses at the rate set by the

370 Commissioner. Other individuals who are not employees
371 of the Department of Insurance shall all be compensated
372 for their work, travel and living expenses at rates ap-
373 proved by the Commissioner or as otherwise provided by
374 law. As used in this section, the costs of an examination,
375 analysis or review means:

376 (1) The entire compensation for each day worked by all
377 personnel, including those who are not employees of the
378 Department of Insurance, the conduct of the examination,
379 analysis or review calculated as hereinbefore provided;

380 (2) Travel and living expenses of all personnel, including
381 those who are not employees of the Department of Insur-
382 ance, directly engaged in the conduct of the examination,
383 analysis or review calculated at the rates as hereinbefore
384 provided for;

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

388 (o) (1) All property and casualty insurers subject to the
389 provisions of this section shall annually pay to the Com-
390 missioner on or before the first day of July, one thousand
391 nine hundred ninety-one, and every first day of July
392 thereafter an examination assessment fee of up to five
393 thousand dollars. Four hundred fifty dollars of this fee
394 shall be paid to the treasurer of the state to the credit of a
395 special revolving fund to be known as the Commissioner's
396 Examination Revolving Fund which is hereby established;
397 up to four thousand two hundred dollars shall be paid to
398 the Treasurer of the state to the credit of the Unfair Claims
399 Settlement Practice Trust Fund established in section
400 four-b, article eleven of this chapter and three hundred
401 fifty dollars shall be paid to the Treasurer of the state. If
402 the Trust Fund has moneys in excess of one million dollars,
403 the examination assessment fee shall be eight hundred
404 dollars and the five thousand-dollar fee shall only be
405 reinstated at whatever amount the Commissioner deems

406 necessary to maintain the Fund, if the Fund value goes
407 below one million dollars. The Commissioner may at his
408 or her discretion, upon notice to the insurers subject to this
409 subsection, increase this examination assessment fee or
410 levy an additional examination assessment fee of two
411 hundred fifty dollars. In no event may the total examina-
412 tion assessment fee, including any additional examination
413 assessment fee levied, exceed five thousand two hundred
414 fifty dollars per insurer in any calendar year.

415 (2) All insurers other than property and casualty insurers
416 subject to the provisions of this section shall annually pay
417 to the Commissioner on or before the first day of July, one
418 thousand nine hundred ninety-one, and every first day of
419 July thereafter an examination assessment fee of eight
420 hundred dollars. Four hundred fifty dollars of this fee
421 shall be paid to the treasurer of the state to the credit of
422 the Commissioner's Examination Revolving Fund and
423 three hundred fifty dollars shall be paid to the treasurer of
424 the state. The Commissioner may at his or her discretion,
425 upon notice to the insurers subject to this subsection,
426 increase this examination assessment fee or levy an
427 additional examination assessment fee of two hundred
428 fifty dollars. In no event may the total examination
429 assessment fee, including any additional examination
430 assessment fee levied, exceed one thousand five hundred
431 dollars per insurer in any calendar year.

432 (p) The moneys collected by the Commissioner from an
433 increase or additional examination assessment fee shall be
434 paid to the Treasurer of the State to be credited to the
435 Commissioner's examination revolving fund. Any funds
436 expended or obligated by the Commissioner from the
437 Commissioner's examination revolving fund may be
438 expended or obligated solely for defrayment of the costs of
439 examinations, analyses or reviews of the financial affairs
440 and business practices of insurance companies, agents,
441 brokers, excess lines brokers, solicitors or other individu-
442 als or corporations transacting or attempting to transact
443 an insurance business in this state made by the Commis-

444 sioner pursuant to this section or for the purchase of
445 equipment and supplies, travel, education and training for
446 the Commissioner's deputies, other employees and ap-
447 pointed examiners necessary for the Commissioner to
448 fulfill the statutory obligations created by this section.

449 (q) The Commissioner may require other individuals who
450 are not employees of the Department of Insurance who
451 have been appointed by the Commissioner to conduct or
452 participate in the examination, analysis or review of
453 insurers, agents, brokers, excess lines brokers, solicitors or
454 other individuals or corporations transacting or attempt-
455 ing to transact an insurance business in this state to:

456 (1) Bill and receive payments directly from the insurance
457 company being examined, analyzed or reviewed for their
458 work, travel and living expenses as previously provided in
459 this section; or

460 (2) If an individual agent, broker or solicitor is being
461 examined, analyzed or reviewed, bill and receive payments
462 directly from the Commissioner's Examination Revolving
463 Fund for their work, travel and living expenses as previ-
464 ously provided in this section. The Commissioner may
465 recover costs paid from the Commissioner's Examination
466 Revolving Fund pursuant to this subdivision from the
467 person upon whom the examination, analysis or review is
468 conducted.

469 (r) The Commissioner and his or her examiners shall be
470 entitled to immunity to the following extent:

471 (1) No cause of action shall arise nor shall any liability
472 be imposed against the Commissioner or his or her exam-
473 iners for any statements made or conduct performed in
474 good faith while carrying out the provisions of this section;

475 (2) No cause of action shall arise, nor shall any liability
476 be imposed, against any person for the act of communicat-
477 ing or delivering information or data to the Commissioner
478 or his or her examiners pursuant to an examination,

479 analysis or review made under this section if the act of
480 communication or delivery was performed in good faith
481 and without fraudulent intent or the intent to deceive;

482 (3) The Commissioner or any examiner shall be entitled
483 to an award of attorney's fees and costs if he or she is the
484 prevailing party in a civil cause of action for libel, slander
485 or any other relevant tort arising out of activities in
486 carrying out the provisions of this section and the party
487 bringing the action was not substantially justified in doing
488 so. For purposes of this section, a proceeding is "substan-
489 tially justified" if it had a reasonable basis in law or fact
490 at the time that it was initiated;

491 (4) This subsection does not abrogate or modify in any
492 way any constitutional immunity or common law or
493 statutory privilege or immunity heretofore enjoyed by any
494 person identified in subdivision (1) of this subsection.

§33-2-15d. Report to the Legislature.

1 (a) By the first day of January, two thousand seven, the
2 Commissioner shall submit a report to the Legislature.
3 The report shall contain analysis of the impact of legisla-
4 tion enacted during the two thousand five regular legisla-
5 tive session upon rates and insurance availability in the
6 state.

7 (b) The Insurance Commissioner shall by proposal of
8 legislative or procedural rules, pursuant to article three,
9 chapter twenty-nine-a of this code, put forth analytical
10 criteria and methodology of all factors to be considered in
11 the report. This purpose of this section is to assure that all
12 relevant factors of concern to the Legislature regarding
13 the effect of the reforms enacted in this article, any savings
14 to consumers, the promotion of insurance availability and
15 impacts on insurance industry services and performance
16 are fully reviewed and addressed.

**§33-2-16. Office of Consumer Advocacy established; Director of
Consumer Advocacy; promulgation of rules.**

1 (a) There is hereby created within the agency of the
2 Insurance Commissioner the Office of Consumer Advoca-
3 cacy. The position of Director of the Office of Consumer
4 Advocacy is a full-time position. The Director shall be an
5 attorney licensed in the State of West Virginia. The
6 Director shall be appointed by the Governor for a term of
7 four years to coincide with the term of the Governor and
8 may be discharged only for failure to carry out the duties
9 of the office or for other good and sufficient cause:
10 *Provided*, That the current Director of the Office of
11 Consumer Advocacy or other appointee of the Commis-
12 sioner shall continue in the position until the Governor
13 appoints a new Director.

14 (b) The Insurance Commissioner shall provide office
15 space, equipment and supplies for the office.

16 (c) The Director may promulgate rules pursuant to
17 article three, chapter twenty-nine-a of this code in order
18 to effect the purposes of this section and sections seven-
19 teen and section eighteen of this article.

20 (d) On or before the first day of each regular session of
21 the Legislature, the Director shall file with the Governor,
22 the Clerk of the Senate and the Clerk of the House of
23 Delegates a report detailing the actions taken by the
24 division in the preceding calendar year.

§33-2-17. Office of Consumer Advocacy.

1 (a) In addition to the authority established under the
2 rules promulgated by the Director, the Office of Consumer
3 Advocacy is authorized to:

4 (1) Institute, intervene in, or otherwise participate in, as
5 an advocate for the public interest and the interests of
6 insurance consumers, proceedings in state and federal
7 courts, before administrative agencies or before the Health
8 Care Authority, concerning applications or proceedings
9 before the Health Care Authority or the review of any act,
10 failure to act or order of the Health Care Authority;

11 (2) At the request of one or more policyholders, or
12 whenever the public interest is served, to advocate the
13 interests of those policyholders in proceedings arising out
14 of any filing made with the Insurance Commissioner by
15 any insurance company or relating to any complaint
16 alleging an unfair or deceptive act or practice in the
17 business of insurance.

18 (3) At the request of one or more third-party claimant
19 who does not have legal representation at a hearing on his
20 or her claim, or whenever the public interest is served, to
21 advocate the interests of those third-party claimants in
22 proceedings arising out of any filing made with the
23 Insurance Commissioner by any insurance company or
24 relating to any third-party complaint alleging an unfair
25 claims settlement practice;

26 (4) Institute, intervene in or otherwise participate in, as
27 an advocate for the public interest and the interests of
28 insurance consumers, proceedings in state and federal
29 courts, before administrative agencies, or before the
30 Insurance Commissioner, concerning applications or
31 proceedings before the Commissioner or the review of any
32 act, failure to act or order of the Insurance Commissioner;

33 (5) Review and compile information, data and studies of
34 the reasonable and customary rate schedules of health care
35 providers and health insurers for the purposes of review-
36 ing, establishing, investigating, or supporting any policy
37 regarding health care insurance rates;

38 (6) Exercise all the same rights and powers regarding
39 examination and cross-examination of witnesses, presen-
40 tation of evidence, rights of appeal and other matters as
41 any party in interest appearing before the Insurance
42 Commissioner or the Health Care Authority;

43 (7) Hire consultants, experts, lawyers, actuaries, econo-
44 mists, statisticians, accountants, clerks, stenographers,
45 support staff, assistants and other personnel necessary to
46 carry out the provisions of this section and sections sixteen

47 and eighteen of this article, which personnel shall be paid
48 from special revenue funds appropriated for the use of the
49 office;

50 (8) Contract for the services of technically qualified
51 persons in the area of insurance matters to assist in the
52 preparation and presentation of matters before the courts,
53 the Insurance Commissioner, administrative agencies or
54 the Health Care Authority, which persons shall be paid
55 from special revenue funds appropriated for the use of the
56 office;

57 (9) Make recommendations to the Legislature concerning
58 legislation to assist the Office in the performance of its
59 duties;

60 (10) Communicate and exchange data and information
61 with other federal or state agencies, divisions, departments
62 or officers and with other interested parties, including, but
63 not limited to, health care providers, insurance companies,
64 consumers or other interested parties; and

65 (11) Perform other duties to effect the purposes of the
66 Office.

67 (b) The provisions of this section do not apply to any
68 filing made by an insurance company, or act or order
69 performed or issued by the Commissioner, or complaint
70 filed by a policyholder with the Commissioner prior to the
71 thirtieth day of June, one thousand nine hundred ninety-
72 one. All proceedings and orders in connection with these
73 prior matters shall be governed by the law in effect at the
74 time of the filing, or performance or issuance of the act or
75 order.

76 (c) Nothing in this section may be construed to authorize
77 the Director to participate in the review and consideration
78 of any rate filing made pursuant to this chapter.

ARTICLE 3. LICENSING, FEES AND TAXATION OF INSURERS.

§33-3-33. Surcharge on fire and casualty insurance policies to benefit volunteer and part volunteer fire departments; public employees insurance agency and municipal pension plans; special fund created; allocation of proceeds; effective date.

1 (a)(1) For the purpose of providing additional revenue
2 for volunteer fire departments, part-volunteer fire depart-
3 ments and certain retired teachers and the teachers
4 retirement reserve fund, there is hereby authorized and
5 imposed on and after the first day of July, one thousand
6 nine hundred ninety-two, on the policyholder of any fire
7 insurance policy or casualty insurance policy issued by any
8 insurer, authorized or unauthorized, or by any risk reten-
9 tion group, a policy surcharge equal to one percent of the
10 taxable premium for each such policy. After the thirtieth
11 day of June, two thousand five, the surcharge shall be
12 imposed as specified in subdivisions (2) and (3) of this
13 subsection.

14 (2) After the thirtieth day of June, two thousand five,
15 through the thirty-first day of December, two thousand
16 five, for the purpose of providing additional revenue for
17 volunteer fire departments, part-volunteer fire depart-
18 ments and to provide additional revenue to the public
19 employees insurance agency and municipal pension plans,
20 there is hereby authorized and imposed on and after the
21 first day of July, two thousand five, on the policyholder of
22 any fire insurance policy or casualty insurance policy
23 issued by any insurer, authorized or unauthorized, or by
24 any risk retention group, a policy surcharge equal to one
25 percent of the taxable premium for each such policy.

26 (3) After the thirty-first day of December, two thousand
27 five, for the purpose of providing additional revenue for
28 volunteer fire departments and part-volunteer fire depart-
29 ments, there is hereby authorized and imposed on the
30 policyholder of any fire insurance policy or casualty
31 insurance policy issued by any insurer, authorized or
32 unauthorized, or by any risk retention group, a policy

33 surcharge equal to fifty-five one hundredths of one percent
34 of the taxable premium for each such policy.

35 (4) For purposes of this section, casualty insurance may
36 not include insurance on the life of a debtor pursuant to or
37 in connection with a specific loan or other credit transac-
38 tion or insurance on a debtor to provide indemnity for
39 payments becoming due on a specific loan or other credit
40 transaction while the debtor is disabled as defined in the
41 policy. The policy surcharge may not be subject to pre-
42 mium taxes, agent commissions or any other assessment
43 against premiums.

44 (b) The policy surcharge shall be collected and remitted
45 to the Commissioner by the insurer, or in the case of
46 surplus lines coverage, by the surplus lines licensee, or if
47 the policy is issued by a risk retention group, by the risk
48 retention group. The amount required to be collected
49 under this section shall be remitted to the Commissioner
50 on a quarterly basis on or before the twenty-fifth day of
51 the month succeeding the end of the quarter in which they
52 are collected, except for the fourth quarter for which the
53 surcharge shall be remitted on or before the first day of
54 March of the succeeding year.

55 (c) Any person failing or refusing to collect and remit to
56 the Commissioner any policy surcharge and whose sur-
57 charge payments are not postmarked by the due dates for
58 quarterly filing is liable for a civil penalty of up to one
59 hundred dollars for each day of delinquency, to be assessed
60 by the Commissioner. The Commissioner may suspend the
61 insurer, broker or risk retention group until all surcharge
62 payments and penalties are remitted in full to the Commis-
63 sioner.

64 (d)(1) All money from the policy surcharge shall be
65 collected by the Commissioner who shall disburse the
66 money received from the surcharge into a special account
67 in the State Treasury, designated the Fire Protection Fund.
68 The net proceeds of this portion of the tax and the interest

69 thereon, after appropriation by the Legislature, shall be
70 distributed quarterly on the first day of the months of
71 January, April, July and October to each volunteer fire
72 company or department on an equal share basis by the
73 State Treasurer. After the thirtieth day of June, two
74 thousand five, the money received from the surcharge shall
75 be distributed as specified in subdivisions (2) and (3) of
76 this subsection.

77 (2)(A) After the thirtieth day of June, two thousand five,
78 through the thirty-first day of December, two thousand
79 five, all money from the policy surcharge shall be collected
80 by the Commissioner who shall disburse one-half of the
81 money received from the surcharge into the Fire Protection
82 Fund for distribution as provided in subdivision (1) of this
83 subsection.

84 (B) The remaining portion of moneys collected shall be
85 transferred into the fund in the State Treasury of the
86 public employees insurance agency into which are depos-
87 ited the proportionate shares made by agencies of this
88 state of the Public Employees Insurance Agency costs of
89 those agencies, until the first day of November, two
90 thousand five. After the thirty-first day of October, two
91 thousand five, through the thirty-first day of December,
92 two thousand five, the remaining portion shall be trans-
93 ferred to the special account in the State Treasury, known
94 as the Municipal Pensions and Protection Fund.

95 (3) After the thirty-first day of December, two thousand
96 five, all money from the policy surcharge shall be collected
97 by the Commissioner who shall disburse all of the money
98 received from the surcharge into the Fire Protection Fund
99 for distribution as provided in subdivision (1) of this
100 subsection.

101 (4) Before each distribution date to volunteer fire
102 companies or departments, the State Fire Marshal shall
103 report to the State Treasurer the names and addresses of
104 all volunteer and part-volunteer fire companies and

105 departments within the state which meet the eligibility
106 requirements established in section eight-a, article fifteen,
107 chapter eight of this code.

108 (e) The allocation, distribution and use of revenues
109 provided in the Fire Protection Fund are subject to the
110 provisions of sections eight-a and eight-b, article fifteen,
111 chapter eight of this code.

ARTICLE 6. THE INSURANCE POLICY.

§33-6-15a. Notation of consumer cost savings.

1 Each policy issued following enactment of this provision
2 during the two thousand five regular session, during the
3 year following the effective date, shall display in a promi-
4 nent location on the policy itself or on an insert included
5 with each policy and provided to each policyholder,
6 statements as following:

7 (1) “YOUR COSTS FOR THIS POLICY (HAVE/HAVE
8 NOT) BEEN REDUCED BY (insert savings amount here)
9 BECAUSE OF CIVIL JUSTICE REFORMS ENACTED BY
10 THE WEST VIRGINIA LEGISLATURE IN 2005, AND
11 SIGNED INTO LAW BY THE GOVERNOR”; and

12 (2) “YOUR COST FOR THIS POLICY HAS BEEN
13 REDUCED BY (insert savings amount here) BECAUSE OF
14 PREMIUM SURCHARGE REDUCTIONS ENACTED BY
15 THE WEST VIRGINIA LEGISLATURE IN 2005 AND
16 SIGNED INTO LAW BY THE GOVERNOR”.

17 If the insurer did not offer the type of insurance pro-
18 vided by the policy in two thousand four, the requirement
19 for these statements do not apply.

ARTICLE 11. UNFAIR TRADE PRACTICES.

§33-11-4a. Complaints by third-party claimants; elimination of private cause of action.

1 (a) A third-party claimant may not bring a private cause
2 of action or any other action against any person for an

3 unfair claims settlement practice. A third-party claim-
4 ant's sole remedy against a person for an unfair claims
5 settlement practice or the bad faith settlement of a claim
6 is the filing of an administrative complaint with the
7 Commissioner in accordance with subsection (b) of this
8 section. A third-party claimant may not include allega-
9 tions of unfair claims settlement practices in any underly-
10 ing litigation against an insured.

11 (b) A third-party claimant may file an administrative
12 complaint against a person for an alleged unfair claims
13 settlement practice with the Commissioner. The adminis-
14 trative complaint shall be filed as soon as practicable but
15 in no event later than one year following the actual or
16 implied discovery of the alleged unfair claims settlement
17 practice.

18 (1) The administrative complaint shall be on a form
19 provided by the Commissioner and shall state with speci-
20 ficity the following information and such other informa-
21 tion as the Commissioner may require:

22 (A) The statutory provision, if known, which the person
23 allegedly violated;

24 (B) The facts and circumstances giving rise to the
25 violation;

26 (C) The name of any individual or other entity involved
27 in the violation; and

28 (D) Reference to specific policy language that is relevant
29 to the violation, if known.

30 (2) If the administrative complaint is deficient, the
31 Commissioner shall contact the third-party claimant
32 within fifteen days of receipt of the complaint to obtain
33 the necessary information.

34 (3) Upon receipt of a sufficiently complete administra-
35 tive complaint, the Commissioner must provide the person

36 against whom the administrative complaint is filed written
37 notice of the alleged violation.

38 (4) If the person against whom the administrative
39 complaint was filed substantially corrects the circum-
40 stances that gave rise to the violation or offers to resolve
41 the complaint in a manner found reasonable by the
42 Commissioner within sixty days after receiving the notice
43 from the Commissioner pursuant to subdivision (3) of this
44 subsection, the Commissioner shall close the complaint
45 and no further action shall lie on the matter, either by the
46 Commissioner or by the third party.

47 (5) The person that is the recipient of a notice from the
48 Commissioner pursuant to subdivision (3) of this subsec-
49 tion shall report to the Commissioner on the disposition of
50 the alleged violation within fifteen days of the disposition
51 but no later than sixty days from receipt of notice of the
52 complaint from the Commissioner.

53 (c) If the third-party claim is not resolved within the
54 sixty-day period described in subdivision (4), subsection
55 (b) of this section through either the person's substantial
56 correction of the circumstances giving rise to the alleged
57 violation or an offer from the person to resolve the admin-
58 istrative complaint that is found to be reasonable by the
59 Commissioner, the Commissioner shall conduct any
60 investigation he or she considers necessary to determine
61 whether the allegations contained in the administrative
62 complaint are meritorious.

63 (d) Following the time period and investigation provided
64 in subsection (c) of this section, if the Commissioner finds
65 that merit exists for a complaint and the complaint has not
66 been resolved, the Commissioner shall forward a complete
67 copy of the complaint to the Office of Consumer Advocacy
68 and, if at his or her discretion, may order further investi-
69 gation and hearing to determine if the person has commit-
70 ted an unfair claims settlement practice with such fre-
71 quency as to constitute a general business practice. Notice

72 of any hearing shall be provided to all parties. The
73 Commissioner shall assign a time and place for a hearing
74 and shall notify the parties of the hearing by written
75 notice at least ten days in advance thereof. The hearing
76 shall be held within ninety days from the date of filing the
77 complaint unless the complaint has been successfully
78 resolved pursuant to subdivision (4), subsection (b) of this
79 section or continued by agreement of all parties or by the
80 Commissioner for good cause. The Commissioner shall
81 cause hearings to be conducted in the geographical region
82 of the state where the complainant resides. The Commis-
83 sioner may promulgate rules pursuant to article three,
84 chapter twenty-nine-a of this code necessary pursuant to
85 the authority of this chapter, to establish procedures to
86 conduct hearings pursuant to this section and chapter.

87 (e) If the Commissioner finds that the person has com-
88 mitted the unfair claim settlement practice with such
89 frequency as to constitute a general business practice, the
90 Commissioner may proceed to take administrative action
91 he or she considers appropriate in accordance with section
92 six of this article or as otherwise provided in this chapter.
93 If the Commissioner finds that the person engaged in any
94 method of competition, act or practice that involves an
95 intentional violation of subdivision (9), section four of this
96 article, and even though it has not been established that
97 the person engaged in a general business practice, the
98 Commissioner may proceed to take administrative action
99 he or she considers appropriate in accordance with
100 subsection (b), section six of this article. The person is
101 entitled to notice and hearing in connection with the
102 administrative proceeding.

103 (f) A finding by the Commissioner that the actions of a
104 person constitute a general business practice may only be
105 based on the existence of substantially similar violations
106 in a number of separate claims or causes of action.

107 (g) A good faith disagreement over the value of an action
108 or claim or the liability of any party to any action or claim
109 is not an unfair claims settlement practice.

110 (h) The Commissioner, pursuant to article three, chapter
111 twenty-nine-a of this code, may promulgate by emergency
112 rule standards for subsection (9), section four of this
113 article.

114 (i) Nothing in this section in any way limits the rights of
115 the Commissioner to investigate and take action against a
116 person which the Commissioner has reason to believe has
117 committed an unfair claims settlement practice or has
118 consistently resolved administrative complaints by third-
119 party claimants within the sixty-day period set forth in
120 subdivision (4), subsection (b) of this section.

121 (j) Definitions:

122 (1) "Third-party claimant" means any individual,
123 corporation, association, partnership or any other legal
124 entity asserting a claim against any individual, corpora-
125 tion, association, partnership or other legal entity insured
126 under an insurance policy or insurance contract for the
127 claim in question.

128 (2) "Unfair claims settlement practice" means a violation
129 of subsection (9), section four of this article.

130 (3) "Underlying litigation" means a third-party claim-
131 ant's lawsuit involving a claim against an insured.

132 (4) "Underlying claim" means the claim by a third-party
133 claimant against an insured.

§33-11-4b. Unfair Claims Settlement Practice Trust Fund.

1 (a) There is hereby created a special account in the State
2 Treasury designated the Unfair Claims Settlement Prac-
3 tice Trust Fund, which shall be an interest-bearing
4 account and may be invested in the manner permitted by
5 section nine, article six, chapter twelve of this code, with
6 the interest income or other refund earned thereon a
7 proper credit to the fund. Funds paid into the account
8 may also be derived from the following sources:

9 (1) Payments received pursuant to section nine, article
10 two of this chapter; and

11 (2) Any appropriations by the Legislature which may be
12 made for this purpose.

13 (b) The moneys from the principal in the fund shall be
14 expended by the Commissioner to compensate claimants
15 as provided in section four-a and six of this article.

**§33-11-6. Violations, cease and desist and penalty orders and
modifications thereof.**

1 If, after notice and hearing, the Commissioner deter-
2 mines that any person has engaged in or is engaging in any
3 method of competition, act or practice in violation of the
4 provisions of this article or any rules or regulations
5 promulgated by the Commissioner thereunder, the Com-
6 missioner shall issue an order directing the person to cease
7 and desist from engaging in the method of competition, act
8 or practice and, in addition thereto, the Commissioner may
9 at his or her discretion order any one or more of the
10 following:

11 (a) Require the payment to the State of West Virginia of
12 a penalty in a sum not exceeding one thousand dollars for
13 each and every act or violation, but not to exceed an
14 aggregate penalty of ten thousand dollars, unless the
15 person knew or reasonably should have known he or she
16 was in violation of this article, in which case the penalty
17 shall not exceed five thousand dollars for each and every
18 act or violation, but not to exceed an aggregate penalty of
19 one hundred thousand dollars in any six-month period.

20 (b) In the event the act involves an intentional violation
21 of subdivision (9), section four of this article, and even
22 though it has not been established that the person engaged
23 in a general business practice, require the payment to the
24 State of West Virginia of a penalty in a sum not to exceed
25 ten thousand dollars.

26 (c) Require the payment to the State of West Virginia of
27 a penalty in a sum not exceeding two hundred fifty
28 thousand dollars if the Commissioner finds that the
29 insurer committed or performed unfair claims settlement
30 practices with such frequency as to indicate a general
31 business practice.

32 (d) Revoke or suspend the license of any person if he or
33 she knew, or reasonably should have known, that he or she
34 was in violation of this article.

35 (e)(1) Provide restitution from the Unfair Claims Settle-
36 ment Practice Trust Fund to a claimant who has suffered
37 damages as a result of a general business practice or from
38 an egregious act by a person whether or not the act
39 constituted a pattern corresponding to an unfair claim
40 settlement practice committed with such frequency as to
41 constitute a general business practice.

42 (2) Restitution provided herein may include: (A) Actual
43 economic damages; and (B) noneconomic damages not to
44 exceed ten thousand dollars. Restitution may not be given
45 for attorney fees and punitive damages.

46 (f) It is expressly understood and intended that the
47 provisions of paragraph (1), subdivision (e) of this section
48 do not create a private cause of action against the person
49 that has committed an unfair claims settlement practice.
50 In the event that any provision of said paragraph is found
51 to be unconstitutional or is deemed by any court of
52 competent jurisdiction to create a private cause of action,
53 then subdivision (e) shall be void.

54 (g) Any person aggrieved by an order of the Commis-
55 sioner under this article may seek judicial review of the
56 order as provided in section fourteen, article two of this
57 chapter.

58 (h) No order of the Commissioner pursuant to this article
59 or order of any court to enforce it, or holding of a hearing,
60 shall in any manner relieve or absolve any person affected

61 by the order or hearing from any other liability, penalty or
62 forfeiture under law.

63 (i) The provisions of section four-a of this article and
64 subdivision (e) of this section do not apply to medical
65 professional liability insurance claims pursuant to article
66 seven-b, chapter fifty-five of this code and workers
67 compensation insurance policies governed by article two-c,
68 chapter twenty-three of this code.

ARTICLE 20. RATES AND RATING ORGANIZATIONS.

§33-20-4a. Biannual rate filings for certain insurance lines.

1 On or before the first day of July, two thousand five, the
2 Commissioner shall promulgate legislative rules pursuant
3 to article three, chapter twenty-nine-a of this code estab-
4 lishing procedures whereby each insurer providing five
5 percent or more of insurance coverage in this state for
6 private passenger automobile insurance and property
7 insurance obtained for personal or family needs shall
8 biannually submit rate filings required under this section:
9 *Provided*, That the requirements under this subsection
10 shall terminate on the first day of July, two thousand nine.

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

Candy White
.....
Chairman Senate Committee

H. Rich Burr
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Darrell Edmonds
.....
Clerk of the Senate

Suzanne S. Surr
.....
Clerk of the House of Delegates

Earl Ray Tomblin
.....
President of the Senate

Robert A. Witt
.....
Speaker House of Delegates

The within *is approved* this the *29th*
Day of *April*, 2005.

Robert M. Stewart
.....
Governor

PRESENTED TO THE
GOVERNOR

APR 27 2005

Time 10:05 am