

HB 4128

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# WEST VIRGINIA LEGISLATURE

SECOND REGULAR SESSION, 2010



# ENROLLED

COMMITTEE SUBSTITUTE  
FOR

## House Bill No. 4128

(By Delegate Perry)



Passed March 3, 2010

In Effect Ninety Days from Passage

FILED  
**ENROLLED**

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COMMITTEE SUBSTITUTE

WEST VIRGINIA  
SECRETARY OF STATE

FOR

## **H. B. 4128**

(DELEGATE PERRY)

[Passed March 3, 2010; in effect ninety days from passage]

AN ACT to repeal §33-34-11 of the Code of West Virginia, 1931, as amended; to repeal §33-34A-1, §33-34A-2, §33-34A-3, §33-34A-4, §33-34A-5, §33-34A-6, §33-34A-7 and §33-34A-8 of said code; to amend and reenact §33-34-3 and §33-34-4 of said code; and to further amend said article by adding thereto a new section, designated §33-34-3a, all relating to determining when insurance companies are to be deemed to be in hazardous financial condition; deleting severability provisions; providing for consideration of impact on creditors; providing for entry of an order by the commissioner placing the insurer under administrative supervision; revising standards and authority for the Insurance Commissioner's identification of companies in potentially hazardous condition; providing for additional remedies; removing requirement of hearing prior to entry of order of supervision; requiring a prompt hearing and providing procedure; and revising confidentiality provisions.

*Be it enacted by the Legislature of West Virginia:*

That §33-34-11 of the Code of West Virginia, 1931, as amended, be repealed; that §33-34A-1, §33-34A-2, §33-34A-3, §33-34A-4, §33-34A-5, §33-34A-6, §33-34A-7 and §33-34A-8 of said code be repealed; that §33-34-3 and §33-34-4 of said code be amended and reenacted; and that said article be amended by adding thereto a new section, designated §33-34-3a, all to read as follows:

## **ARTICLE 34. ADMINISTRATIVE SUPERVISION.**

### **§33-34-3. Administrative supervision; order; review.**

1 (a) An insurer may be subject to administrative  
2 supervision by the commissioner if upon examination or at  
3 any other time it appears in the commissioner's discretion  
4 that:

5 (1) The insurer's condition renders the continuance of its  
6 business hazardous to the public, to its insureds or to its  
7 creditors;

8 (2) The insurer has or appears to have exceeded its  
9 powers granted under its certificate of authority and  
10 applicable law;

11 (3) The insurer has failed to comply with the applicable  
12 provisions of this chapter or chapter twenty-three of this  
13 code;

14 (4) The business of the insurer is being conducted  
15 fraudulently; or

16 (5) The insurer gives its consent.

17 (b) If the commissioner determines that one or more of  
18 the conditions set forth in subsection (a) of this section exist,  
19 the commissioner shall enter an order placing the insurer

20 under administrative supervision of the commissioner. The  
21 order shall:

22 (1) Notify the insurer of the commissioner's  
23 determination and set forth the conduct, conditions and  
24 grounds upon which the commissioner based the  
25 determination;

26 (2) Set forth all requirements necessary to abate the  
27 determination; and

28 (3) Notify the insurer that it is under the supervision of  
29 the commissioner and that the commissioner is applying and  
30 effectuating the provisions of the article.

31 (c) (1) If placed under administrative supervision, the  
32 insurer shall have sixty days, or another period of time as  
33 designated by the commissioner, to comply with the  
34 requirements of the commissioner subject to the provisions  
35 of this article.

36 (2) If it is determined after notice and hearing that  
37 conditions giving rise to the supervision still exist at the end  
38 of the supervision period specified above, the commissioner  
39 may enter an order to extend such period.

40 (3) If it is determined by the commissioner that  
41 conditions giving rise to the supervision have been corrected,  
42 the commissioner shall enter an order to release the insurer  
43 from supervision.

44 (d) (1) An insurer subject to an order placing the insurer  
45 under administrative supervision may contest and seek  
46 review of the order, or any extensions or modifications  
47 thereof, pursuant to the provisions of section thirteen, article

48 two of this chapter. Every notice of hearing shall state the  
49 time and place of the hearing and the conduct, condition or  
50 ground upon which the commissioner based the order. Unless  
51 mutually agreed between the commissioner and the insurer,  
52 the hearing shall occur not less than ten days nor more than  
53 thirty days after notice is served.

54 (2) A hearing upon an order of the commissioner in  
55 which the commissioner is alleging, pursuant to subdivision  
56 (1), subsection (a) of this section that the insurer's condition  
57 renders the continuance of its business hazardous to the  
58 public, its insureds or its creditors shall be held privately  
59 unless the insurer requests a public hearing, in which case the  
60 hearing shall be public.

61 (3) During the period of supervision, the insurer may  
62 contest an action taken or proposed to be taken by the  
63 supervisor specifying the manner wherein the action being  
64 complained of would not result in improving the condition of  
65 the insurer.

**§33-34-3a. Standards to determine hazardous condition;  
commissioner's authority.**

1 (a) *Standards.* -- In making a determination pursuant to  
2 subdivision (1), subsection (a), section three of this chapter  
3 as to whether the continued operation of an insurer  
4 transacting an insurance business in this state might be  
5 deemed to be hazardous to the public, to its insureds or to its  
6 creditors, the commissioner may consider the following  
7 standards either singly or in combination:

8 (1) Adverse findings reported in financial condition and  
9 market conduct examination reports, audit reports and  
10 actuarial opinions, reports or summaries;

11 (2) The National Association of Insurance Commissioners'  
12 insurance regulatory information system and its other  
13 financial analysis solvency tools and reports;

14 (3) Whether the insurer has made adequate provision,  
15 according to presently accepted actuarial standards of  
16 practice, for the anticipated cash flows required by the  
17 contractual obligations and related expenses of the insurer,  
18 when considered in light of the assets held by the insurer with  
19 respect to such reserves and related actuarial items including,  
20 but not limited to, the investment earnings on such assets and  
21 the considerations anticipated to be received and retained  
22 under such policies and contracts;

23 (4) The ability of an assuming reinsurer to perform and  
24 whether the insurer's reinsurance program provides sufficient  
25 protection for the insurer's remaining surplus, after taking  
26 into account the insurer's cash flow and the classes of  
27 business written as well as the financial condition of the  
28 assuming reinsurer;

29 (5) Whether the insurer's operating loss in the last twelve-  
30 month period or any shorter period of time, including but not  
31 limited to net capital gain or loss, change in nonadmitted assets  
32 and cash dividends paid to shareholders, is greater than fifty  
33 percent of such insurer's remaining surplus as regards  
34 policyholders in excess of the minimum required;

35 (6) Whether the insurer's operating loss in the last  
36 twelve-month period or any shorter period of time, excluding  
37 net capital gains, is greater than twenty percent of the  
38 insurer's remaining surplus as regards policyholders in  
39 excess of the minimum required;

40 (7) Whether a reinsurer, obligor or any entity within the  
41 insurer's insurance holding company system is insolvent,

42 threatened with insolvency or delinquent in payment of its  
43 monetary or other obligations and which in the opinion of the  
44 commissioner may affect the solvency of the insurer;

45 (8) Contingent liabilities, pledges or guaranties which  
46 either individually or collectively involve a total amount  
47 which in the opinion of the commissioner may affect the  
48 solvency of the insurer;

49 (9) Whether any controlling person of an insurer is  
50 delinquent in the transmitting to, or payment of, net  
51 premiums to such insurer;

52 (10) The age and collectability of receivables;

53 (11) Whether the management of an insurer, including  
54 officers, directors or any other person who directly or  
55 indirectly controls the operation of such insurer, fails to  
56 possess and demonstrate the competence, fitness and  
57 reputation deemed necessary to serve the insurer in such  
58 position;

59 (12) Whether management of an insurer has failed to  
60 respond to inquiries relative to the condition of the insurer or  
61 has furnished false and misleading information concerning an  
62 inquiry;

63 (13) Whether the insurer has failed to meet financial and  
64 holding company filing requirements in the absence of a  
65 reason satisfactory to the commissioner;

66 (14) Whether management of an insurer has filed any false  
67 or misleading sworn financial statement, released a false or  
68 misleading financial statement to lending institutions or to the  
69 general public, or made a false or misleading entry or omitted an  
70 entry of material amount in the books of the insurer;

71 (15) Whether the insurer has grown so rapidly and to  
72 such an extent that it lacks adequate financial and  
73 administrative capacity to meet its obligations in a timely  
74 manner;

75 (16) Whether the insurer has experienced or will  
76 experience in the foreseeable future cash flow or liquidity  
77 problems;

78 (17) Whether management has established reserves that  
79 do not comply with minimum standards established by this  
80 chapter or the rules promulgated thereunder, statutory  
81 accounting standards, sound actuarial principles and  
82 standards of practice;

83 (18) Whether management persistently engages in material  
84 under-reserving that results in adverse development;

85 (19) Whether transactions among affiliates, subsidiaries  
86 or controlling persons for which the insurer receives assets or  
87 capital gains, or both, do not provide sufficient value,  
88 liquidity or diversity to assure the insurer's ability to meet its  
89 outstanding obligations as they mature; and

90 (20) Any other finding determined by the commissioner  
91 to be hazardous to the insurer's insureds, creditors or the  
92 general public.

93 (b) *Commissioner's authority.* -- For the purposes of  
94 making a determination of an insurer's financial condition  
95 under this section, the commissioner may:

96 (1) Disregard any credit or amount receivable resulting  
97 from transactions with a reinsurer that is insolvent, impaired  
98 or otherwise subject to a delinquency proceeding;



99 (2) Make appropriate adjustments, including disallowance,  
100 to asset values attributable to investments in or transactions  
101 with parents, subsidiaries or affiliates consistent with the  
102 NAIC Accounting Policies And Procedures Manual, state  
103 laws and rules;

104 (3) Refuse to recognize the stated value of accounts  
105 receivable if the ability to collect receivables is highly  
106 speculative in view of the age of the account or the financial  
107 condition of the debtor; or

108 (4) Increase the insurer's liability in an amount equal to  
109 any contingent liability, pledge or guarantee not otherwise  
110 included if there is a substantial risk that the insurer will be  
111 called upon to meet the obligation undertaken within the next  
112 twelve-month period.

113 (c) *Order.* -- If the commissioner determines that the  
114 continued operation of the insurer may be hazardous to its  
115 insureds, creditors or the general public, then the  
116 commissioner may order the insurer to do one or more of the  
117 following: *Provided*, That if the insurer is a foreign insurer,  
118 the commissioner's order may be limited to the extent  
119 provided by statute:

120 (1) Reduce the total amount of present and potential  
121 liability for policy benefits by reinsurance;

122 (2) Reduce, suspend or limit the volume of business  
123 being accepted or renewed;

124 (3) Reduce general insurance and commission expenses  
125 by specified methods;

126 (4) Increase the insurer's capital and surplus;

127 (5) Suspend or limit the declaration and payment of  
128 dividend by an insurer to its stockholders or to its  
129 policyholders;

130 (6) File reports in a form acceptable to the commissioner  
131 concerning the market value of an insurer's assets;

132 (7) Limit or withdraw from certain investments or  
133 discontinue certain investment practices to the extent the  
134 commissioner deems necessary;

135 (8) Document the adequacy of premium rates in relation  
136 to the risks insured;

137 (9) File, in addition to regular annual statements, interim  
138 financial reports on the form adopted by the National  
139 Association of Insurance Commissioners or in such format as  
140 promulgated by the commissioner.

141 (10) Correct corporate governance practice deficiencies,  
142 and adopt and utilize governance practices acceptable to the  
143 commissioner;

144 (11) Provide a business plan to the commissioner in order  
145 to continue to transact business in the state; or

146 (12) Notwithstanding any other provision of law limiting  
147 the frequency or amount of premium rate adjustments, adjust  
148 rates for any nonlife insurance product written by the insurer  
149 that the commissioner considers necessary to improve the  
150 financial condition of the insurer.

**§33-34-4. Confidentiality of certain proceedings and records.**

1 (a) Notwithstanding any other provision of law and  
2 except as set forth in this section, proceedings, hearings,

3 notices, correspondence, reports, records and other  
4 information in the possession of the commissioner relating to  
5 the supervision of any insurer shall not be subject to  
6 disclosure as provided in article one, chapter twenty-nine-b  
7 of this code, shall not be subject to subpoena and shall not be  
8 subject to discovery or admissible in evidence in any private  
9 civil action, except as provided by this section. However, the  
10 commissioner is authorized to use the documents, materials  
11 or other information in the furtherance of any regulatory or  
12 legal action brought as part of the commissioner's official  
13 duties.

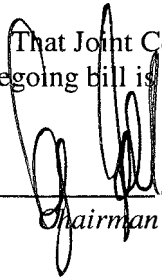
14 (b) The personnel of the offices of the Insurance  
15 Commissioner shall have access to these proceedings,  
16 hearings, notices, correspondence, reports, records or  
17 information as permitted by the commissioner. Neither the  
18 commissioner nor any person who received documents,  
19 materials or other information while acting under the  
20 authority of the commissioner shall be permitted or required  
21 to testify in any private civil action concerning any such  
22 documents, materials or information.

23 (c) The commissioner may share the notices,  
24 correspondence, reports, records or information with other  
25 state, federal and international regulatory agencies, with the  
26 National Association of Insurance Commissioners and its  
27 affiliates and subsidiaries, and with state, federal and  
28 international law enforcement authorities, if the  
29 commissioner determines that the disclosure is necessary or  
30 proper for the enforcement of the laws of this or another state  
31 of the United States, and provided that the recipient agrees to  
32 maintain the confidentiality of the documents, material or  
33 other information. No waiver of any applicable privilege or  
34 claim of confidentiality shall occur as a result of the sharing  
35 of documents, materials or other information pursuant to this  
36 subsection.

37 (d) The commissioner may open the proceedings or  
38 hearings or make public the notices, correspondence, reports,  
39 records or other information if the commissioner deems that  
40 it is in the best interest of the public, the insurer, its insureds,  
41 creditors or the general public.

42 (e) This section does not apply to hearings, notices,  
43 correspondence, reports, records or other information  
44 obtained upon the appointment of a receiver for the insurer  
45 by a court of competent jurisdiction.

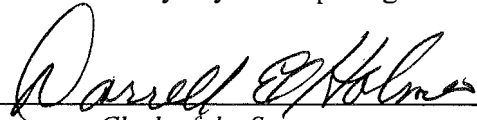
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

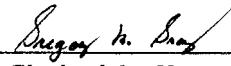
  
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Chairman Senate Committee

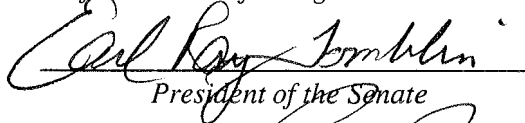
  
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Chairman House Committee

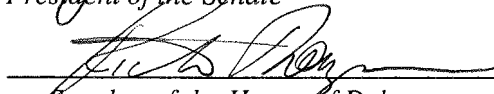
Originating in the House.

In effect ninety days from passage.

  
\_\_\_\_\_  
Clerk of the Senate

  
\_\_\_\_\_  
Clerk of the House of Delegates

  
\_\_\_\_\_  
President of the Senate

  
\_\_\_\_\_  
Speaker of the House of Delegates

The within is approved this the 10<sup>th</sup>  
day of March 2010.

  
\_\_\_\_\_  
Governor

PRESENTED TO THE  
GOVERNOR

MAR 09 2010

Time Rowan