

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

Form #3

Do Not Mark In This Box

FILED

2002 JUL 26 P 2:49

WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: Insurance Commission TITLE NUMBER: 114

CITE AUTHORITY: W.Va. Code Section 33-2-10 & 33-20D-4

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 30

TITLE OF RULE BEING AMENDED: "Tail" Malpractice Insurance Covering
Certain Medical and Allied Health Care Providers

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.



Authorized Signature

SCANNED

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period, Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 26, 2002

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: OFFICE OF THE INSURANCE COMMISSIONER
ATTN: Legal Division
1124 Smith Street
Post Office Box 50540
Charleston, West Virginia 25305-0540

LEGISLATIVE RULE TITLE: "TAIL" MALPRACTICE INSURANCE COVERING
CERTAIN MEDICAL AND ALLIED HEALTH CARE
PROVIDERS (Title 114, Series 30)

1. Authorizing statute(s) citation:

W. Va. Code § 33-20D-3 (6th Special Session 2001)

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

May 29, 2002 - Comment Period.

b. What other notice, including advertising, did you give of the hearing?

None

c. Date of Public Hearing(s) or Public Comment Period ended:

Comment period ended July 1, 2002.

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received

**e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing:
(be exact)**

July 26, 2002

- f. **Name, title, address and phone/fax/e-mail numbers of agency person(s) to receive all written correspondence regarding this rule: (Please type)**

Vincent J. King, General Counsel
West Virginia Insurance Commission
Legal Division
P.O. Box 50540
Charleston, WV 25305-0540
Phone: (304) 558-0401, ext. 146
Fax: (304) 558-1362
E-mail: kingv@mail.wvnet.edu

- g. **IF DIFFERENT FROM ITEM 'f', please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)**

Not applicable

3. **If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:**

- a. **Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.**

N/A

- b. **Date of hearing or comment period:**

N/A

- c. **On what date did you file in the State Register the findings and determinations required together with the reasons therefor?**

N/A

- d. **Attach findings and determinations and reasons:**

N/A

Attachment 2d

Only one comment was received, namely, American Insurance Association.

The existing rule first says that, in the event of default in making a premium payment when due, the entire balance of the premium for "Tail" insurance coverage shall be immediately due and payable in full. As a practical matter, the insurer must somehow tell the insured what the balance is, and get that statement to the insured, and then the insured has to respond. The new rule provides additional clarity by essentially requiring a thirty day notice. The comment was that "The prospect of introducing further delay is troublesome". Unless the insured has authorized automatic bank draft (and the money is in the account) this writer does not know any way to avoid some lapse in time. While the period could, perhaps, be shortened, then it would be more critical to determine the exact day the notice was received thereby necessitating notice by certified mail which requires additional programming and postage expense. All things considered, the thirty day period seems reasonable.

The comment went on to raise two questions. The first was "How will this apply to clinic or group-practice related policies?". In discussing this question further with Pamela M. Young, Assistant General Counsel for the American Insurance Association, she worried about frequency when one physician, of a large group of physicians, leaves the practice. It should be noted, however, that the subject rule is not triggered by insureds coming and going, or even termination of the policy but, rather, only upon default of the amortized portion of the payment on the tail coverage after the policy ceases to exist. This should be a one time event, at most, regardless of whether it is an individual or group policy.

The second and final question was "Will the proposal require new filings?". The answer is, it depends. In the event that the currently approved filing contains contrary language, then yes, a new filing would be required. However, there is no requirement that this particular rule be spelled out in the policy, and any currently approved filings do not contain the rule or any contrary language, in which event the existing filing may continue to be used, as approved, providing that the insurer does comply with the rule if and when the triggering event occurs.

The Commissioner recommends proceeding with the rule as drafted.

LAW OFFICES
SPILMAN THOMAS & BATTLE, PLLC
SINCE 1864

990 ELMER PRINCE DRIVE, SUITE 205
MORGANTOWN, WEST VIRGINIA 26505
TELEPHONE (304) 599-8175

417 GRAND PARK DRIVE, SUITE 203
PARKERSBURG, WEST VIRGINIA 26101
TELEPHONE (304) 422-6700

SPILMAN CENTER
300 KANAWHA BOULEVARD, EAST
POST OFFICE BOX 273
CHARLESTON, WEST VIRGINIA 25321-0273

TELEPHONE (304) 340-3800
FACSIMILE (304) 340-3801

333 PENCO ROAD, SUITE A
WEIRTON, WEST VIRGINIA 26062
TELEPHONE (304) 723-6980

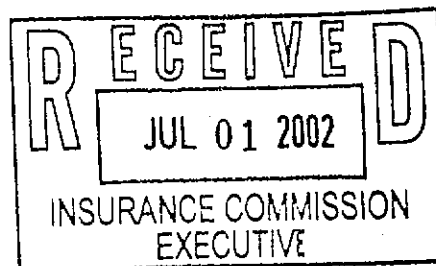
WRITER'S DIRECT DIAL NO.

(304) 340-3829
e-mail
tcox@spilmanlaw.com

July 1, 2002

VIA HAND-DELIVERY

Ms. Jane Cline, Commissioner
West Virginia Division of Insurance
1124 Smith Street
Charleston, West Virginia 25301



**RE: Comments – Proposed 114 CSR 62, 114 CSR 2,
114 CSR 30, and 114 CSR 20**

Dear Commissioner Cline:

Enclosed are the American Insurance Association's comments to the above-referenced proposed rules.

Very truly yours,

Randy Cox
T. Randolph Cox

TRC/lb

Encl.

RECEIVED

JUL 01 2002
LEGAL DIVISION
W.VA. INS. DEPT.

7/1/02 - copy to Greg Elam
Vince King



American Insurance Association

1130 Connecticut Ave. NW

Suite 1000

Washington, DC 20036

202-826-7100

Fax 202-293-1219

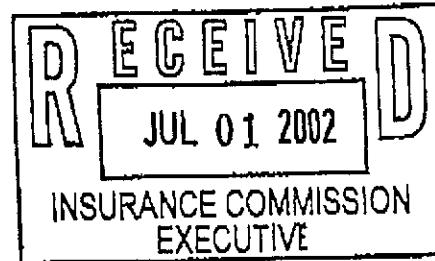
www.aiaacc.org

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JUL 01 2002

LEGAL DIVISION
W.VA. INS. DEPT.

June 28, 2002



The Honorable Jane Cline, Commissioner
West Virginia Insurance Department
1124 Smith Street
Charleston, West Virginia 25305

Dear Commissioner Cline:

The American Insurance Association (AIA) has reviewed proposed amendments to several rules, 114 CSR2, 114 CSR30, and 114 CSR 20, and has the following comments:

Licensing and Conduct of Agents and Agencies:

Rule 114CSR2, addresses licensing requirements for agents and agencies. Yet, proposed text in 114-2-3.6 imposes a burden on insurers. It provides that "...each insurer is required to notify all its agencies of their responsibility to file an agency application and to pay the required fee." The responsibility to meet the requirements of 11-2-3.6 should not extend to insurers.

114-2-4.2, dealing with commissions, ties the payment of commissions/compensation to appointments. We respectfully submit that they should not be tied together. We note that the NAIC model Producer Licensing Law (see Section 13) does not use the proposed approach. In addition, we did not locate in the commission section (Section 33-12-23) of the producer licensing law authority for such an approach. Appointment requirements should establish those obligations, rather than a section dealing with commission/compensation payments.

Subsection 4.3 is broadly stated, making it difficult to determine just what is prohibited. If there is a prohibition in the rule to which this section is referring then it should be specifically stated, so as to provide direction in terms of compliance.

Subsection 4.1 also presents issues. The text is difficult to follow with its distinctions between resident and non-resident producers and its references to "like and duly licensed" residents and "other duly" residents. In addition, it departs from the Section 33-12-23 (d) of the producer licensing law—a provision that prohibits payments "to a person for selling, soliciting or negotiating insurance in this state if that person is required to be licensed under this article and is not so licensed." Furthermore, we could not be certain as how to read the commission section against the referrals section (114-2-6). The concern is that there is a potential for conflict, depending on how the sections are read.

114-2-6 is the proposed referrals section. We would respectfully urge consideration of the treatment of referrals in the NAIC Unfair Trade Practices Act (see Sec. 5(B)8) to avoid possible OCC preemption concerns. Considerable work went into the amendments, which address the Sec. 104(d) safe harbors of the Gramm-Leach-Bliley Act.

BERNARD L. HENGESBAUGH
Chairman

ROBERT P. RESTREPO, JR.
Chairman Elect

DAVID B. MATHIS
Vice Chairman

JAY S. FISHMAN
Vice Chairman

ROBERT E. VAGLEY
President

We also have a question regarding 114-2-5, which addresses "switching." Are there no consumer protections in place to address the concern? Again, we would refer to the NAIC model Unfair Trade Practices Act for guidance on consumer protections.

"Tail" Malpractice Insurance:

Rule 114CSR30, addresses "tail" malpractice insurance. 114-30-6.2, which is proposed for amendment, addresses providers' defaults in the making of quarterly payments. Rather than the balance of a premium for tail coverage becoming due and payable in full when there has been a default, the proposal would require a certain notice and a 30 day period before the entire balance of payments would be due. The preference is to receive the entire premium payment immediately upon the effective date of coverage to avoid complication, so the prospect of introducing further delay is troublesome. The proposed changes also raise questions. How will this apply to clinic or group-practice rated policies? Will the proposal require new filings?

Excess Line Brokers Regulation:

Rule 114CSR20, which addresses the regulation of excess lines brokers, includes references to a countersignature requirement (see 114-20-4 4.4 and 4.7). Consistent with AIA's position on countersignatures generally, we urge the deletion of a countersignature requirement.

Thank you very much for this opportunity to provide comments.

Very truly yours,

Pamela M. Young
Assistant General Counsel

Insurance Commissioner
Legislative Rule
Title 114, Series 30

**"TAIL" MALPRACTICE INSURANCE COVERING
CERTAIN MEDICAL AND ALLIED HEALTH CARE PROVIDERS**

TITLE 114, SERIES 30

BRIEF SUMMARY OF RULE

Determination of applicable limits in the event of default on
amortized portion of tail premium.

Insurance Commissioner
Legislative Rule
Title 114, Series 30

**"TAIL" MALPRACTICE INSURANCE COVERING
CERTAIN MEDICAL AND ALLIED HEALTH CARE PROVIDERS**

TITLE 114, SERIES 30

STATEMENT OF CIRCUMSTANCES

Inconsistency between existing statute (recently amended)
and rule.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: "Tail" Malpractice Insurance Covering Certain
Medical and Allied Health Care Providers
Title 114, Series 30

Type of Rule: XX Legislative ___ Interpretive ___ Procedural

Agency: Insurance Commissioner

Address: Post Office Box 50540
1124 Smith Street, Greenbrooke Building
Charleston, West Virginia 25305-0540

=====

1. Effect of Proposed Rule

	ANNUAL FISCAL YEAR				
	Increase	Decrease	Current	Next	Thereafter
ESTIMATED TOTAL COST	Negligible	Not-applicable	None	Negligible	Negligible
PERSONAL SERVICES	Negligible	Not-applicable	None	Negligible	Negligible
CURRENT EXPENSE	None	None	None	None	None
REPAIRS AND ALTERATIONS	None	None	None	None	None
EQUIPMENT	None	None	None	None	None
OTHER	None	None	None	None	None

2. Explanation of above estimates:

This will involve review of a brief one page filing, presumably on a one time basis, but with possible occasional modification, from medical malpractice carriers actively writing (presently number only a few). Potential cost would be limited to personal services by salaried employees who's job it already is to review any and all filings.

Rule Title: "Tail" Malpractice Insurance Covering Certain
Medical and Allied Health Care Providers
Title 114, Series 30

3. Objectives of these rules:

To resolve conflict between existing (recently amended) statute and rule with respect to determination of limits upon default on amortized tail premium payment.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

Negligible - minimal personal services for review only

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

Insurance carriers actively writing medical malpractice coverage will need to make a one time filing setting forth their proposed plan for determination of limits in the event of default on amortized tail premium payment.

C. Economic Impact on Citizens/Public at Large.

None

Date: July 26, 2002

Signature of Agency Head or Authorized Representative



JANE L. CLINE, INSURANCE COMMISSIONER

114CSR30
WEST VIRGINIA LEGISLATIVE RULE
INSURANCE COMMISSIONER

FILED

2002 JUL 26 P 2:49

SERIES 30

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**"TAIL" MALPRACTICE INSURANCE COVERING
CERTAIN MEDICAL AND ALLIED HEALTH CARE PROVIDERS**

Section.

§114-30-1. General.

§114-30-2. Definitions

§114-30-3. Applicability.

§114-30-4. "Tail" Insurance Offer Mandated.

§114-30-5. Premium Payment Amortization.

§114-30-6. Premium Due Dates; Acceleration of Premium Due upon Payment Default.

§114-30-7. Penalty for Insurer's Non-Compliance.

§114-30-8. Separability.

114CSR30
WEST VIRGINIA LEGISLATIVE RULE
INSURANCE COMMISSIONER

SERIES 30

**"TAIL" MALPRACTICE INSURANCE COVERING
CERTAIN MEDICAL AND ALLIED HEALTH CARE PROVIDERS**

§114-30-1. General.

1.1. Scope. -- This legislative rule provides for premium payment amortization, under certain circumstances specified in the rule, for "tail" professional malpractice insurance covering medical physicians, osteopathic physicians, podiatrists, chiropractors, dentists, midwives and nurse practitioners and hospitals.

1.2. Authority. -- W. Va. Code §§33-20D-4, 33-2-10.

1.3. Filing Date. -- ~~May 19, 1992.~~

1.4. Effective Date. -- ~~May 19, 1992.~~

§114-30-2. Definitions.

As used in this legislative rule:

2.1. "Claims made' malpractice insurance" means a policy which covers claims which are reported during the policy period, meet the provisions specified by the policy, and are for an incident which occurred during the policy period, or occurred prior to the policy period, as is specified by the policy.

2.2. "Commissioner" means the Insurance Commissioner of the State of West Virginia.

2.3. "'Tail' insurance" means insurance which covers a professional insured once a "claims made" malpractice insurance policy is cancelled, not renewed or terminated and covers claims made after such cancellation or termination for acts occurring during the period the prior malpractice insurance was in effect.

§114-30-3. Applicability.

This rule applies to premium payment amortization for "tail" malpractice insurance offered to the medical and allied health care providers enumerated in subsection 1.1 herein whose prior

**Insurance Commissioner
Legislative Rule
Title 114, Series 30**

"claims made" malpractice insurance policy had been in effect for at least sixty (60) days: Provided, That each quarterly amortized premium paid pursuant to this rule shall not be less than seven hundred fifty dollars (\$750.00).

§114-30-4. "Tail" Insurance Offer Mandated.

4.1. Upon cancellation, nonrenewal or termination of any "claims made" professional malpractice insurance policy to which this rule is applicable as set forth in section 3 herein, the insurer shall offer to the insured "tail" insurance coverage.

4.2. Such offer of "tail" insurance shall expire forty-five (45) days after the cancellation, nonrenewal, expiration or other termination of the insured's "claims made" professional malpractice insurance policy, unless the "tail" insurance offer is accepted sooner, in writing, by the insured.

§114-30-5. Premium Payment Amortization.

5.1. Upon cancellation, nonrenewal or termination of any "claims made" professional malpractice insurance policy to which this rule is applicable, the insurer shall offer to any eligible professional who is licensed and practicing in the state of West Virginia, or who, prior to retirement, last practiced in the state of West Virginia, the opportunity to amortize the payment of quarterly premiums for "tail" insurance over twelve (12), twenty-four (24) or thirty-six (36) months.

5.2. Such quarterly premium payments for "tail" insurance shall be amortized at a per annum rate of interest equal to two (2) percentage points above the prime interest rate reported in the **Wall Street Journal** on the date when the insurer or its agent receives the insured's written request to purchase "tail" insurance, or on the next publication date of the **Wall Street Journal** following the effective date of the "tail" insurance policy if the **Wall Street Journal** is not published on the date when the insurer or its agent receives the insured's written request to purchase "tail" insurance.

5.3. The insured shall not be entitled to pay amortized premiums pursuant to this rule unless each quarterly premium payment, as computed applying the amortization rate set forth in subsection 5.2, equals at least seven hundred fifty dollars (\$750.00).

§114-30-6. Premium Due Dates; Acceleration of Premium Due upon Payment Default.

6.1. The first quarterly payment due for "tail" insurance pursuant to this rule shall be payable contemporaneously with the issuance of the "tail" insurance policy. Subsequent payments shall be due and payable quarterly thereafter.

**Insurance Commissioner
Legislative Rule
Title 114, Series 30**

6.2. ~~Upon~~ In the event of the insured's default in making a premium payment when due, the entire balance of the premium for "tail" insurance coverage shall immediately be due and payable in full. Insurer shall notify the insured by certified mail that the entire balance is due and payable in full within 30 days of receipt of said notice. If the entire balance is not ~~then~~ timely paid in full, the "tail" insurance coverage ~~shall not terminate, but the limit of liability will be reduced, pro rata, based on the amount of the total premium paid for the extended reporting coverage. limits shall be determined in accordance with the plan filed by the carrier and approved by the commissioner.~~

§114-30-7. Penalty for Insurer's Non-Compliance.

Any professional malpractice insurer subject to the provisions of this rule that fails to offer "tail" insurance to an eligible insured, or that violates in any way the provisions of article 20D, chapter 33 of the West Virginia code, shall be assessed a penalty by the commissioner equal to the total amount of premium due for the "tail" insurance that the insurer is required to offer.

§114-30-8. Separability.

If any provision of this rule or the application thereof to any person or circumstance is for any reason held to be invalid, the remainder of the rule and the application of such provisions to other persons or circumstances shall not be affected thereby.



STATE OF WEST VIRGINIA

Offices of the Insurance Commissioner

BOB WISE
Governor

Legal Division

JANE L. CLINE
Insurance Commissioner

July 26, 2002

HAND DELIVERED

Ms. Judy Cooper, Director
Administrative Law Division
Office of Secretary of State
State Capitol
Charleston, West Virginia 25305

Dear Ms. Cooper:

Please find herewith, one (1) copy of the following for filing:

- 1) Notice of Agency Approval of a Proposed Rule and Consent of Cabinet Secretary of Tax and Revenue;
- 2) Legislative Rule-Making Review Committee Questionnaire;
- 3) Brief Summary of Rule;
- 4) Statement of Circumstances;
- 5) Fiscal Note for Proposed Rule; and
- 6) Agency approved proposed rule entitled "'Tail" Malpractice Insurance Covering Certain Medical and Allied Health Care Providers" (Title 114, Series 30).

Please contact me if further information is required.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jane L. Cline".

Jane L. Cline
Insurance Commissioner

JLC/jz
Attachments