

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

Form #2

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FILED

2002 MAY 29 P 2:31

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Insurance Commission TITLE NUMBER: 114

RULE TYPE: Legislative CITE AUTHORITY: 33-6-31(i) and 33-2-10

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: non-applicable

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 63

TITLE OF RULE BEING PROPOSED: Standard Motor Vehicle Policy Provisions

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON July 1, 2002 AT 4:30 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Vincent J. King, General Counsel

Offices of the Insurance
Commissioner

P.O. Box 50540

Charleston WV 25305-0540

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.



Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

SCANNED

**Department of Tax and Revenue
Agency Questionnaire**

Re: Administrative Rule to be Filed

STANDARD MOTOR VEHICLE POLICY PROVISIONS

TITLE 114, SERIES 63

Question 1: Are regulations required?

Yes, see W. Va. Code §33-6-31(i).

Question 2: Is the rule you are proposing controversial? If yes, what are the pros and the cons?

Yes. Insurance industry would prefer to have complete discretion and no rule regarding standard policy provisions.

Question 3: Is the rule you are proposing a copy of another state's rule? A model rule? Custom-drafted?

Custom-drafted

Question 4: What are the really important things you think the Secretary of Tax and Revenue should know about this rule and the issues that surround it?

Much of the "*Mitchell v. Broadnax*" litigation, about which the industry has sorely complained, revolves around the specific language of a policy term, condition or exclusion which, according to some, should not have been approved by the Insurance Commission inasmuch as it is alleged to be contrary to public policy, etc. This rule attempts to comply with the statutory requirement under W. Va. Code §33-6-31(i), that the Commissioner promulgate standard policy provisions. Specifically, it collects existing law from various statutes and cases and places the same under one rule, updated to current law.

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STANDARD MOTOR VEHICLE POLICY PROVISIONS

TITLE 114, SERIES 63

BRIEF SUMMARY OF RULE

Formulation of standard policy provisions with respect to motor vehicle liability, uninsured and underinsured motor vehicle coverages.

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TITLE 114, SERIES 63

STATEMENT OF CIRCUMSTANCES

Recognition that standard policy provisions have not been formulated as required under W. Va. Code §33-6-31(i).

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: STANDARD MOTOR VEHICLE POLICY PROVISIONS

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	None	Negligible	Negligible	Negligible
PERSONAL SERVICES	Negligible	None	Negligible	Negligible	Negligible
CURRENT EXPENSE	Negligible	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:

Carriers already have to file proposed forms and obtain approval prior to using. This rule may require some immediate replacement provisions together with filing and approval of the same. Thereafter, there should not be any change. It is not anticipated that the brief review time will necessitate any additional employees or equipment.

Rule Title: Standard Auto Policy Provisions
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3. Objectives of these rules:

To bring uniformity to policy provisions and reduce litigation regarding the same.

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 will have to review their policies and, in some instances, prepare revised forms.

C. Economic Impact on Citizens/Public at Large.

Standard policy provisions should reduce litigation costs for all concerned.

Date: May 29, 2002

Signature of Agency Head or Authorized Representative



VINCENT J. KING
GENERAL COUNSEL

114CSR63
WEST VIRGINIA LEGISLATIVE RULE
INSURANCE COMMISSIONER

SERIES 63

STANDARD MOTOR VEHICLE POLICY PROVISIONS

Section.

§114-63-1. General

§114-63-2. Definitions

§114-63-3. Liability Insurance Provisions

§114-63-4. Uninsured Motor Vehicle Insurance Provisions

§114-63-5. Underinsured Motor Vehicle Provisions

§114-63-6. Replacement of Earlier Provisions and Future Compliance

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SERIES 63

STANDARD MOTOR VEHICLE POLICY PROVISIONS

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§114-63-1. General.

1.1. Scope. - - This rule establishes the standard motor vehicle insurance policy provisions as required by W. Va. Code §33-6-31(i).

1.2. Authority. - - W. Va. Code §33-6-31(i) and §33-2-10.

1.3. Filing Date. - -

1.4. Effective Date. - -

§114-63-2. Definitions.

2.1. "Motor Vehicle" means a car, auto, or other synonym as such word is defined in the policy.

2.2. "Underinsured Motor Vehicle" means a motor vehicle with respect to the ownership, operation or use of which there is liability insurance applicable at the time of the accident but the limits actually available to the injured person in question are less than the total amount of damages sustained by the injured person regardless of the comparison between such liability insurance limits actually available and the underinsured motorist coverage limits. syl. pt. 5, *Pristavec v. Westfield Insurance Co.*, 184 W. Va. 331, 400 S.E.2d 575 (1990).

2.3. "Uninsured Motor Vehicle" means a motor vehicle as to which there is no:

- a. Bodily injury liability insurance and property damage liability insurance, or
- b. There is such insurance, but the insurance company writing the same denies coverage thereunder; and
- c. There is no certificate of self insurance.

A motor vehicle shall be deemed to be uninsured if the owner or operator thereof be unknown. W. Va. Code §33-6-31(c). A motor vehicle shall also be deemed to be uninsured if there has been a valid bodily injury or property damage liability policy issued upon such vehicle but the

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policy is uncollectible, in whole or in part, by reason of the insurance company being insolvent or having been placed in receivership. W. Va. Code §33-6-31(j).

§114-63-3. Liability Insurance Provisions.

3.1. All motor vehicle liability policies shall contain a provision insuring the named insured and any other person responsible for the use of, or using the motor vehicle with the consent, express or implied, of the named insured or his or her spouse. W. Va. Code §33-6-31(a).

3.2. All motor vehicle liability policies shall contain a provision insuring against liability for death or bodily injury sustained, or loss or damage occasioned, as a result of negligence in the ownership, maintenance or use of the vehicle. W. Va. Code §33-6-31(a).

3.3. All motor vehicle liability policies shall contain a provision providing primary coverage to the named insured, and any other person who normally operates the covered vehicle, if they are instead operating a motor vehicle owned by one engaged in the business of selling, repairing, leasing or servicing motor vehicles, without separate consideration, while the insured's motor vehicle is in the custody of one engaged in said business of selling, repairing, leasing or servicing motor vehicles. W. Va. Code §33-6-29.

3.4. All motor vehicle liability policies shall contain coverage for liability under the family purpose doctrine and may not exclude such liability with respect to use by a bailee for hire, restricted driver, or other permissive user. W. Va. Code §33-6-31(a).

3.5. Motor vehicle liability policies shall not contain family member exclusions, cf., child-parent immunity abolished, *Lee v. Comer*, 159 W. Va. 585, 224 S.E.2d 721 (1976), husband-wife immunity abolished, *Coffindaffer v. Coffindaffer*, 161 W. Va. 557, 244 S.E.2d 338 (1978).

3.6. Motor vehicle liability policies shall not contain terms for cancellation or non-renewal less favorable to the insured than those set forth in W. Va. Code §33-6A.

3.7. Motor vehicle liability policies shall not contain any condition, stipulation or agreement requiring the policy to be construed according to the laws of any other state or country, except as necessary to meet the requirements of the motor vehicle financial responsibility laws or compulsory disability benefit laws of such other state or country. W. Va. Code §33-6-14.

3.8. Motor vehicle liability policies shall not contain any condition, stipulation or agreement limiting the time within which a claim may be brought to less than two years from the time the cause of action accrues. W. Va. Code §33-6-14.

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3.9. Motor vehicle liability policies may contain a provision excluding coverage for the negligence of a driver operating the motor vehicle without the consent, express or implied, of the named insured (or his or her spouse). *Metropolitan Property & Liability Insurance Co., v. Acord* 195 W. Va. 444, 465 S.E.2d 901 (1995).

3.10. Motor vehicle liability policies may contain a provision with respect to the negligence of any bailee for hire making the coverage thereunder secondary to any primary coverage that might be applicable to the negligence. W. Va. Code §33-6-31(a).

3.11. Motor vehicle liability policies may contain an exclusion for intentional torts, above the minimum financial liability limits under W. Va. Code §17D-4-2. *Dotts v. Taressa*, 182 W. Va. 586, 390 S.E.2d 568 (1990).

3.12. Motor vehicle liability policies may contain a restricted named driver exclusion endorsement, above the minimum financial liability limit under W. Va. Code §17D-4-2. *Jones v. Motorist Mutual Insurance Co.*, 177 W. Va. 763, 356 S.E.2d 634 (1987). The restricted named driver exclusion must specifically designate by name the individual or individuals to be excluded. *Burr v. Nationwide*, 178 W. Va. 398, 359 S.E.2d 626 (1987).

3.13. Motor vehicle liability policies may contain a provision, in exchange for a multi-car discount, which precludes stacking. *Payne v. Weston*, 195 W. Va. 502, 466 S.E.2d 161 (1995).

3.14. Motor vehicle liability policies may contain a duty to cooperate clause provided that, before an insurance policy will be voided because of the insured's failure to cooperate, the failure must be substantial and of such nature as to prejudice the insurer's rights. *Bowyer by Bowyer v. Thomas*, 188 W. Va. 297, 423 S.E.2d 906 (1992).

3.15. Any coverage issued under a substandard risk motor vehicle insurance policy shall contain the notice set forth in W. Va. Code §33-6-31c.

§114-63-4. Uninsured Motor Vehicle Insurance Provisions.

4.1. All motor vehicle policies shall contain a provision undertaking to pay the insured all sums which he or she shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle up to the limit selected by the named insured on a properly completed form pursuant to W. Va. Code §33-6-31d.

4.2. Uninsured motor vehicle coverage shall not contain family member exclusions, cf., child-parent immunity abolished, *Lee v. Comer*, 159 W. Va. 585, 224 S.E.2d 721 (1976), husband-

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wife immunity abolished, *Coffindaffer v. Coffindaffer*, 161 W. Va. 557, 244 S.E.2d 338 (1978).

4.3. Uninsured motor vehicle coverage shall not contain a provision requiring arbitration. W. Va. Code §33-6-31(g).

4.4. Uninsured motor vehicle coverage may contain a provision excluding the first three hundred dollars of property damage but shall not contain any other deductible or setoff up to the limits of the uninsured motorist coverage. W. Va. Code §33-6-31(b).

4.5. Uninsured motor vehicle coverage may contain a provision requiring that the insured, with reasonable diligence, and upon learning that the tortfeasor is uninsured, provide notice of any potential uninsured motor vehicle claim within a reasonable period of time. syl. pt. 1 and 2, *State Auto Mutual Insurance Co., v. Youler*, 183 W. Va. 556, 396 S.E.2d 737 (1990).

4.6. Uninsured motor vehicle coverage may contain an owned but not insured exclusion precluding benefits, above the minimum financial responsibility limits contained in W. Va. Code §17D-4-2. *Imgrund v. Yarbrough*, 199 W. Va. 187, 483 S.E.2d 533 (1997).

4.7. Uninsured motor vehicle coverage may contain a provision excluding benefits for injuries which result from a motor vehicle collision which occurs within the course and scope of employment, syl. pt. 2 *Wisman v. Rhodes & Shamblin Stone, Inc.*, 191 W. Va. 542, 447 S.E.2d 5 (1994), but only with respect to fault of the employer or co-employee but not with regard to the fault of a third party. syl. pts. 3, 4 and 5, *Henry v. Benyo*, 203 W. Va. 172, 506 S.E.2d 615 (1998).

4.8. With regard to uninsured motor vehicle coverage in the event of negligence by an unknown tortfeasor, the policy may contain a provision requiring a close and substantial physical nexus between the unidentified hit and run vehicle and the insured vehicle. syl. pt. 2, *State Farm Mutual Automobile Insurance Co., v. Norman*, 191 W. Va. 498, 446 S.E.2d 720 (1994). "Close and Substantial Physical Nexus" means evidence which can be established by independent third party testimony to the satisfaction of the trial judge and the jury that, but for the immediate evasive action of the insured, direct physical contact would have incurred between the unknown motor vehicle and the victim. *Hamric v. Doe*, 201 W. Va. 619, 499 S.E.2d 619 (1997).

4.9. Uninsured motor vehicle coverage may contain a provision providing for the right of subrogation against the tortfeasor, up to the amount paid under the uninsured motor vehicle endorsement, consistent with W. Va. Code §33-6-31(f).

4.10. Uninsured motor vehicle coverage may include an exclusion for punitive damage liability. State ex rel. *State Auto Insurance Co., v. Risovich*, 204 W. Va. 87, 511 S.E.2d 498 (1998).

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§114-63-5. Underinsured Motor Vehicle Provisions.

5.1. If selected by the insured, policies must include a provision agreeing to pay the insured all sums with which he or she shall be legally entitled to recover as damages from the owner or operator of an underinsured motor vehicle up to the limits selected by the insured. W. Va. Code §33-6-31(b).

5.2. Underinsured motor vehicle coverage shall not provide for setoff for any payments made by the insured's policy or any other policy. W. Va. Code §33-6-31(b).

5.3. Underinsured motor vehicle coverage shall not contain a provision requiring arbitration. W. Va. Code §33-6-31(g).

5.4. Underinsured motor vehicle coverage may contain a provision requiring that the insured, with reasonable diligence, and upon learning that the tortfeasor is underinsured, provide notice of any potential underinsured motorist claim within a reasonable period of time. syl. pt. 1 and 2, *State Auto Mutual Insurance Co., v. Youler*, 183 W. Va. 556, 396 S.E.2d 737 (1990).

5.5. Underinsured motor vehicle coverage may contain a provision requiring notice of any settlement with the liability carrier consistent with W. Va. Code §33-6-31(e).

5.6. Underinsured motor vehicle coverage may contain a provision excluding benefits for injuries which result from a motor vehicle collision which occurs within the course and scope of employment, syl. pt. 2 *Wisman v. Rhodes & Shamblin Stone, Inc.*, 191 W. Va. 542, 447 S.E.2d 5 (1994) but only with respect to the fault of the employer or co-employee but not with regard to the fault of a third party. syl. pts 3, 4 and 5, *Henry v. Benyo*, 203, W. Va. 172, 506 S.E.2d 615 (1998).

5.7. With regard to underinsured motor vehicle coverage in the event of negligence by an unknown tortfeasor, the policy may contain a provision requiring a close and substantial physical nexus between the unidentified hit and run vehicle and the insured vehicle. syl. pt. 2, *State Farm Mutual Automobile Insurance Co., v. Norman*, 191 W. Va. 498, 446 S.E.2d 720 (1994). "Close and Substantial Physical Nexus" means evidence which can be established by independent third party testimony to the satisfaction of the trial judge and the jury that, but for the immediate evasive action of the insured, direct physical contact would have incurred between the unknown vehicle and the victim. *Hamric v. Doe*, 201 W. Va. 619, 499 S.E.2d 619 (1997).

5.8. Underinsured motor vehicle coverage may contain a provision providing for the right of subrogation against the tortfeasor, up to the amount paid under the underinsured motor vehicle endorsement, consistent with W. Va. Code §33-6-31(f).

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5.9. Underinsured motor vehicle coverage may contain family member or similar exclusion precluding a guest passenger from collecting such benefits with respect to the negligence of the driver of the motor vehicle in which he or she is riding. syl. pt. 3, *Alexander v. State Automobile Mutual Insurance Co.*, 187 W. Va. 72, 415 S.E.2d 618 (1992) but such guest passenger may not be precluded from recovery of underinsured benefits with respect to the negligence of a third party. *Dairyland Insurance Co., v. Bradley*, 192 W. Va. 199, 451 S.E.2d 765 (1994).

5.10. Underinsured motor vehicle coverage may contain a provision precluding intra policy stacking, syl. pt. 5, *Russell v. State Automobile Insurance Co.*, 188 W. Va. 81, 422 S.E.2d 803 (1992).

5.11. Underinsured motor vehicle coverage may contain a family use exclusion to be applied when a passenger family member receives payment under the liability provisions with respect to the negligence of his or her driver thereby preventing the underinsured coverage from being converted into additional liability coverage. syl. pt. 2, *Thomas v. Nationwide Mutual Insurance Co.*, 188 W. Va. 640, 425 S.E.2d 595 (1992).

5.12. Underinsured motor vehicle coverage may include a provision precluding recovery of underinsured benefits if the liability coverage of the tortfeasor with respect to who's negligence benefits are sought has not been exhausted. *Castle v. Williamson*, 192 W. Va. 641, 453 S.E.2d 624 (1994).

5.13. Underinsured motor vehicle coverage may include a provision precluding benefits if the claimant is in an owned but not insured motor vehicle. *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989).

§114-63-6. Replacement of Earlier Provisions and Future Compliance.

6.1. This rule shall completely replace Informational Letters two revised and two-a, and all contrary policy provisions approved by the Insurance Commission before the effective date of this rule. Thereafter all policy provisions must be in compliance with this rule.