

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

Form #3

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OFFICE OF 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: 33-6-31 (i) and 33-2-10

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 63

TITLE OF RULE BEING PROPOSED: Standard Motor Vehicle Policy Provisions

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:** STANDARD MOTOR VEHICLE POLICY  
PROVISIONS (Title 114, Series 63)

**1. Authorizing statute(s) citation:**

W. Va. Code § 33-6-31(i).

**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

Insurance Commissioner  
Title 114, Series 63

- 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

W. Va. Code § 33-6-31(i) requires that the Commissioner “formulate and require the use of standard policy provisions for insurance required by this section . . .”. The proposed rule was an attempt to comply. Three general methodologies have been considered. The first was to adopt a form policy which would have to be used in the event of sale of this type of coverage in the State of West Virginia. In discussing the same in advance, much opposition was received. Second, industry had suggested the possibility of adopting the Insurance Services Office (ISO) approved forms as the “standard”. The Commission chose not to follow this recommendation for several reasons. Among them, any company which prepared its own form, but included a provision which was not in the ISO “standard” form, would then subject itself to liability for the deviation. Likewise, any company which prepared its own form, but failed to include a provision in the ISO “standard” form, would also subject itself to liability. Finally, since the ISO is in business to make money, it sells the rights to use its policy form and adoption of the same as a “standard” would either create a monopoly or induce copyright infringement. The Commissioner declined. The third methodology which has been considered to date, and which was utilized in the proposed rule, was to collect the various statutes and cases which have addressed certain policy provisions and to recite the same in one rule so that insurers and insureds alike could, at a glance, review all the legal tenets currently in place on this issue.

One comment has been received, namely, from the West Virginia Insurance Federation. It contains several parts which are addressed separately below.

The first comment is that the statutory provisions relied upon in the proposed rule fail to take into consideration case law interpreting those standards. While it cites to the proposed rules to which it refers it does not cite any cases which it believes have been omitted. Again, the intent was to include all the law and, if something has been omitted, it should be included.

Conversely, the Federation objects to the inclusion of those provisions which rely solely on Supreme Court decisions. The Federation notes, among other things, that case law is ever changing and evolving. The Commissioner concedes that adoption of the proposed rule would be high maintenance to keep current but, as referenced above, it still seems like the least intrusive methodology. The Commissioner also concedes that the proposed rule does not include each and every fact from the cases cited nor do those cases suggest that the court’s holding with regard to exclusionary language was limited to those particular facts. The Federation has a point with respect to its separation of powers argument and the question of whether the Supreme Court could reverse or modify a decision once it was in effect codified by citing the same in a Legislative Rule. In response, The Commissioner has deleted all case citations.

Beyond the aforesaid general concerns set forth in comment number 1, the Federation suggests, in comment number 2, that the rule simply be withdrawn. The Commissioner, faced with the requirement of 33-6-31(i) that she formulate standard policy provisions, is not prepared to do so.

The Federation’s third comment is a series of specific concerns on the substantive portion of the rule. Comment 3a, relating to proposed rule 3.3, points out that W.Va. Code § 33-6-29 “requires that a loaner car must be provided free of charge” (as stated in comment). In fact, the

statute actually states “no separate consideration is paid” and the words “without separate consideration” was also incorporated in the proposed rule. Accordingly, no change was made.

Comment 3b notes that proposed rule 3.4 prohibits application of the restrictive endorsement to family purpose doctrine claims. The stated fear is that the proposed rule abrogates the statute. In fact, W. Va. Code § 33-6-31(a), at the end, contains the identical prohibition and so no change was made.

Comment 3c expresses concern that, while proposed rule 3.9 authorizes an exclusion for a non-permissive user, some carriers handle that issue through the definition of “insured” rather than through a separate exclusion. The comment concludes “Does this provision create a problem for companies that do not include this exclusion?”. In response, the language in the proposed rule is the language used by the court, namely, “may contain a provision excluding coverage. . .”. The Commissioner does not read that language to be limited to an exclusion but, rather, any provision including a definition. Therefore, no change was made.

The Federation’s comment 3d, with regard to section 3.10 of the proposed rule, makes a good point and the words “making the coverage thereunder secondary to any primary coverage that might be applicable to the negligence” has been deleted.

Comment 3e seems to praise section 3.12 of the proposed rule allowing named driver exclusions for liability coverage above the minimum financial liability limit, but laments that the same language is not included as to uninsured and underinsured coverages. In response, there isn’t any such authority in the statute. The named driver exclusion provision appears only in 33-6-31(a) (liability coverage) and not subsection (b) dealing with uninsured and underinsured motorist coverage. No change was made.

Comment 3f refutes proposed rule 3.13 and argues that a multi-car discount is not necessary in order to prohibit stacking of liability coverage. It cites, in support, Payne v. Weston, 195 W. Va. 502, 466 S.E.2d 161 (1995). On the contrary, the penultimate paragraph in Payne states:

Accordingly, we hold that an insured is not entitled to stack liability coverage for every vehicle covered by his or her policy when the insured received a multi-car discount, when only one vehicle was involved in the accident, and when the policy contains language limiting the insurers liability. . .

*Id.* et. S.E.2d 171. No change was made.

Comment 3g simply makes the conclusory statement “underinsured motorist coverage should be excess over Workers Compensation coverage”. The comment is made in response to proposed rule 4.4 which states, “Uninsured motor vehicle coverage may contain a provision excluding the first \$300 dollars of property damage but shall not contain any other deductible or set off up to the limits of the uninsured motorist coverage”. Reading between the lines, it appears that the Federation would like to legislate, by way of rule, something which is not presently permitted and, indeed, it is prohibited. The Commissioner can not agree.

Comment 3h suggests that proposed rule 4.10, authorizing an exclusion for punitive damages

in uninsured motor vehicle coverage, should also be included in section 5 dealing with underinsured motorist coverage. The Commissioner agrees and the same has been added as proposed rule 5.14.

Comment 3i is correct. There was a typographical error and the proper citation in proposed rule 5.5 should be 33-6-31e.

Comment 3j suggests that the authorization for a provision precluding intra-policy stacking of underinsured motorist coverage should be extended to include inter-policy stacking as well. The comment correctly states that equal treatment was given to companies that issue separate policies on each vehicle in the 1995 amendment to W. Va. Code § 33-6-31(b). The Commissioner agrees and proposed rule 5.10 should be amended to read "underinsured motor vehicle coverage may contain a provision precluding intra-policy stacking and inter-policy stacking.

Finally, comment 3k suggests that the proposed rule should include a provision authorizing exclusions for punitive damages. In response, such a provision was included as to uninsured motorists coverage (4.10) and the Commissioner has previously conceded that underinsured should be added (5.14).

7/1/02 - copy to Vince King

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JUL 01 2002

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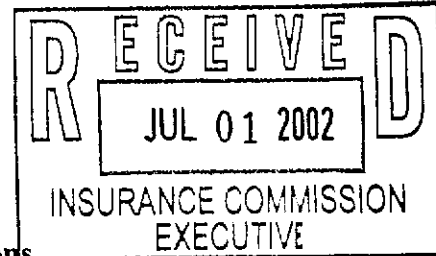
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July 1, 2002

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



**RE: Comments – Proposed 114 CSR 63  
Standard Motor Vehicle Policy Provisions**

Dear Commissioner Cline:

These comments are submitted on behalf of the West Virginia Insurance Federation (WVIF) to the proposed Series 63 regulations entitled "Standard Motor Vehicle Policy Provisions." The West Virginia Insurance Federation is a state trade association made up of 16 members representing over 80 percent of the total automobile insurance premiums in West Virginia.

1. The WVIF understands that these regulations are submitted in accordance with and to address W. Va. Code § 33-6-31(i) which requires the Insurance Commissioner to "formulate and require the use of standard policy provisions for the insurance required by this section." The WVIF does have serious concerns about these standards. While the WVIF does not object generally to the concept to the inclusion of standards based on statutory authority,<sup>1</sup> (although the WVIF will provide specific comments regarding these standards), it does have some concern that these standards in certain instances do not take into consideration the case law interpreting these standards.

The WVIF does, however, object to the inclusion of these standards included in these rules which are based solely on Supreme Court decisions.<sup>2</sup> First and foremost, these decisions rely on the specific facts of each particular case. To incorporate these decisions as black letter law, does not allow for the nuances and distinctions that exist based on these facts. Second, the WVIF objects to the codification of these Supreme Court decisions through their incorporation in a legislative rule. The case law in this area of the law is ever changing and evolving. To

<sup>1</sup> 3.1, 3.2, 3.3, 3.4, 3.6, 3.7, 3.8, 3.10 and 3.15; 4.1, 4.3, 4.4 and 4.9; 5.1, 5.2, 5.3, 5.5 and 5.8

<sup>2</sup> 2.2; 3.5, 3.9, 3.11, 3.12, 3.13 and 3.14; 4.2, 4.5, 4.6, 4.7, 4.8 and 4.10; 5.4, 5.6, 5.7, 5.9, 5.10, 5.11, 5.12 and 5.13

***SPILMAN THOMAS & BATTLE, PLLC***

Jane Cline, Commissioner

July 1, 2002

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codify these decisions through legislative rulemaking would establish a standard from which the Court would be reluctant to deviate even though it is a standard based on one of their decisions. In instances when the Court might be inclined to modify or clarify its positions, the incorporation of these decisions into rules would greatly limit the ability of the Court to modify or clarify its position.

For these and other reasons, the WVIF would propose that these subsections be deleted from the proposed rules.

2. Because of the concerns expressed in comment 1 above, the WVIF suggests that the Commissioner withdraw this rule. The WVIF committed to work with the Department to develop new rules which would satisfy the requirements of § 33-6-31(i).

3. In the alternative, the WVIF would propose the following specific comments to the proposed regulations:

a. Section 3.3. Section 3.3 requires some clarification regarding use of loaner cars. W. Va. Code § 33-6-29 requires that a loaner car must be provided free of charge by the business owner who is repairing the damaged vehicle or another person with the permission of the business owner.

b. Section 3.4. W. Va. Code § 33-6-31(a) specifically permits liability coverage to be excluded for a bailee for hire, and any person specifically excluded by any restrictive endorsement attached to the policy. This rule apparently is contradictory to these requirements by prohibiting such an exclusion under the family purpose doctrine. Case law appears to permit the exclusion for losses exceeding the financial responsibility limits. This rule seems to abrogate this standard.

c. Section 3.9. Many companies do not include an exclusion that precludes coverage for a non-permission user. Instead, they rely on the argument that the non-permission user would simply not meet the definition of an insured and deny coverage. Does this provision create any problem for companies that do not include this exclusion?

d. Section 3.10. W. Va. Code § 33-6-31(a) allows liability coverage to be excluded for a bailee for hire. How can 3.10 require secondary coverage for the bailee for hire in light of the provisions of W. Va. Code § 33-6-31(a)?

e. Section 3.12. This rule correctly allows named driver exclusions for liability coverage beyond a minimum required Financial Responsibility liability limits. However, what about those named driver exclusions for uninsured motorists and underinsured motorist coverage? The rules should allow named driver exclusions to be authorized for uninsured and underinsured coverage.



***SPILMAN THOMAS & BATTLE, PLLC***

Jane Cline, Commissioner

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f. Section 3.13. This rule implies that liability coverage would be allowed to stack in the absence of a multi-car discount. While this requirement may be accurate for underinsured and uninsured motorist coverage, it is not accurate for liability coverage. Case law clearly allows policy language that prohibits stacking of liability coverage without any regard to multi-vehicle discounts. See Payne v. Weston, 466 S.E.2d 161 (W. Va. 1995).

g. Section 4.4. Underinsured motorist coverage should be excess over Workers Compensation coverage.

h. Section 4.10. This rule correctly allows an exclusion for punitive damages under uninsured motorist coverage. There should be a similar standard for underinsured motorist coverage.

i. Section 5.5. This appears to be an incorrect cite. This should be W. Va. Code § 33-6-31e.

j. Section 5.10. While 5.10 addresses intra-policy stacking, it does not address interpolicy stacking. The amendments to W. Va. Code § 33-6-31(b) adopted in 1995 allow anti-stacking provisions for interpolicy stacking situations as well when the multi-vehicle discount is involved.

k. Finally, West Virginia law allows carriers to exclude coverage for punitive damages. We would propose that this requirement be included in the regulations.

Thank you for the opportunity to submit these comments.

Very truly yours,



T. Randolph Cox

TRC/lb;213824

Insurance Commissioner  
Legislative Rule  
Title 114, Series 63

**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.

Insurance Commissioner  
Legislative Rule  
Title 114, Series 63

**STANDARD MOTOR VEHICLE POLICY PROVISIONS**

**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  
Title 114, Series 63

**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
<b>ESTIMATED TOTAL COST</b>	Negligible	None	Negligible	Negligible	Negligible
<b>PERSONAL SERVICES</b>	Negligible	None	Negligible	Negligible	Negligible
<b>CURRENT EXPENSE</b>	Negligible	None	None	None	None
<b>REPAIRS AND ALTERATIONS</b>	None	None	None	None	None
<b>EQUIPMENT</b>	None	None	None	None	None
<b>OTHER</b>	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  
Title 114, Series 63

**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: July 24, 2002

Signature of Agency Head or Authorized Representative

  
\_\_\_\_\_  
JANE L. CLINE, INSURANCE COMMISSIONER

**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

**114CSR63**  
**WEST VIRGINIA LEGISLATIVE RULE**  
**INSURANCE COMMISSIONER**

**SERIES 63**

**STANDARD MOTOR VEHICLE POLICY PROVISIONS**

**§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.

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.

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.

3.9. Motor vehicle liability policies may contain a provision excluding coverage for the



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negligence of a driver operating the motor vehicle without the consent, express or implied, of the named insured (or his or her spouse).

3.10. Motor vehicle liability policies may contain a provision with respect to the negligence of any bailee for hire. 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.

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. The restricted named driver exclusion must specifically designate by name the individual or individuals to be excluded.

3.13. Motor vehicle liability policies may contain a provision, in exchange for a multi-car discount, which precludes stacking.

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.

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.

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).

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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.

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.

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 but only with respect to fault of the employer or co-employee but not with regard to the fault of a third party.

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. "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.

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.

**§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.

**Insurance Commissioner**  
**Legislative Rule**  
**Title 114, Series 63**

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.

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

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 but only with respect to the fault of the employer or co-employee but not with regard to the fault of a third party.

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. "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.

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).

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 but such guest passenger may not be precluded from recovery of underinsured benefits with respect to the negligence of a third party.

5.10. Underinsured motor vehicle coverage may contain a provision precluding intra-policy stacking and inter-policy stacking.

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.

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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.

5.13. Underinsured motor vehicle coverage may include a provision precluding benefits if the claimant is in an owned but not insured motor vehicle.

5.14. Underinsured motor vehicle coverage may include an exclusion for punitive damage liability.

**§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.



STATE OF WEST VIRGINIA

Offices of the Insurance Commissioner

Legal Division

BOB WISE  
Governor

RECEIVED

JANE L. CLINE  
Insurance Commissioner

02 JUL 26 PM 2:45

July 26, 2002

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

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 "Standard Motor Vehicle Policy Provisions" (Title 114, Series 63).

Please contact me if further information is required.

Sincerely,

Jane L. Cline  
Insurance Commissioner

JLC/jz  
Attachments