

**WEST VIRGINIA  
SECRETARY OF STATE  
BETTY IRELAND  
ADMINISTRATIVE LAW DIVISION**

Form #2

Do Not Mark In This Box

**FILED**

2005 AUG 30 P 4: 01

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE**

AGENCY: Insurance Commissioner TITLE NUMBER: 114

RULE TYPE: Procedural CITE AUTHORITY: WV Code §§33-2-10 & 33-11-4a(d)

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: 76

TITLE OF RULE BEING PROPOSED: Rules of Practice and Procedure for Administrative Proceedings Brought by Third Party Claimants

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 Sept. 29, 2005 AT 5:00 PM ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

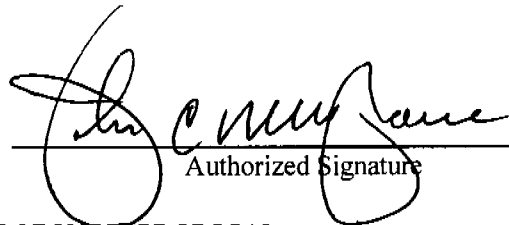
Victor Mullins, Associate Counsel

WV Insurance Commission

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

\$4.60

Insurance Commissioner  
Procedural Rule  
Title 114, Series 76

**RULES OF PRACTICE AND PROCEDURE FOR  
ADMINISTRATIVE PROCEEDINGS  
BROUGHT BY THIRD PARTY CLAIMANTS**

**TITLE 114, SERIES 76**

**BRIEF SUMMARY OF RULE**

This rule clarifies the rules of practice and procedure after a third party insurance claimant files an administrative complaint with the Insurance Commissioner alleging an unfair claims settlement practice. The rule addresses the requirements of Senate Bill 418 (2005) concerning the third party administrative complaint process.

Insurance Commissioner  
Procedural Rule  
Title 114, Series 76

**RULES OF PRACTICE AND PROCEDURE FOR  
ADMINISTRATIVE PROCEEDINGS  
BROUGHT BY THIRD PARTY CLAIMANTS**

**TITLE 114, SERIES 76**

**STATEMENT OF CIRCUMSTANCES**

With the enactment of Senate Bill 418 during the 2005 regular session, the Legislature prohibited a third party insurance claimant from bringing a private cause of action against an insurer for an unfair claim settlement practice. The legislation also changed the administrative process under which a third party claimant files a complaint with the Insurance Commissioner. Given these changes, the Legislature authorized the promulgation of a procedural rule for the Insurance Commissioner to conduct hearings under this new administrative process.

***FISCAL NOTE FOR PROPOSED RULES***

Rule Title: Rules of Practice and Procedure for Administrative Proceedings Brought by Third Party Claimants - (Title 114, Series 76)

Type of Rule:  Legislative  Interpretive  Procedural

Agency: Insurance Commissioner

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

Phone Number: (304) 558-0401 Email: Victor.Mullins@wvinsurance.gov

**Fiscal Note Summary**

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

If there are any expenses resulting from the administrative hearing process described in the procedural rule, it is a result of the requirements of Senate Bill 418 (2005). Accordingly, the rule should have no additional fiscal impact upon state government.

**Fiscal Note Detail**

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

<b>FISCAL YEAR</b>			
<b>Effect of Proposal</b>	<b>2005 Increase/Decrease (use "-")</b>	<b>2006 Increase/Decrease (use "-")</b>	<b>Fiscal Year (Upon Full Implementation)</b>
<b>1. Estimated Total Cost</b>	None	None	None
Personal Services	None	None	None
Current Expenses	None	None	None
Repairs & Alterations	None	None	None
Assets	None	None	None
Equipment	None	None	None
Other	None	None	None
<b>2. Estimated Total Revenues</b>	None	None	None

Rule Title: Rules of Practice and Procedure for Administrative Proceedings Brought by Third Party Claimants - (Title 114, Series 76)

3. Explanation of above estimates (including long-range effect):  
Please include any increase or decrease in fees in your estimated total revenues.

N/A

### MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date: 8/30/05

Signature of Agency Head or Authorized Representative

  
Jane L. Cline, Insurance Commissioner

**114CSR76**

**PROCEDURAL RULE  
INSURANCE COMMISSIONER**

**SERIES 76  
RULES OF PRACTICE AND PROCEDURE FOR  
ADMINISTRATIVE PROCEEDINGS  
BROUGHT BY THIRD PARTY CLAIMANTS**

Section

- 114-76-1. General.
- 114-76-2. Definitions.
- 114-76-3. Representation of Claimants and Respondents.
- 114-76-4. Filing of an Administrative Complaint.
- 114-76-5. Resolution Without Hearing.
- 114-76-6. Determination of Need For Hearing.
- 114-76-7. Hearings.
- 114-76-8. Commissioner's Authority.
- 114-76-9. Penalties, Restitution and Judicial Review.

114CSR76

FILED

PROCEDURAL RULE  
INSURANCE COMMISSIONER

2005 AUG 30 P 4: 02

SERIES 76  
RULES OF PRACTICE AND PROCEDURE FOR  
ADMINISTRATIVE PROCEEDINGS  
BROUGHT BY THIRD PARTY CLAIMANTS

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**§114-76-1. General.**

1.1. Scope. -- These procedural rules shall govern the initiation and conduct of administrative proceedings before the Insurance Commissioner upon the filing of an administrative complaint by a third party claimant alleging an unfair claims settlement practice in violation of W. Va. Code §33-11-4(9) or WV 114 CSR 14.

1.2. Authority. -- W. Va. Code §§33-2-10 and 33-11-4a(d).

1.3. Filing Date. --

1.4. Effective Date. --

1.5. These rules are intended to be read in conjunction with the procedural rule at WV 114 CSR 13. In the event of any conflict between the two rules, the provisions of this rule would control.

1.6. These rules are intended to compliment W. Va. Code §§29A-5-1 et seq.

**§114-76-2. Definitions.**

The following definitions apply to this rule:

2.1. "Claimant" means a third party claimant.

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

2.3. "Complaint" means an administrative complaint filed by a third party claimant pursuant to W. Va. Code §33-11-4a(b).

2.4. "Egregious act" means conduct that is fraudulent or malicious and reckless, whether or not the act constituted a pattern corresponding to an unfair claims settlement practice committed with such frequency as to constitute a general business practice. An act, or failure to act, that is due to negligence, lack of judgment, incompetence, or bureaucratic confusion, is not an egregious act.

**Insurance Commissioner  
Procedural Rule  
Title 114, Series 76**

2.5. "Natural person" means a human being, as distinguished from an artificial person created by law.

2.6. "Person" includes any individual, company, insurer, association, organization, society, reciprocal, business trust, corporation or any other legal entity, including agents, adjusters and brokers.

2.7. "Respondent" means a person(s) against whom a complaint is filed with the commissioner pursuant to W. Va. Code §33-11-4a(b).

2.8. "Sixty-day period" means the 60-day period following the respondent's receipt of a complaint.

**§114-76-3. Representation of Claimants and Respondents.**

3.1. Pro hac vice admission. -- Representation of parties in proceedings before the commissioner shall be only by attorneys at law admitted to practice before the courts of this state, before the courts of last resort of other states, or before the Supreme Court of the United States; *Provided, That* attorneys appearing before the commissioner who are not licensed to practice in West Virginia shall have sought and obtained permission to practice before the commissioner in compliance with Rule 8.0 of the Rules for Admission to the Practice of Law of the State of West Virginia. Documentation of permission granted by the West Virginia State Bar shall be supplied to the commissioner before such attorney files any pleading, motion or other paper or otherwise makes any appearance before the commissioner.

3.2. Pro se appearance. -- Any claimant who is a natural person may appear at and represent himself or herself in any matter before the commissioner.

3.3. Partner representing partnership. -- A partner may represent his or her partnership upon permission by the commissioner.

3.4. Representation of corporation. -- A corporate entity may be represented only by an attorney duly licensed or authorized to practice law in the state of West Virginia, although an employee of a corporation may testify at a hearing without the presence of counsel.

3.5. Representation by lay person prohibited. -- A party may not be represented in a matter before the commissioner by a spokesperson, lay representative or any other natural person not admitted or authorized to practice law in the state of West Virginia.



**Insurance Commissioner  
Procedural Rule  
Title 114, Series 76**

**§114-76-4. Filing of an Administrative Complaint.**

4.1. Time within which complaint must be filed. -- A written administrative complaint must be received by the commissioner no later than one (1) year following the actual or implied discovery of the alleged unfair claims settlement practice.

4.2. Receipt of complaint. -- For purposes of the time limit imposed by W. Va. Code §33-11-4a(b) and subsection 4.1 of this section, a complaint shall be deemed to have been received on the date on which a written document describing acts that could reasonably be construed as an unfair claims settlement practice is received by the commissioner, regardless of whether such document is on a form as described in subsection 4.3 of this section.

4.3. Complaint form. --

a. A complaint shall be on a form provided by the commissioner and shall state with specificity the following:

1. The statutory provision, if known, which the person allegedly violated;
2. The facts and circumstances giving rise to the violation;
3. The name of any individual or other entity involved in the violation;
4. Reference to specific policy language that is relevant to the violation, if known; and
5. Any other information the commissioner may require.

b. If the complaint does not provide sufficient information, the commissioner shall contact the claimant within fifteen (15) days of receipt of the complaint to obtain the necessary information and may, with the claimant's permission, amend the original complaint to clarify it, add and/or delete parties, and make any other necessary changes. The commissioner shall verify by any reasonable means the claimant's acceptance of any changes and shall document such verification in the commissioner's complaint file.

c. Upon receipt of a sufficiently complete complaint, the commissioner must, within five (5) working days thereafter, mail or by electronic means provide a copy to the respondent(s).

4.4. Reporting status of negotiations. -- Within forty-five (45) days after receiving a

**Insurance Commissioner  
Procedural Rule  
Title 114, Series 76**

complaint, the respondent must advise the commissioner in writing of the status of negotiations with the claimant unless the complaint has been resolved and the Commissioner has been so advised.

**§114-76-5. Resolution Without Hearing.**

5.1. Correction by respondent. -- The commissioner shall close the complaint if he or she determines that, within the sixty-day period, the respondent:

- a. Substantially corrected the circumstances that gave rise to the complaint; or
- b. Offered to resolve the complaint in a reasonable manner.

5.2. When complaint may be closed. -- A determination to close the complaint pursuant to subsection 5.1 of this section may be made at any time after the expiration of the sixty-day period, including during or after a hearing conducted pursuant to section 7 of this rule.

5.3. Right to contest closure. -- This section shall not affect the right of a claimant to make a written demand for a hearing pursuant to the provisions of W. Va. Code §33-2-13 on the issue of whether the commissioner properly decided to close the complaint pursuant to subsection 5.1 of this section. If the commissioner determines after such hearing that the closure was in error, the complaint shall be reopened and the matter shall proceed as if the commissioner had not made the determination to close the complaint pursuant to subsection 5.1 of this section. In the event of a reopening of the complaint pursuant to this subsection, all time periods in this rule shall be tolled pending the final determination of the proceedings instituted to contest the closure under subsection 5.1 of this section.

5.4. Effect of closure. -- The closure of a complaint pursuant to subsection 5.1 of this section does not limit the authority of the commissioner to consider evidence related to the factual allegations of the complaint in determining, in the context of a proceeding other than that involving the closed complaint itself, whether the alleged unfair settlement practice was, when considered in conjunction with other similar violations, part of a general business practice.

**§114-76-6. Determination of Need For Hearing.**

6.1. When investigation may begin. -- Upon the expiration of the sixty-day period or upon a declaration by the respondent that he or she does not intend to take any further action to resolve the complaint within the sixty-day period, the commissioner may conduct any investigation he or she considers necessary to determine whether the allegations contained in the complaint are meritorious, including any further investigation to determine if the person has

**Insurance Commissioner  
Procedural Rule  
Title 114, Series 76**

committed an unfair claims settlement practice with such frequency as to constitute a general business practice.

6.2. Complaint provided to Office of Consumer Advocacy. -- If the complaint has not been closed pursuant to subsection 5.1 of this rule or has been reopened pursuant to subsection 5.3 of this rule, and the commissioner makes a preliminary finding that the complaint has merit, he or she shall forward a complete copy of the complaint and the respondent's response, if any, to the Office of Consumer Advocacy.

6.3. Representation by Office of Consumer Advocacy. -- At the request of a claimant or whenever the public interest is served, the Office of the Consumer Advocacy may, at the Director's discretion, advocate for the interests of any claimant or for the public interest in proceedings relating to any complaint, and such advocacy may include representation of the claimant or intervention in the public interest at any hearing and in proceedings involving judicial review of orders issued by the commissioner or by any court with respect to the complaint.

**§114-76-7. Hearings.**

7.1. Scheduling of hearing. -- A hearing on a complaint shall be scheduled to be held within ninety (90) days from the date of filing the complaint, unless continued by agreement of all parties or by the commissioner for good cause. Good cause includes but is not limited to a determination by the commissioner that additional investigation is necessary.

7.2. Notice of hearing. -- The commissioner shall assign a time and place for a hearing and shall mail written notice of the hearing to the parties at least ten (10) days in advance thereof.

7.3. Pre-hearing matters. -- The provisions of WV 114 CSR 13.4 are specifically made applicable to proceedings under this rule.

7.4. Location of hearing. -- Hearings are to be conducted in the geographical region of the state where the complainant resides, as determined by the commissioner. Upon concurrence of all parties, the commissioner may conduct the hearing by telephone conference call.

7.5. Conduct of hearings.

a. To the extent such provisions are not in conflict with this rule, hearings shall be conducted in accordance with the procedures set forth in WV 114 CSR 13.

b. All testimony, argument and rulings shall be recorded by stenographic or voice

**Insurance Commissioner  
Procedural Rule  
Title 114, Series 76**

recording or by other means.

7.6. Required findings. -- The commissioner shall determine whether or not the respondent committed the unfair claims settlement practice alleged in the complaint.

7.7. Required determinations. -- If an unfair claims settlement practice is found, the commissioner shall determine:

- a. Whether the violation was intentional;
- b. Whether the violation was committed with such frequency as to constitute a general business practice; and
- c. Whether the violation was a result of an egregious act.

7.8. Continuation and adjournment. -- The commissioner may continue a hearing from one day to another or adjourn it to a later date to hear evidence that may relate to the determinations required by subsection 7.7 of this section.

**§114-76-8. Commissioner's Authority.**

8.1. Commissioner's authority not limited by rule. -- Nothing in this rule may be construed to limit the authority of the commissioner to conduct an investigation of or to take action against a respondent whom the commissioner has reason to believe has:

- a. Intentionally committed an unfair claims settlement practice;
- b. Committed an unfair claims settlement practice with such frequency as to constitute a general business practice; or
- c. Consistently used the sixty-day period to resolve or settle third party claims.

**§114-76-9. Penalties, Restitution and Judicial Review.**

9.1. Penalties. -- If the commissioner determines after hearing that the respondent has committed the unfair claims settlement practice alleged in the complaint, he or she shall issue an order directing the respondent to cease and desist from such practice and may, in addition, impose one or more of the penalties as prescribed by W. Va. Code §33-11-6(a) through (d), inclusive.

**Insurance Commissioner  
Procedural Rule  
Title 114, Series 76**

9.2. Restitution. --

a. The commissioner may, in addition to any penalties imposed pursuant to subsection 9.1 of this section, grant restitution to the claimant if the commissioner determines that the claimant has suffered damages as a result of:

1. A general business practice; or
2. An egregious act committed by the respondent, regardless of whether the act occurred within a general business practice.

b. Restitution permitted under W. Va. Code §33-11-6(e)(1) and subdivision a of this subsection may include non-economic damages not to exceed ten thousand dollars (\$10,000) and actual economic damages. Restitution may not be given for attorney fees or punitive damages.

c. The payment of any restitution award shall be made from the Unfair Claims Settlement Practice Trust Fund established by W. Va. Code §33-11-4b.

9.3. Judicial review. -- Any person aggrieved by any act, which includes the entry of an order, or failure to act of the commissioner under this rule may seek judicial review as provided in W. Va. Code §33-2-14.