WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION

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OFFICE OF STATE

NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW

AGENCY: Insurance Commissioner TITLE NUMBER: 114

CITE AUTHORITY WV Code §§33-2-10 and 33-11-4a(d)

RULE TYPE: PROCEDURAL X INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____

CITE STATUTE (s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

_____

AMENDMENT TO AN EXISTING RULE: YES _____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

_____

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 76

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

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THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS April 27, 2006

John C. Musgrave
Acting Cabinet Secretary
West Virginia Department of Revenue

#13.40

114CSR76

PROCEDURAL RULE
INSURANCE COMMISSIONER

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

Section

114CSR76

PROCEDURAL RULE
INSURANCE COMMISSIONER

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

§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. -- March 28, 2006.

1.4. Effective Date. -- April 27, 2006.

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 as defined in WV 114 CSR 14-2.8.

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.

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 or appearance 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.

§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 advising that the complaint does not provide sufficient information. The claimant may amend, within an additional fifteen (15) days from the date of contact, the original complaint to clarify it, add and/or delete parties, and make any other necessary changes. If the claimant fails to provide information for a sufficiently complete complaint within fifteen (15) days from contact by the Commission, no further action will be taken on the complaint.

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 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 or the respondent has advised the commissioner that he or she does not intend to take any further action to resolve the complaint.

§114-76-5. Resolution Without Hearing.

5.1. Closing of complaint. -- Except as provided in W. Va. Code §33-11-4a(i) and subsection 5.4 of this section, the commissioner shall close the complaint and no further action shall lie on the matter if he or she determines that the respondent:

a. Substantially corrected the circumstances that gave rise to the complaint within

the sixty-day period;

b. Offered to resolve the complaint in a reasonable manner within the sixty-day period; or

c. Provided sufficient information to satisfy the commissioner that the complaint lacks merit.

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 investigations may begin. -- Upon the expiration of the sixty-day period without a resolution of the complaint or 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. Upon finding, after hearing, that an unfair claims settlement practice has been committed, the commissioner may also conduct an investigation to determine whether the unfair claims settlement practice was committed 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.

§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 and evidence at any such hearing shall be reported by stenographic notes and characters or by mechanical means.

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

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 a result of an egregious act; and

c. Whether the violation was committed with such frequency as to constitute a general business practice upon further investigation and, if necessary, a hearing brought pursuant to an administrative proceeding initiated by the commissioner.

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 an unfair claims settlement practice, 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.

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 and 33-11-6(g).

Insurance Commissioner
Title 114, Series 76
Procedural Rule – Rules of Practice and Procedure for Administrative Proceedings Brought by Third Party Claimants

RESPONSES TO COMMENTS

Eight sets of comments were received during the comment period in response to the proposed procedural rule entitled "Rules of Practice and Procedure for Administrative Proceedings Brought by Third Party Claimants." The comments are addressed below by the rule provisions commented upon.

A. Section 2.1

Comments were received suggesting that the definition of "claimant" be amended by referencing to the definition of "third party claimant" contained in 114 CSR 14-2.8.

The Commissioner agrees that a reference to 114 CSR 14.2.8 would further clarify who a claimant is for purposes of this rule and therefore will change the section to read as follows:

2.1. "Claimant" means a third party claimant as defined in WV 114 CSR 14-2.8.

B. Section 2.4

Several commentators advocate for a "clear and convincing" standard of proof in order for the Commissioner to find an "egregious act." These commentators suggest that such a standard be incorporated either in the definition of "egregious act" or in another part of the rule.

The Commissioner responds that the procedure regarding hearings remains unchanged. The preliminary paragraph to W. Va. Code § 33-11-6, which was not changed in Senate Bill 418, provides that the Commissioner after notice and hearing must first determine if a person has violated any provision of Article 11 of Chapter 33 or rules promulgated thereunder. If such a determination is made, the Commissioner may "at his or her discretion" order any number of forms of relief, including restitution from the newly-created Unfair Claims Settlement Practice Trust Fund if the claimant has suffered damages from an "egregious act" or a "general business practice." The applicable hearing procedures are found in W. Va. Code § 33-2-13, 114 CSR 13 and 114 CSR 76. Thus, hearings to determine whether an "egregious act" has occurred will proceed in the same manner as other hearings, and determinations as to whether a particular violation has occurred will continue to be made in the same manner and under the same standards of proof as similar determinations have heretofore been made with regard to other violations of the Insurance Code.

One comment was received stating that "the term 'reckless' is undefined, creating an ambiguous standard by which an insurer's conduct will be measured." It is therefore suggested that the term "reckless" be deleted.

The Commissioner believes that the term "reckless" does not need defined as the Commissioner can avail herself of the ample case law defining this term. See W. Va. Fire & Cas. Co. v. Stanley, 216 W. Va. 40, 602 S.E.2d 483 (2004); Estate of Robinson v. Randolph County Comm'n, 209 W. Va. 505, 549 S.E.2d 699 (2001); Cline v. Joy Mfg. Co., 172 W. Va. 769, 310 S.E.2d 835 (1983).

C. Section 3.1

Comments were received that the words "or appearance" be inserted after the word "representation" in the first sentence to make this section more consistent with 114 CSR 13-6.13.

The Commissioner concurs that this section should, when possible, mirror 114 CSR 13-6.13 and will make the suggested change.

D. Section 3.4

Several comments were received arguing that the requiring of lawyers to represent corporations may result in increased costs to insurers, costs that could ultimately be passed on to consumers. It is further argued that there may be hearings where limited legal questions are involved and a pro se appearance by a company representative may be all that is necessary to adequately respond to a complaint. It is thus suggested that this rule be stricken.

The Commissioner believes that the benefits of having a company represented by counsel at hearings outweigh the monetary costs for such a requirement. While there may be occasions where the matter will turn on factual rather than legal issues, there is always the chance of a legal issue arising in which the company did not anticipate. Moreover, when a company employee who is not an attorney comes without counsel to a hearing, he or she will almost invariably be called upon to address legal issues relevant to the complaint. Such a situation will put this person in a representational capacity.

E. Section 3.5

A comment was received that the prohibition against lay persons representing a party will result in increased costs to insurers.

See Commissioner's response to the comments on section 3.4 above. Moreover, the Commissioner does not wish to promote the unauthorized practice of law.

F. Section 4.2

One commentator believes that the language of this section should be changed to require the Commissioner's actual receipt of the approved form prior to the one-year period.

The Commissioner responds that the suggested change would be too harsh for those individuals that need assistance in completing the complaint form as anticipated by W. Va. Code § 33-11-4a(b)(2). Therefore, the Commissioner declines to adopt such a change.

Several commentators also requested that the Commissioner require date-stamping of complaints received by the agency in order to verify whether a complaint was timely filed. The following language was suggested: "All administrative complaints received by the Insurance Commissioner shall be date stamped on the face of the document showing the date of receipt by the Insurance Commission."

The Commissioner believes that such a change is unnecessary because it is already the current practice of the Commission's Consumer Service Division to date stamp complaints upon receipt.

G. Section 4.3.b

Commentators argued that this provision improperly changes the Commissioner's role in the matter to being an advocate for the complainant. It is further argued that the provision "implicates a perception of impropriety since it is presumed that the Commission would only change a pleading previously determined to be insufficient in a manner to make it meritorious against an insurance carrier." It was suggested that the language be changed as follows:

> b. If the complaint does not provide sufficient information, the Commissioner shall contact the claimant within fifteen (15) days of receipt of the complaint advising that the complaint does not provide sufficient information and advising the claimant of an additional fifteen (15) days to amend the original complaint to clarify, add and/or delete parties or make any other necessary changes. Any time limitations for the filing of the administrative complaint pursuant to Rule 4.1 shall be tolled for the fifteen (15) days provided by the Commissioner to the complainant to amend or otherwise clarify the original complaint.

The Commissioner notes the commentators concerns and believes that the provision's language should be modified to better conform with W. Va. Code § 33-11-4a(b)(2). Accordingly, the language will be changed as follows:

> *b. If the complaint does not provide sufficient information, the Commissioner shall contact the claimant within fifteen (15) days of receipt of the complaint advising that the complaint does not provide sufficient information. The claimant may amend, within an additional fifteen (15) days from the date of contact, the original complaint to clarify it, add and/or delete parties, and make any other necessary changes. If the claimant fails to provide information for a sufficiently complete complaint within fifteen (15) days from contact by the Commission, no further action will be taken on*

the complaint.

H. Section 4.3.c

Several comments were received requesting that a provision be included directing the Commissioner where to send the complaint once it is received by the agency. It was suggested that the Commissioner maintain a listing of contact names and addresses for insurance carriers that have been designated to receive complaints or require complaints to be forwarded to specific locations such as to a company's registered agent for service of process.

The Commissioner responds that her office already has a database which contains the principal place of business address of insurance companies licensed in this state. The Commissioner believes this to be sufficient for notification purposes given the relatively long "cure period" of sixty (60) days. The Commissioner further notes that it is the agency's current practice to send complaints to a specific contact person/address of an insurance company when such a request is made by the insurer.

A comment was received stating that the respondent might find the complaint to be insufficiently complete, therefore the respondent should be permitted to advise the Commissioner that additional information is necessary. Accordingly, it is argued, the rule should allow a tolling of the "cure period" from the time that both the Commissioner and the respondent believe the complaint is sufficiently complete.

The Commissioner responds that it is her statutory duty to ensure that the complaint is sufficiently complete. The suggestion of allowing the respondent to play a role in determining when a complaint is adequately complete may interfere with this duty of the Commissioner and could possibly hinder the process.

It is also suggested by this commentator that the rule permit a response to the complaint "in writing by mail or electronic means."

The Commissioner notes that there is no statutory or rule provision that requires a response to be submitted by any defined means and that this agency already accepts responses via electronic submission. The Commissioner does not believe that such a policy needs to be set forth in a rule provision.

I. Section 4.4

Comments were received suggesting that this section is unnecessary and should be deleted. If, however, the provision remained, it was recommended that the phrase "if any" be inserted to cover situations where the insurer determines that it had made an appropriate settlement offer or other decision. This way, it is argued, there is no affirmative requirement on an insurer to change its prior position.

The Commissioner believes that a requirement to report on the status of negotiations during the cure period will better keep this agency informed concerning the matter and may refocus efforts in getting the matter resolved. The recommendation that the phrase "if any" be inserted may be more confusing than helpful. However, the Commissioner does believe that the section could be clarified and thus will change the section to read as follows:

> *4.4. Reporting status of negotiations. -- Within forty-five (45) days after receiving a 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 or the respondent has advised the commissioner that he or she does not intend to take any further action to resolve the complaint.*

J. Section 5.1

Several commentators requested that the phrase "and no further action shall lie on the matter" be inserted after the word "complaint" in the preamble to be more fully mirror the language found in W. Va. Code § 33-11-4a(b)(4).

The commissioner agrees that this language should be included to conform with W. Va. Code § 33-11-4a(b)(4) and will amend accordingly. However, the Commissioner will note the exception contained in W. Va. Code § 33-11-4a(i) and section 5.4 of this rule.

It is further suggested by commentators that a subparagraph "c" be added to state one of the following:

1. "Has demonstrated the correctness of its position complained of";
2. "Has shown that the complaint has no merit"; or
3. "Provided sufficient information to satisfy the commissioner of the correctness of its position."

The concern is that without the recommended subparagraph, the rule would impose an affirmative duty on an insurer to change its position upon the filing of an administrative complaint.

The Commissioner concurs that the section should include a provision whereby the matter could be closed due to a determination that the complaint lacked merit. Accordingly, the Commissioner will change the section to read as follows:

> *5.1 Closing of complaint. -- Except as provided in W. Va. Code §33-11-4a(i) and subsection 5.4 of this section, the commissioner shall close the complaint if he or she determines that the respondent:*
>
> *a. Substantially corrected the circumstances that gave rise to the complaint within*

the sixty-day period;

b. Offered to resolve the complaint in a reasonable manner within the sixty-day period; or

c. Provided sufficient information to satisfy the commissioner that the complaint lacks merit.

K. Section 5.3

A comment was received stating that the underlying statute does not provide this remedy. One commentator stated that this rule "provides no standard of reasonableness or burden of proof required of a complainant in order to prevail in reopening a complaint."

The Commissioner responds that this section was inserted out of due process concerns and in conformity with W. Va. Code § 33-2-13, which states that the Commissioner "shall hold hearings . . . upon a written demand therefore by a person aggrieved by an act or failure to act by the commissioner . . .." The closing of the complaint is surely an act of the Commissioner that may potentially aggrieve a person and thus trigger the right to a hearing.

Several commentators raised the issue that this section is silent with respect to whether an insurer has the right to appeal a decision by the Commissioner to reopen a previously closed complaint.

As the response to the comment directly above notes, any person aggrieved by an act of the Commissioner has the right to request and be heard at a hearing under W. Va. Code § 33-2-13. This is so regardless of whether such a right is restated in this rule.

Another commentator suggests that "[i]f a claim is closed by the commissioner, then the remedy should remain the same for all parties and that is to appeal through judicial review."

The Commissioner responds that, after a determination that the complaint lacks merit, she does not enter an order and thus there is no order to appeal.

L. Section 5.4

Several comments stated that this section should be deleted as it is inconsistent with the right of the insurer to correct the circumstances under which the administrative complaint was originally filed and would eliminate the effectiveness of the sixty-day period.

This rule provision was derived from W. Va. Code § 33-11-4a(i), which states:

Nothing in this section in any way limits the rights of the Commissioner to investigate

and take action against a person which the Commissioner has reason to believe has committed an unfair claims settlement practice or has consistently resolved administrative complaints by third-party claimants within the sixty-day period set forth in subdivision (4), subsection (b) of this section.

The Commissioner believes that the purpose of this statute is to prevent an abuse of the sixty-day "cure period" provided by W. Va. Code § 33-11-4a(b)(4) and to allow for the Commissioner's review of the factual allegations of a complaint if she has reason to believe that an unfair claims settlement practice has been committed with such frequency as to constitute a general business practice. It is the Commissioner's opinion that Section 5.4 clarifies the statutory language and that the rule provision should remain.

One commentator states that the "[m]ere allegations within a complaint should never rise to the level of accepted 'fact' if disputed by the opposing party and the matter is settled before any formal administrative determination as to the validity."

The Commissioner responds that the commentator misinterprets the rule language. The rule does not require the Commissioner to correlate "allegations" with "facts." The Commissioner can, however, "consider evidence related to the factual allegations of the complaint in determining [a business practice]." The weight and credibility of that evidence will be appropriately evaluated by the Commissioner when she makes a determination as to whether a business practice exists.

It was further urged by a commentator that if a complaint was closed during the sixty-day period, the Commissioner should be required to issue an order finding that the complaint had no merit.

The Commissioner responds that just because the complaint was closed during the sixty-day period, it does not mean that the complaint had no merit. To the contrary, it could be that the complaint was resolved and subsequently closed during this period because the complaint was, in fact, meritorious. Accordingly, the Commissioner declines to include such a provision.

Another suggestion was "to allow a procedure whereby a claimant could withdraw their complaint if the matter is now resolved."

The Commissioner notes that such a procedure is already in place. Therefore, the Commissioner does not believe that it needs to be expressly stated in this rule.

M. Section 6.1

A number of commentators believe that the Commissioner is only authorized to make a merit determination at the initial investigation stage and does not have the authority at this time to determine whether a person committed an unfair claims settlement practice with such frequency as to constitute a general business practice. It is argued that such a general business practice

investigation can only be commenced until there is a determination of merit. Thus, it is suggested that the last portion of the provision ("including any further investigation to determine if the person has committed an unfair claims settlement practice with such frequency as to constitute a general business practice") be deleted.

The Commissioner notes that the applicable statutory language allows for two separate investigations. The first investigation by the Commissioner is to determine whether the complaint has merit. If, through this investigation, a determination is made that a possible unfair claims settlement practice has been committed, a hearing is scheduled and held whereby the parties can present evidence supporting their respective positions. If, after such hearing, an unfair claims settlement practice is found, the Commissioner may conduct another investigation, and hold another hearing, to determine whether the unfair claims settlement practice was committed with such frequency as to constitute a general business practice. The general business practice investigation and hearing are regulatory actions initiated and brought in the name of the Insurance Commission. However, if a general business practice is found, this may trigger an award of restitution to the third party complainant if the complainant proved during his or her hearing that he or she suffered damages as a result of the unfair claims settlement practice. The Commissioner believes that this section should be clarified to better describe when each investigation may begin. Accordingly, the Commissioner will change the section to read as follows:

> *6.1 When investigations may begin. -- Upon the expiration of the sixty-day period without a resolution of the complaint or 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. Upon finding, after hearing, that an unfair claims settlement practice has been committed, the commissioner may also conduct an investigation to determine whether the unfair claims settlement practice was committed with such frequency as to constitute a general business practice.*

Another comment received on this section states that the phrase "investigation she considers necessary" is vague, too broad and open-ended. It is argued that consideration must be given to the fact that some administrative matters will also have an underlying case being pursued in court, and that the commissioner should be cautious about revealing elements that are directly related to the defense of the claim, which could compromise the defense as well as the representation of the insurance carrier and/or their policyholder in such matters.

The Commissioner responds that the language "investigation he or she considers necessary" is taken directly from W. Va. Code § 33-11-4a(c). The Commissioner's further notes that the acquisition of any materials, including the claim file, during her review of a complaint is deemed to be part of an official investigation and therefore confidential.

N. Section 6.3

One comment asked whether "it is appropriate to have the Consumer Advocate, a de facto employee of the commissioner who will be deciding these cases, representing complainants."

Several comments were received stating that the rule was too broad and in contravention to W. Va. Code §§ 33-2-17(a)(3) and 33-11-4a(d). The commentators assert that a referral to the Office of Consumer Advocacy may be made by the Commissioner "only after the sixty (60) day cure period and a determination by the Commissioner that the complaint has merit." They interpret the proposed rule to mean that the Office of Consumer Advocacy may represent a third party complainant at any stage of the matter.

It is further noted that the proposed rule language does not include the qualifier that the complainant must not have legal counsel before the Office of Consumer Advocacy can undergo representation (unless the public interest will be served), as contained in W. Va. Code § 33-2-17(a)(3). It also argued that said code section "only applies to filings made with the Insurance Commissioner by an insurance company or relating to a third-party complaint alleging an unfair claims settlement practice," and "does not encompass any other hearing or proceedings as set forth in proposed Section 6.3."

Without responding directly to the above comments, the Commissioner believes that this section should not be included within this rule considering that the Consumer Advocate's role in third party administrative proceedings is defined by statute (W. Va. Code § 33-2-17(a)(3)) and the Consumer Advocate's office has its own rule-making authority pursuant to W. Va. Code § 33-2-16(c). Accordingly, this section will be deleted from the rule.

O. Section 7.1

One commentator believes that the rule should state that hearings are not required where a complaint has been closed due to resolution or because the complaint was found to lack merit.

The Commissioner believes that such language is unnecessary as there would be no purpose for a hearing on the complaint if the complaint was closed because the parties resolved the matter or the complaint was found to lack merit.

A commentator also argues that the time frame for scheduling the hearing should be clarified to run from the time a sufficiently complete complaint is filed, rather than from the date the complaint is originally filed. This commentator also expresses a concern that the 90-day time frame may not allow sufficient time to schedule and prepare for a hearing.

The Commissioner responds that the time frame for scheduling/conducting a hearing is set by W. Va. Code § 33-11-4a(d) and cannot be modified with this rule. The Commissioner does share the commentator's concern that the 90-day time frame may be insufficient to conduct most hearings. However, this is somewhat ameliorated by the fact that the parties may continue the hearing by

agreement and the Commissioner may continue the hearing for good cause.

P. Section 7.2

One commentator believes that ten (10) days notice is insufficient. It is further argued that because the notice only has to be "mailed" ten (10) days before the hearing, the respondent will actually have less than ten (10) days to prepare to defend the complaint.

The Commissioner responds that the 10-day notice provision is set by W. Va. Code § 33-11-4a(d) and cannot be modified with this rule.

Q. Section 7.4

A comment was received stating that this provision needs clarification concerning "whether hearing[s] will occur in geographical towns or cities or some specified 'regions.'"

The Commissioner notes that W. Va. Code § 33-11-4a(d) states that hearings are "to be conducted in the geographical region of the state where the complainant resides." The Commissioner does not wish to specify these regions in a rule as they may change from time to time.

R. Section 7.5.a

One commentator believes that 114 CSR 13 may not be designed for the hearings contemplated by W. Va. Code § 33-11-4a. The commentator is generally concerned over issues such as the use of administrative subpoenas to gather information while the underlying matter is in court and the lack of protection for personal and confidential information potentially being introduced as evidence at this these hearings.

The Commissioner responds that 114 CSR 13 and this rule are procedural rules that do not address any substantive right of a party, which includes the protection of personal and confidential information. The Commissioner believes that it is necessary for 114 CSR 13 to be applicable to third party administrative proceedings where there is no conflict with this proposed procedural rule. Accordingly, the Commissioner declines to change section 7.5.a.

S. Section 7.5.b

The commentators maintain that this proposed rule is broader than the Administrative Procedures Act, W. Va. Code § 29A-5-1, which states: "All testimony and evidence at any such hearing shall be reported by stenographic notes and characters or by mechanical means." It is suggested that the rule should be amended so as to be in compliance with the APA.

The Commissioner concurs that the rule provision should conform to the Administrative Procedures Act and will change the provision accordingly.

T. Section 7.6

Several commentators believe that this section should be amended to include the provisions of W. Va. Code § 33-11-4a(f) and (g).

The Commissioner responds that subsections (f) and (g) of W. Va. Code § 33-11-4a speak for themselves and need no further clarification. Therefore, the Commissioner declines to include them in the rule.

Also, the commentators express concerns over "a proceeding whereby the Commissioner makes a finding as to whether the respondent has committed an unfair claims settlement practice as alleged in the complaint given that the Commissioner has already made a preliminary determination that the allegations had merit."

The Commissioner notes that she is charged with implementing the statutory language and that such language cannot be changed through a procedural rule. However, the Commissioner believes that the rule language could be better clarified. Accordingly, the section will be changed as follows:

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

Another commentator notes that there is no burden of proof inserted concerning a finding of a violation and suggests that an additional section could be added to accomplish this.

The Commissioner believes that a section on burden of proof is unnecessary. The basic procedures regarding hearings have remained unchanged. The preliminary paragraph to W. Va. Code § 33-11-6, which was not changed in Senate Bill 418, provides that the Commissioner after notice and hearing must first determine if a person has violated any provision of Article 11 of Chapter 33 or rules promulgated thereunder. If such a determination is made, the Commissioner may "at his or her discretion" order any number of forms of relief, including restitution from the newly-created Unfair Claims Settlement Practice Trust Fund if the claimant has suffered damages from an "egregious act" or a "general business practice." The applicable hearing procedures are found in W. Va. Code § 33-2-13, 114 CSR 13 and 114 CSR 76. Thus, determinations as to whether a particular violation has occurred will continue to be made in the same manner and under the same standards of proof as similar determinations have heretofore been made with regard to other violations of the Insurance Code.

U. Section 7.7

One commentator states that this rule should be clarified so that any administrative order will not have *res judicata* or collateral estoppel effects, "but rather, [would] be considered an

administrative finding only, not equal to a judicial determination of a violation of the Unfair Claims Settlement Practices Act with such frequency as to constitute a general business practice."

The Commissioner responds that it is not within her authority to advise a court how it should treat any administrative order that she enters.

The Commissioner notes that a change made to section 6.1 requires an amendment to this section so that the sections are consistent with each other. Accordingly, the section will be changed as follows:

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 a result of an egregious act; and

c. Whether the violation was committed with such frequency as to constitute a general business practice upon further investigation and, if necessary, a hearing brought pursuant to an administrative proceeding initiated by the commissioner.

V. Section 8.1.b

It is argued by several commentators that Section 8.1.b is too broad and does not track W. Va. Code § 33-11-4a(i). It is maintained that subsection (i) makes no reference to a general business practice and therefore subdivision b of Section 8.1 should be deleted. It is also argued by another commentator that the provision is unfair to insurers by giving the Commissioner "unfettered authority to investigate an insurance carrier who consistently settles 3rd party claims within the 60 day period."

The Commissioner responds that subdivision b is a clarification of W. Va. Code § 33-11-4a(i) and is not believed to be overly broad. The Commissioner further responds that W. Va. Code § 33-11-4a(i) contemplates that safeguards need to be in place to ensure that an insurer does not abuse the sixty-day period.

W. Section 9.1

One commentator states that this provision is "somewhat awkward and leaves one to question if this section is referring to the hearing discussed in Section 7."

The Commissioner does not share the commentator's concerns that the language is awkward or needs to specifically reference section 7. However, the language of this section should conform to certain changes made in section 7.6 of this rule and thus the Commissioner will accordingly amend

this section as follows:

> *9.1. Penalties. -- If the commissioner determines after hearing that the respondent has committed an unfair claims settlement practice, 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.*

X. Section 9.3

Several comments suggested that W. Va. Code § 33-11-6(g), which also permits judicial review, should be referenced in the rule provision.

The Commissioner agrees that W. Va. Code § 33-11-6(g) should be referenced in this provision and will accordingly do so.

Nationwide
On Your Side™

Mark D. Davidson
Director of Legislative Affairs
Office of Government Relations

September 16, 2005

Mr. Victor A. Mullins
Associate Counsel
Legal Division
West Virginia Insurance Commission
1124 Smith Street
Charleston, West Virginia 25301

Dear Mr. Mullins:

In response to the Department's revised proposed UTPA Rule 76, I would say that Nationwide generally welcomes the many revisions proposed by the Department and believes that, in large part, the rule will be workable.

I would offer, however, that while subsection 5.1B provides for the closure of a complaint if a responding carrier 'offered to resolve the complaint in a reasonable manner,' subsection 5.3 provides for an immediate right to contest the closure in a new hearing. The proposed language, however, provides no standard of reasonableness or burden of proof required of a complainant in order to prevail in reopening a complaint, e.g., 'may petition the Commissoiner with new evidence showing...' , etc. From the other perspective, by what standard can the Commissioner dismiss or reopen the complaint without being subject to litigation from either party?

As in the past, we are ready to work with you to address this point in the rule or on any other provision you might seek our input.

Thank you for the opportunity to comment

Sincerely,

Cc: The Hon. Jane L. Cline
Mary Jane Pickens

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September 23, 2005

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

Dear Sir:

After reviewing the proposed Procedural Rule Title 114, Series 76, the following comments are respectfully submitted on behalf of Inland Mutual and Safe Insurance Companies:

1) Under *'114-76-3. Representation of Claimants and Respondents.'* As small companies, we feel the requirement of representation by legal counsel for ALL matters before a hearing should be expanded to allow representation of the corporation on a pro se basis by an officer of the corporation. We can envision potential 'hearings' where there are limited legal questions and a pro se appearance explaining the corporation's position would be more than adequate – and of course more cost effective and less burdensome, thus benefiting our policyholders.

2) It seems clear upon review of the enabling legislation (see 33-11-4A (c) and (d)) that the commissioner is the arbiter of what constitutes a 'meritorious' claim of third party bad faith. This should be clearly stated in the procedural rule, perhaps by adding the following:

under: *'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:'*

add: c. has shown to the satisfaction of the commissioner that the complaint has no merit.

This would allow meritless complaints to be closed without the added expense of hearings or additional useless investigation.

If you have any questions, or comments, please contact the undersigned.

Sincerely,

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Secretary

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c.c. file

PROGRESSIVE

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September 26, 2005

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VIA HAND DELIVERY

RE: Comments Regarding Proposed Procedural Rules at 114 CSR 76

Dear Mr. Mullens:

Please accept this letter containing the comments, developed with the assistance of outside counsel, of the Progressive group of companies (hereinafter referred to as "Progressive") presently authorized and doing business in West Virginia, to the proposed procedural rules at 114 CSR 76 with respect to the Rules of Practice and Procedure for Administrative Proceedings Brought by Third-Party Claimants. We have also included in our comments proposed additional sections of the Rules for the Commissioner's consideration.

Section 2.1 - Definition of "Claimant"

Proposed Section 2.1 defines "claimant" as a third-party claimant. We would suggest that the section be amended to further adopt the definition of a third-party claimant as set forth in 114 CSR 14-2.8 under the Unfair Trade Practices Rules. Section 2.8 of the UTPA Rules defines a third-party claimant as "any individual, corporation, association, partnership or other legal entity asserting a claim against any individual, corporation, association, partnership or other legal entity insured under an insurance policy or insurance contract of an insurer." We would therefore suggest that 2.1 be amended to read as follows: "Claimant" means a third-party claimant as further defined by 114 CSR 14-2.8.

Section 2.4- "Egregious Act"

The Commissioner has set forth a definition of "egregious act" at proposed Section 2.4. However, the definition is different than the definition of "egregious act" as set forth in the proposed changes to the UTPA Rules, 114 CSR 14-2.14.[1] The definition as set forth in the proposed Procedural Rules defines egregious act as "conduct that is fraudulent or malicious and reckless whether or not the act constituted a pattern corresponding to an unfair claim settlement practice committed with such frequency as to constitute a general business practice. An act, or failure to act, that is due to simple negligence, lack of judgment, incompetence or bureaucratic confusion is not an egregious act." This proposed definition omits the additional clause of conduct that is "clearly irresponsible."

[1]The proposed emergency UTPA Rules recently filed by the Insurance Commissioner with the West Virginia Secretary of State delete any definition of egregious act.

Given that the Commissioner defines an egregious act as fraudulent, malicious or reckless activity, such findings should also be at a higher standard of proof, i.e., clear and convincing evidence. Neither the definition of "egregious act" nor any of the other proposed Procedural Rules sets forth the standard of proof for an "egregious act" and we advocate that such standard be included either in the definition or in subsequent procedural rules so that any finding of an "egregious act" must be made at the higher burden of proof of clear and convincing evidence.

Section 3.1 - Pro Hac Vice Admission

The provision permitting representation of parties by *pro hac vice* admission is slightly inconsistent with 114 CSR 13, the Rules of Practice and Procedure for Hearings before the West Virginia Insurance Commissioner, and we recommend that the words "or appearance" be inserted after the term "representation" in the first sentence to make these two provisions consistent.

Section 4.2 - Receipt of Complaint

Section 4 of the proposed Rules sets forth the time for the filing of an administrative complaint, which time limit is governed by receipt by the Commissioner. However, there is no provision in either Section 4.1 or 4.2 to verify when such a complaint is received by the Commissioner. Therefore, we would propose the following addition to Section 4.2:

> All administrative complaints received by the Insurance Commissioner shall be date stamped on the face of the document showing the date of receipt by the Insurance Commission.

This will, therefore, provide an avenue whereby receipt can be verified to determine if an administrative complaint was timely filed.

Section 4.3b - Amending Complaints

Section 4.3b permits the Insurance Commissioner to amend an original complaint to clarify and/or delete parties or "make any other necessary changes" if the Commissioner determines that the original administrative complaint is deficient. We disagree that the Commissioner should in any way be involved in amending a third-party complaint filed by a consumer. This provision essentially converts the Commissioner - who is charged with determining whether the complaint has merit - into an advocate for the complainant. This process may also result in addition of the Commission's work product or mental impressions. Moreover, it implicates a perception of impropriety since it is presumed that the Commission would only change a pleading previously determined to be insufficient in a manner to make it meritorious against an insurance carrier. If the Commission is concerned that a lay person may file deficient pleadings out of time, we would suggest that Section 4.3b be rewritten to state as follows:

> If the complaint does not provide sufficient information, the Commissioner shall contact the claimant within fifteen (15) days of receipt of the complaint advising that the complaint does not provide sufficient information and advising the claimant of an

> additional fifteen (15) days to amend the original complaint to clarify, add and/or delete parties or make any other necessary changes. Any time limitations for the filing of the administrative complaint pursuant to Rule 4.1 shall be tolled for the fifteen (15) days provided by the Commissioner to the complainant to amend or otherwise clarify the original complaint.

Section 4.3c - Notification to Insurer

Section 4.3c requires the Insurance Commissioner to provide within five (5) working days a complete copy of the complaint to the insurance carrier against whom the complaint is filed. There is no provision in the proposed Rules, however, to determine where the complaint will be forwarded. This process could obviously lead to significant bureaucratic confusion if complaints are forwarded to offices that are not equipped to timely respond to administrative complaints. We would therefore suggest either that the Commission maintain a listing of contact names and addresses to where said complaints should be delivered by the Insurance Commission pursuant to Rule 4.3c or to amend this Section to require complaints be forwarded to specific locations such as to a company's registered agent for service of process.

Our proposed change to this Section is as follows:

> 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) through the respondent'(s) registered agent for service of process.

Section 4.4 - Reporting

Section 4.4 requires the reporting of the status of negotiations by the insurer within forty-five (45) days after receiving a complaint. This, however, is inconsistent with West Virginia Code § 33-11-4a(4) which gives insurance carriers sixty (60) days in which to "cure" any issue raised in an administrative complaint. Therefore, we believe that Section 4.4 is unnecessary. However, if the Insurance Commissioner is to require interim reporting of the status of negotiations, we would also recommend that the Rule be amended to insert the term "if any" in the event that an insurance carrier determines that it had made an appropriate settlement offer or other decision which may have lead to the filing of an administrative complaint so that there is no affirmative requirement on an insurance carrier to change its prior position which will also be discussed *infra*. Therefore, we would alternatively suggest that if Section 4.4 is not deleted in its entirety that it be amended to read:

> Within forty-five (45) days after receiving a complaint, the respondent must advise the Commissioner in writing of the status of negotiations, if any, with the claimant unless the complaint has been resolved and the Commissioner has been so advised.

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Section. 5.1 - Closing Complaints

We believe that Section 5.1 is deficient in two regards. First, the preamble does not fully cite West Virginia Code § 33-11-4a(4) and we would recommend inserting the clause "and no further action shall lie on the matter" so that the sentence will now read:

> The Commissioner shall close the complaint and no further action shall lie on the matter if he or she determines that, within the sixty-day period, the respondent:

Furthermore, we believe that a subparagraph c be added to state:

> c. Has demonstrated the correctness of its position complained of.

Our concern is that the new statute imposes an affirmative duty on an insurance carrier to change its position upon the filing of an administrative complaint. An insurance carrier, however, should have the right to stand on its prior claim decision and the Commissioner should consider not only whether there has been a substantial correction to the circumstances that gave rise to the complaint or whether the insurance carrier has subsequently offered to resolve the complaint in a reasonable manner, but should also consider whether the original position was correct. Moreover, given that a good faith disagreement over value or liability is not an unfair claim settlement practice, West Virginia Code § 3-11-4a(g), there should be no reason to change such decisions if previously made in good faith. For example, an insurance carrier may deny a claim based upon no liability on the part of its insured. Simply because an administrative complaint is filed should not require the insurance carrier to change its liability determination. At the other end of the spectrum, a carrier may offer policy limits or what it believes to be policy limits and said offer is rejected with an administrative complaint filed. In such situation, there may be no other action which could be taken by an insurance carrier to offer more than its policy limits and it would be impossible for an insurance carrier to make additional offers. Therefore, any affirmative duty to change a prior position is improper and the Commissioner should take into consideration the propriety of the carrier's position when the complaint is filed.

Section 5.3 - Right to Contest Closure

This proposed section grants a claimant the right to contest the Insurance Commissioner's closing of a complaint after the sixty (60) day "cure period" and makes provisions for the reopening of an administrative complaint. This section, however, is silent as to whether an insurance company shall be granted the right to appeal any decision of the Insurance Commissioner to reopen a previously closed administrative complaint.

Section 5.4 - Effect of Closure

We believe that Section 5.4 should be deleted in its entirety because it is inconsistent with the right of the insurance carrier to correct the circumstances under which the administrative complaint was originally filed and essentially eradicates the effectiveness of the sixty (60) day cure period. Moreover, we believe that if a complaint is closed within the sixty (60) day cure

period that the Insurance Commissioner should be required to issue an order stating that the Commissioner found no merit to the administrative complaint.

Section 6.1 - When Investigation May Begin

West Virginia Code § 33-11-4a(c) outlines that the initial investigation by the Insurance Commissioner is to determine solely whether the allegations in the complaint are meritorious and does not, at the initial investigation stage, require any determination as to whether a person has committed an unfair claims settlement practice with such frequency as to constitute a general business practice. Only after making such a determination of merit, may the Commissioner, at his or her discretion, forward the complaint to the Office of Consumer Advocacy for further investigation at which point an investigation will be undertaken to determine if the person has committed an unfair claims settlement practice with such frequency as to constitute a general business practice. West Virginia Code § 33-11-4a(d). Therefore, we believe that the last clause of proposed Rule 6.1 should be stricken and the sentence should end after the clause "complaint are meritorious."

Section 6.3 - Representation by Office of Consumer Advocacy

We believe that proposed Section 6.3 is too broad and is in contravention of West Virginia Code § 33-2-17(a)(3) and West Virginia Code § 33-11-4a(d). The new statute permits a referral to the Office of Consumer Advocacy for further investigation only after the sixty (60) day cure period and a determination by the Commissioner that the complaint has merit. Proposed Section 6.3, however, seems to call for representation by the Office of Consumer Advocacy at any time at the request of a claimant and at proceedings beyond the second stage of investigation in contravention of these two statutes.

First, proposed Section 6.3 states that the Office of Consumer Advocacy may become involved at the request of a claimant. West Virginia Code § 33-2-17(a)(3), however, only permits the Office of Consumer Advocacy to become involved at the request of one or more third-party claimants who does not have legal representation at a hearing on his or her claim, or when the public interest is served, with respect to any third-party complaint alleging an unfair claim settlement practice. (Emphasis added). No other subsection of West Virginia Code § 33-2-17 deals with third-party complaints alleging unfair claims settlement practices save for subparagraph 2, which is not applicable in this issue. I draw to your attention the fact that West Virginia Code § 33-2-17a(2) indicates that the Office of Consumer Advocacy may become involved at the request of one or more policyholders. A policyholder, however, is not a third-party claimant and thus this subsection of the Code is beyond the scope of these proposed Rules.

In addition, West Virginia Code § 33-2-17(a)(3) only applies to filings made with the Insurance Commissioner by an insurance company or relating to a third-party complaint alleging an unfair claims settlement practice. It does not encompass any other hearing or proceedings as set forth in proposed Section 6.3 and we believe that this language must be deleted. Moreover, it appears that the inclusion of the right of the Office of Consumer Advocacy to become involved in other hearings or proceedings involving judicial review of orders issued by the Commissioner or by any Court impermissibly permits collateral attacks on the Commissioner's orders or orders of any court. While West Virginia Code § 33-2-17 permits the Office of Consumer Advocacy to

become involved in other proceedings in State and Federal Courts, that right arises in other contexts, not with respect to allegations of unfair claims settlement practices. See West Virginia Code § 33-2-17(a)(1) and (4).

In addition to the overly broad scope of proposed Section 6.3, the duties of the Consumer Advocate are not set forth in either this or any other proposed Rule. West Virginia Code § 33-11-4a(d) sets forth the right of the Office of Consumer Advocacy to conduct a further investigation and hearing to determine if the person has committed an unfair claims settlement practice with such frequency as to constitute a general business practice and sets forth the notice requirements for any hearing, but does not, for example, identify who will conduct such hearings or the level of proof which must be presented at such hearings. Such omissions should be addressed at this juncture. For example, we believe that at any such hearing in which the Consumer Advocate is involved to determine if a person has committed an unfair claim settlement practice with such frequency as to constitute a general business practice, that such proof should be by the preponderance of the evidence unless the Consumer Advocate is attempting to establish an "egregious act" at which point the proof should be elevated to a clear and convincing standard.

Therefore, we propose that Rule 6.3 be amended as follows:

> At the request of a claimant who does not have legal representation at a hearing on his or her claim, or whenever the public interest is served, the Office of Consumer Advocacy may advocate for the interests of any non-represented claimant or for the public interest in proceedings related to any complaint filed pursuant to the Rules or pursuant to West Virginia Code § 33-11-4a.

In addition, there are no provisions set forth in these proposed Rules permitting an insurance carrier the right to appeal the referral of any administrative complaints to the Consumer Advocate after the Insurance Commissioner has made a preliminary finding that the complaint has merit.

Section 6.5(b) Recording of Hearings

This proposed Section permits recording of hearings "by voice recordings or by other means." This is broader than the Administrative Procedures Act, West Virginia Code § 29A-5-1, which requires: "All the testimony and evidence at any such hearing shall be reported by stenographic notes and characters or by mechanical means." We believe that Section 6.5(b) should be amended so as to be in compliance with West Virginia Code § 29A-5-1 and therefore propose to delete the right to conduct such hearings by "voice recording or by other means."

Section 7.6 - Required Finding

Proposed Section 7.6 requires the Commissioner to determine whether or not the respondent committed an unfair claims settlement practice as alleged in the complaint. However, the proposed Section does not include the statements of the newly enacted statutes, specifically West Virginia Code § 33-11-4a(f) and (g).

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Subsection (f) states:

> A finding by the Commissioner that the actions of a person constitute a general business practice may only be based on the existence of substantially similar violations in a number of separate claims or causes of action.

Subsection (g) states:

> A good faith disagreement over the value of an action or claim or the liability of any party to any action or claim is not an unfair claims settlement practice.

We believe that these specific provisions of the statute should be included. Further, we question a proceeding whereby the Commissioner makes a finding as to whether the respondent has committed an unfair claims settlement practice as alleged in the complaint given that the Commissioner has already made a preliminary determination that the allegations had merit.

Section 7.7 - Required Determination

If an unfair claims settlement practice is found, the Commissioner is required under proposed Section 7.7 to determine, *inter alia,* whether the violation was a result of an egregious act. We again believe that before making such a determination that the proof should be by clear and convincing evidence and we would suggest additions to subparagraph (c) to state: "Whether the violation was a result of an egregious act as demonstrated by clear and convincing evidence."

Section 8.1 - Commissioner's Authority

We believe that Section 8.1, particularly subsection (b), is too broad. West Virginia Code § 33-11-4a(i) indicates that nothing in the statute should limit the rights of the Commissioner to investigate and take action against a person which the Commissioner has reason to believe has committed an unfair claims settlement practice or has consistently resolved administrative complaints within the sixty (60) day "cure" period. Subsection (i), however, does not make any reference to whether a respondent has committed an unfair claims settlement practice with such frequency as to constitute a general business practice and therefore we believe that subsection (b) of proposed Section 8.1 should be stricken.

Section 9.3 - Judicial Review

Section 9.3 permits judicial review as per West Virginia Code § 33-2-14. However, West Virginia Code § 33-11-6(g) also permits judicial review and we believe that this Code section should also be added.

PROGRESSIVE

Additional Rule Recommendations

In addition, we believe there are additional factors which should be set forth in these procedural Rules. First, these Rules are silent as to the standard of proof and we have recommended the addition of the higher standards of proof at proposed Section 7.7.

The Rules are also silent as to whether any proof can be set forth through the use of what is commonly characterized as 404(b) evidence. Usually 404(b) evidence is through testimony of either plaintiff's attorneys or claimants who have presented prior claims against an insurance carrier. Given that West Virginia Code § 33-11-4a(f) requires that a finding by the Commissioner of a general business practice may only be based on the existence of substantially similar violations in a number of separate claims or causes of action, we believe that the propriety or impropriety of such testimony should specifically be set forth in these Procedural Rules. Likewise, what constitutes "substantially similar violations" should be set forth. We recommend that the proof of a substantially similar violation be established only by the introduction of evidence from other third-party claims involving the same line of coverage involved in the administrative complaint under review with factual circumstances which are similar to those presented in the complaint under review. Our proposed addition of Section 7.9 is:

> 7.9 Proof - - Proof of any unfair claim settlement practice with such frequency as to constitute a general business practice may only be based on the existence of substantially similar violations in a number of separate claims or causes of action. Such proof can only be established by evidence from other third party claims involving the same line of coverage as the administrative complaint under review and with factual circumstances substantially similar to those presented in the administrative complaint under review. No testimony from other claimants or their attorneys shall be admissible or considered.

The Procedural Rules are also silent as to the effect of any administrative order by the Commissioner, both at the preliminary sixty (60) investigation stage and during an investigation conducted by the Office of Consumer Advocacy. Given the recent ruling of *Holloman v. Nationwide*, we believe that specific reference should be made that such administrative orders shall not have *res judicata* or collateral estoppel effects, but should be considered an administrative finding only, not equal to a judicial determination of a violation of the Unfair Claims Settlement Practices Act with such frequency as to constitute a general business practice.

Therefore, our proposed Section 7.6 is:

> No such finding of an unfair settlement practice shall have a preclusive effect on any future administrative complaint.

Finally, as set forth earlier, we believe that if the Insurance Commissioner, upon the initial sixty (60) day cure period, determines that the complaint is without merit, that the Commissioner should be required to draft an Order finding that the complaint has no merit or that he or she has determined there was no violation of the Unfair Claims Settlement Practices Act. Our proposed Section 5.4 states:

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5.4 Closure - When the commissioner closes a complaint because it is determined not to have merit, the commissioner shall issue a written order setting forth such finding of no merit or the propriety of the respondent's position.

Thank you, in advance, for your consideration of Progressive's comments, proposed changes and additions to the procedural rules. Should you wish to discuss our comments and proposals further, please do not hesitate to contact me.

Very truly yours,

James A. Dodrill | JBH

James A. Dodrill
Corporate Claims Counsel

JAD/tbh

9/28/05 Copy: V. Mullins
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September 28, 2005

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RE: Comments on Proposed Procedural Rules 114 CSR 76 Rules of Practice and Procedure for Administrative Proceedings Brought by Third Party Claimants

Dear Mr. Mullins:

On behalf of the State Farm Insurance Companies, please accept these written comments regarding the proposed rules at 114 CSR 76, Rules of Practice and Procedure for Administrative Proceedings Brought by Third Party Claimants.

Section 2.1 - Definition of "Claimant"

Proposed Section 2.1 defines "claimant" as a third-party claimant. We would suggest that the section be amended to further adopt the definition of a third-party claimant as set forth in 114 CSR 14-2.8 under the Unfair Trade Practices Rules. Section 2.8 of the UTPA Rules defines a third-party claimant as "any individual, corporation, association, partnership or other legal entity asserting a claim against any individual, corporation, association, partnership or other legal entity insured under an insurance policy or insurance contract of an insurer." We would therefore suggest that 2.1 be amended to read as follows:

"Claimant" means a third-party claimant as further defined by 114 CSR 14-2.8.

Section 2.4- "Egregious Act"

The Commissioner has set forth a definition of "egregious act" at proposed Section 2.4. However, the definition is different than the definition of "egregious act" as set forth in the proposed changes to the UTPA Rules, 114 CSR 14-2.14.[1] The definition as set forth in the proposed Procedural Rules defines egregious act as "conduct that is fraudulent or malicious and reckless whether or not the act constituted a pattern corresponding to an unfair claim settlement practice committed with such frequency as to constitute a general business practice. An act, or failure to act, that is due to simple negligence, lack of judgment, incompetence or bureaucratic confusion is not an egregious act." This proposed definition omits the additional clause of conduct that is "clearly irresponsible."

Given that the Commissioner defines an egregious act as fraudulent, malicious or reckless activity, such findings should also be at a higher standard of proof, i.e., clear and convincing evidence. Neither the definition of "egregious act" nor any of the other proposed Procedural Rules sets forth the standard of proof for an "egregious act" and we would advocate that such standard be included either in the definition or in subsequent procedural rules so that any finding of an "egregious act" must be made at the higher burden of proof of clear and convincing evidence.

Section 3.1 - Pro Hac Vice Admission

The provision permitting representation of parties by *pro hac vice* admission is slightly inconsistent with 114 CSR 13, the Rules of Practice and Procedure for Hearings before the West Virginia Insurance Commissioner, and we would recommend that the words "or appearance" be inserted after the term "representation" in the first sentence to make these two provisions consistent.

Section 4.2 - Receipt of Complaint

It is conceivable that there will be discrepancies as to when third-party administrative complaints are filed and/or received by the Commissioner. Section 4 of the proposed Rules sets forth the time limit for the filing of an administrative complaint, which time limit is governed by receipt by the Commissioner. However, there is no provision in either Section 4.1 or 4.2 to

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[1]The WV Insurance Commissioner has now filed proposed emergency UTPA Rules with the West Virginia Secretary of State. The proposed emergency Rules delete any definition of egregious act.

verify when such a complaint is received by the Commissioner. Therefore, we would propose the following language be added to Section 4.2:

> *All administrative complaints received by the Insurance Commissioner shall be date stamped on the face of the document by the Insurance Commission.*

This will, therefore, provide an avenue whereby receipt can be verified to determine if an administrative complaint was timely filed.

Section 4.3b - Amending Complaints

Section 4.3b permits the Insurance Commissioner to amend an original complaint to clarify and/or delete parties or "make any other necessary changes" if the Commissioner determines that the original administrative complaint is deficient. We disagree that the Commissioner should in any way be involved in amending a third-party complaint filed by a consumer. This provision essentially converts the Commissioner - who is charged with determining whether the complaint has merit - into an advocate for the complainant. This process may also result in addition of the Commission's work product or mental impressions. Moreover, it implicates a perception of impropriety since it is presumed that the Commission would only change a pleading previously determined to be insufficient in a manner to make it meritorious against an insurance carrier. If the Commission is concerned that a lay person may file deficient pleadings out of time, we would suggest that Section 4.3b be rewritten to state as follows:

If the complaint does not provide sufficient information, the Commissioner shall contact the claimant within fifteen (15) days of receipt of the complaint advising that the complaint does not provide sufficient information and advising the claimant of an additional fifteen (15) days to amend the original complaint to clarify, add and/or delete parties or make any other necessary changes. Any time limitations for the filing of the administrative complaint pursuant to Rule 4.1 shall be tolled for the fifteen (15) days provided by the Commissioner to the complainant to amend or otherwise clarify the original complaint.

Section 4.3c - Notification to Insurer

Section 4.3c requires the Insurance Commissioner to provide within five (5) working days a complete copy of the complaint to the insurance carrier against whom the complaint is filed. There is no provision in the proposed Rules, however, to determine where the complaint will be forwarded. This process

could obviously lead to significant bureaucratic confusion if complaints are forwarded to offices which are not equipped to timely respond to administrative complaints. We would therefore suggest that either the Commission maintain a listing of contact names and addresses to where said complaints should be delivered by the Insurance Commission pursuant to Rule 4.3c, or to amend this Section to require complaints be forwarded to specific locations such as to a company's registered agent for service of process.

Section 4.4 - Reporting

Section 4.4 requires the reporting of the status of negotiations by the insurer within forty-five (45) days after receiving a complaint. This, however, is inconsistent with West Virginia Code § 33-11-4a(4) which provides insurance carriers sixty (60) days in which to "cure" any issue raised in an administrative complaint. Therefore, we believe that Section 4.4 is unnecessary.

However, if the Insurance Commissioner is to require interim reporting of the status of negotiations, we would also recommend that the Rule be amended to insert the term "if any" in the event that an insurance carrier determines that it had made an appropriate settlement offer or other decision which may have lead to the filing of an administrative complaint so that there is no affirmative requirement of an insurance carrier to change its prior position which will also be discussed *infra.* Therefore, we would alternatively suggest that if Section 4.4 is not deleted in its entirety that it be amended to read:

> *Within forty-five (45) days after receiving a complaint, the respondent must advise the Commissioner in writing of the status of negotiations, if any, with the claimant unless the complaint has been resolved and the Commissioner has been so advised.*

Section. 5.1 - Closing Complaints

We believe that Section 5.1 is deficient in two regards. First, the preamble does not fully cite West Virginia Code § 33-11-4a(4) and we would recommend that the clause "and no further action shall lie on the matter" be added so that the sentence will now read:

> *The Commissioner shall close the complaint and no further action shall lie on the matter if he or she determines that, within the sixty-day period, the respondent:*

Furthermore, we believe that a subparagraph c should be added to state:

c. *Has demonstrated the correctness of its position complained of.*

Our concern is that the new statute imposes an affirmative duty on an insurance carrier to change its position upon the filing of an administrative complaint. An insurance carrier, however, should have the right to stand on its prior claims decision and the Commissioner should consider not only whether there has been a substantial correction to the circumstances that gave rise to the complaint or whether the insurance carrier has subsequently offered to resolve the complaint in a reasonable manner, but should also consider whether the original position was correct. Moreover, given that a good faith disagreement over value or liability is not unfair claim settlement practice, West Virginia Code § 3-11-4a(g), there should be no reason to change such decisions if previously made in good faith. For example, an insurance carrier may deny a claim based upon no liability on the part of its insured. Simply because an administrative complaint is filed should not require the insurance carrier to change its liability determination. At the other end of the spectrum, a carrier may offer policy limits or what it believes to be policy limits and said offer is rejected with an administrative complaint filed. In such situation, there may be no other action which could be taken by an insurance carrier to offer more than its policy limits and it would be impossible for an insurance carrier to make additional offers. Therefore, any affirmative duty to change a prior position is improper and the Commissioner should take into consideration the propriety of the carrier's position when the complaint is filed.

Section 5.3 - Right to Contest Closure

This proposed section grants a claimant the right to contest the Insurance Commissioner's closing of a complaint after the sixty (60) day "cure period" and makes provisions for the reopening of an administrative complaint. This section, however, is silent as to whether an insurance company shall be granted the right to appeal any decision of the Insurance Commissioner to reopen a previously closed administrative complaint.

Section 5.4 - Effect of Closure

We believe that Section 5.4 should be deleted in its entirety because it is inconsistent with the right of the insurance carrier to correct the circumstances under which the administrative complaint was originally filed and essentially

eradicates the effectiveness of the sixty (60) day cure period. Moreover, we believe that if a complaint is closed within the sixty (60) day cure period that the Insurance Commissioner should be required to issue an order stating that the Commissioner found no merit to the administrative complaint.

Section 6.1 - When Investigation May Begin

West Virginia Code § 33-11-4a(c) outlines that the initial investigation by the Insurance Commissioner is to determine solely whether the allegations in the complaint are meritorious and does not at the initial investigation stage require any determination as to whether a person has committed an unfair claims settlement practice with such frequency as to constitute a general business practice. Only after making such a determination of merit may the Commissioner, at his or her discretion, forward the complaint to the Office of Consumer Advocacy for further investigation at which point an investigation will be undertaken to determine if the person has committed an unfair claims settlement practice with such frequency as to constitute a general business practice. West Virginia Code § 33-11-4a(d). Therefore, we believe that the last clause of proposed Rule 6.1 should be stricken and the sentence should end after the clause "complaint are meritorious.

Section 6.3 - Representation by Office of Consumer Advocacy

We believe that proposed Section 6.3 is too broad and is in contravention of West Virginia Code § 33-2-17(a)(3) and West Virginia Code § 33-11-4a(d). The new statute permits a referral to the Office of Consumer Advocacy for further investigation only after the 60 day cure period and a determination by the Commissioner that the complaint has merit. Proposed Section 6.3, however, seems to call for representation by the Office of Consumer Advocacy at any time at the request of a claimant and at proceedings beyond the second stage of investigation in contravention of these two statutes.

First, proposed Section 6.3 states that the Office of Consumer Advocacy may become involved at the request of a claimant. West Virginia Code § 33-2-17(a)(3), however, only permits the Office of Consumer Advocacy to become involved at the request of one or more third-party claimants who does not have legal representation at a hearing on his or her claim, or when the public interest is served, with respect to any third-party complaint alleging an unfair claim settlement practice. (Emphasis added). No other subsection of West Virginia Code § 33-2-17 deals with third-party complaints alleging unfair claims settlement practices save for subparagraph 2 which is not applicable in this issue.

I draw to your attention that West Virginia Code § 33-2-17a(2) indicates that the Office of Consumer Advocacy may become involved at the request of one or more policyholders. A policyholder, however, is not a third-party claimant and thus this subsection of the Code is beyond the scope of these proposed Rules.

In addition, West Virginia Code § 33-2-17(a)(3) only applies to filings made with the Insurance Commissioner by an insurance company or relating to a third-party complaint alleging an unfair claims settlement practice. It does not encompass any other hearing or proceedings as set forth in proposed Section 6.3 and we believe that this language must be deleted. Moreover, it appears that the inclusion of the right of the Office of Consumer Advocacy to become involved in other hearings or proceedings involving judicial review of orders issued by the Commissioner or by any Court impermissibly permits collateral attacks on the Commissioner's orders or orders of any court. While West Virginia Code § 33-2-17 permits the Office of Consumer Advocacy to become involved in other proceedings in State and Federal Courts, that right arises in other contexts, not with respect to allegations of unfair claims settlement practices. See West Virginia Code § 33-2-17(a)(1) and (4).

In addition to the overly broad scope of proposed Section 6.3, the duties of the Consumer Advocate are not set forth in either this or any other proposed Rule. West Virginia Code § 33-11-4a(d) sets forth the right of the Office of Consumer Advocacy to conduct a further investigation and hearing to determine if the person has committed an unfair claims settlement practice with such frequency as to constitute a general business practice and sets forth the notice requirements for any hearing, but does not, for example, identify who will conduct such hearings or the level of proof which must be presented at such hearings. Such omissions should be addressed at this juncture. For example, we believe that at any such hearing in which the Consumer Advocate is involved to determine if a person has committed an unfair claim settlement practice with such frequency as to constitute a general business practice, that such proof should be by the preponderance of the evidence unless the Consumer Advocate is attempting to establish an "egregious act" at which point the proof should be elevated to a clear and convincing standard.

Therefore, we propose that Rule 6.3 be amended as follows:

> *At the request of a claimant who does not have legal representation at a hearing on his or her claim, or whenever the public interest is served, the Office of Consumer Advocacy may advocate for the interests of any non-represented claimant or for the public interest in proceedings related to any complaint filed pursuant to the Rules or pursuant to West Virginia Code § 33-11-4a.*

In addition, there are no provisions set forth in these proposed Rules permitting an insurance carrier the right to appeal the referral of any administrative complaints to the Consumer Advocate after the Insurance Commissioner has made a preliminary finding that the complaint has merit, but question if carriers want such an appeal at this stage.

Section 6.5(b) Recording of Hearings

This proposed Section permits recording of hearings "by voice recordings or by other means." This is broader than the Administrative Procedures Act, West Virginia Code § 29A-5-1, which requires: "All the testimony and evidence at any such hearing shall be reported by stenographic notes and characters or by mechanical means." We believe that Section 6.5(b) should be amended so as to be in compliance with West Virginia Code § 29A-5-1 and therefore propose to delete the right to conduct such hearings by "voice recording or by other means."

Section 7.6 - Required Finding

Proposed Section 7.6 requires the Commissioner to determine whether or not the respondent committed an unfair claims settlement practice as alleged in the complaint. However, the proposed Section does not include the statements of the newly enacted statutes, specifically West Virginia Code § 33-11-4a(f) and (g). Subsection (f) states:

> *A finding by the Commissioner that the actions of a person constitute a general business practice may only be based on the existence of substantially similar violations in a number of separate claims or causes of action.*

Subsection (g) states:

> *A good faith disagreement over the value of an action or claim or the liability of any party to any action or claim is not an unfair claims settlement practice.*

We believe that these specific provisions of the statute should be included. Further, we question a proceeding whereby the Commissioner makes a finding as to whether the respondent has committed an unfair claims settlement practice as alleged in the complaint given that the Commissioner has already made a preliminary determination that the allegations had merit.

Section 7.7 - Required Determination

If an unfair claims settlement practice is found, the Commissioner is required under proposed Section 7.7 to determine, *inter alia,* whether the violation was a result of an egregious act. We again believe that before making such a determination that the proof should be by clear and convincing evidence and we would suggest additions to subparagraph (c) to state: "Whether the violation was a result of an egregious act as demonstrated by clear and convincing evidence."

Section 8.1 - Commissioner's Authority

We believe that Section 8.1, particularly subsection (b), is too broad. West Virginia Code § 33-11-4a(i) indicates that nothing in the statute should limit the rights of the Commissioner to investigate and take action against a person which the Commissioner has reason to believe has committed an unfair claims settlement practice or has consistently resolved administrative complaints within the sixty (60) day "cure" period. Subsection (i), however, does not make any reference to whether a respondent has committed an unfair claims settlement practice with such frequency as to constitute a general business practice and therefore we believe that subsection (b) of proposed Section 8.1 should be stricken.

Section 9.3 - Judicial Review

Section 9.3 permits judicial review as per West Virginia Code § 33-2-14. However, West Virginia Code § 33-11-6(g) also permits judicial review and we believe that this Code section should also be added.

Additional Rule Recommendations

In addition to these proposed changes to the language as presented, we believe that there are additional factors which should be set forth in these procedural Rules. First, these Rules are silent as to the standard of proof and we have recommended the addition of the higher standards of proof at proposed Section 7.7.

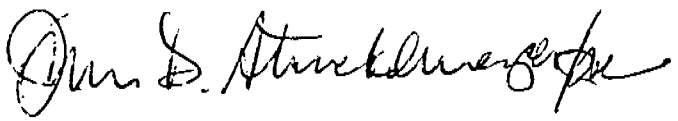
The Rules are also silent as to whether any proof can be set forth through the use of what is commonly characterized as 404(b) evidence. Usually 404(b) evidence is through testimony of either plaintiff's attorneys or claimants who have presented prior claims against an insurance carrier. Given that West Virginia Code § 33-11-4a(f) requires that a finding by the Commissioner of a general business practice may only be based on the existence of substantially similar violations in a number of separate claims or causes of action, we believe that the propriety or impropriety of such testimony should specifically be set forth in these Procedural Rules.

Likewise, what constitutes "substantially similar violations" should be set forth. We recommend that the proof of a substantially similar violation be established only by the introduction of evidence from other third-party claims involving the same line of coverage involved in the administrative complaint under review with factual circumstances which are similar to those presented in the complaint under review.

The Procedural Rules are also silent as to the effect of any administrative order by the Commissioner, both at the preliminary sixty (60) investigation stage and during an investigation conducted by the Office of Consumer Advocacy. Given the recent ruling of *Holloman v. Nationwide*, we believe that specific reference should be made that such administrative orders shall not have *res judicata* or collateral estoppel effects, but should be considered an administrative finding only, not equal to a judicial determination of a violation of the Unfair Claims Settlement Practices Act with such frequency as to constitute a general business practice.

Finally, as set forth earlier, we believe that if the Insurance Commissioner, upon the initial sixty (60) day cure period, determines that the complaint is without merit, that the Commissioner should be required to draft an Order finding that the complaint has no merit or that he or she has determined there was no violation of the Unfair Claims Settlement Practices Act.

Sincerely,



John D. Stuckemeyer
Counsel
STATE FARM INSURANCE COMPANIES

cc: *Commissioner Jane Cline*
Deputy Commissioner Bill Kenny
General Counsel Mary Jane Pickens

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September 28, 2005

Via e-mail to victor.mullins@wvinsurance.gov and regular U.S. mail

West Virginia
Insurance Commissioner
Atten: Victor A. Mullins, Esq.
P.O. Box 50540
1124 Smith Street
Charleston, WV 25305-0540

RE: Comments of Westfield Insurance Company to Proposed Procedural Rule 114 CSR 76

Dear Mr. Mullins,

Please allow this letter to serve as the response of Westfield Insurance Company to the Insurance Commissioner's Proposed Procedural Rule 114 CSR 76 titled "Rules of Practice and Procedure for Administrative Proceedings Brought by Third Party Claimants." It is our understanding that this proposal is open to public comment through 5:00 p.m., September 29, 2005.

Overall, we find the proposal to be unfairly based on the false premise that all claimant's complaints are valid and/or that the position of an insurance carrier is erroneous and without merit. As proposed, the administrative hearing process is set up to be onerous on all insurance carriers whereby a system is created to give undue assistance to anyone who may find fault of any kind with the handling of a claim. Unfortunately, the additional procedural hurdles will only serve to increase the cost of doing business for insurance carriers in the state of West Virginia, which in turn will drive up insurance premiums for all the citizens of your state.

Below is our analysis of the proposal with the specific section of the proposal reproduced and comments following thereafter.

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

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.

Comment: *This section equally requires both corporate consumers and insurance carriers to have legal counsel for these proceedings. Most complaints of this kind will involve consumers who can file on their own without legal counsel (per section 3.2) and an insurance carrier and their legal counsel. Unfortunately for the insurance carriers and corporate complainants, this will mean an increase in cost. The increased costs incurred by insurance carriers for hiring counsel, with the cost of having claims adjusters present at hearings, will be passed onto consumers through higher premiums and rates, as each insurer will have to retain or employ local counsel on every administrative action. Many smaller insurance carriers, particular domestic carriers, will find these increased costs to be overly burdensome. Additionally, one would question if hearings on complaints that do not involve third parties will require, from this point forward, all corporate parties to be represented by attorneys. This section should be completely stricken from the proposal.*

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.

Comment: *See above comments for 3.4 regarding increased cost, which will have to be passed onto consumers through higher rates and premiums, as each insurance carrier will have to retain or employ counsel to handle these matters. Again this section should be stricken form the proposal.*

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

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.

Comment: *This section needs clarification. Essentially, any letter written to the Insurance Department where the allegation of bad faith is raised would be construed as a "complaint" under this provision. This would simply allow the Consumer Advocate to contact such a person and help them fill out the appropriate form (as described in 4.3) in a timely manner. This section should be stricken, with the requirement being that actual receipt of the form must occur no later than one year. Additionally, procedures should be established where all complaints are time stamped upon receipt by the commissioner.*

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).

Comment: *Section "b" allows the commissioner to make changes in the complaint, effectively becoming counsel representing the claimant and transforming from an impartial hearing officer presiding over this administrative proceeding to an advocate for a party with a vested interest in the outcome. Who will hear the cases when the commissioner turns into an advocate for the complainant? Section "b" should be stricken. As for section "c," this section needs clarification as to whom the commissioner will transmit the complaint. Perhaps the complaint should be sent to an insurance carrier's home office or registered agent to avoid any confusion or needless delay.*

§ 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.

Comment: *This section is curiously constructed with an unreasonable assumption that all complaints will have merit. The only two ways in which the commissioner can dispose of the complaint is if the insurance carrier has corrected the matter or offers to resolve the complaint. This overlooks the fact that many times these types of complaints are insignificant and/or baseless "gripes." What if the complaint is completely fraudulent or frivolous? Perhaps a solution would be to add a part "c" which would allow the insurance carrier to respond whereby the commissioner could close the complaint if it is demonstrated that that there has been no violation or that the claim lacks merit.*

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.

Comment: *If the commissioner closes the matter, then it should be closed. It is patently unfair that the claimant has the right to petition to have the case reopened and a carriers' only recourse in these proceedings is to appeal the process though judicial review. This section should be stricken from the proposal. If a claim is closed by the commissioner, then the remedy should remain the same for all parties and that is to appeal through judicial review.*

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.

Comment: *This section is unclear and needs clarification. It appears that if a complaint is resolved to the satisfaction of the complainant and closed by the commissioner, the matter should not then be open for continuing factual review. Effectively, this would mean that closed complaints are never closed, and this section leaves open the question as to whether a plaintiff's lawyers could argue to the commissioner that a general business practice exists in terms of a first party bad faith claim by piggybacking on to the unchallenged "factual" allegations within a 3rd party complaint. If a matter is settled and resolved, the commissioner should not be able to rely upon the allegations within that complaint to establish a general business practice. Mere allegations within a complaint should never rise to the level of accepted "fact" if disputed by the opposing party and the matter is settled before any formal administrative determination as to their validity. A solution would be to allow a procedure whereby a claimant could withdraw their complaint if the matter is resolved.*

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

Comments: *The power enumerated to the commissioner allowing for "investigation he or she considers necessary" is not only vague but too broad and open-ended. It must be considered that, if the underlying case is ongoing in court, the commissioner could find and reveal elements that are directly related to the defense of the claim, thereby compromising the defense as well as the representation of the insurance carrier and/or their policyholder in such matters.*

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.

Comments: *This section is too vague and seems to provide far too much power and authority to the Consumer Advocate. Does the Consumer Advocate have authority to represent the "public interest" and seek judicial review of the closing of a complaint or the monetary award issued by the commissioner? Further, isn't the Office of the Consumer Advocate as well as the*

Director of the agency within the Insurance Commissioner (per Sec. 33-2-16)? As such, is it appropriate to have the Consumer Advocate, a de facto employee of the commissioner who will be deciding these cases, representing complainants?

§114-76-7. Hearings.

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.

Comment: *This section needs clarification as "geographical region" is undefined. Does this mean the city/town where complainant resides or does it mean that the DOI will have several regional office locations?*

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.

Comment: *WV 114 CSR 13 does not appear to be designed for these types of hearings or for consideration of these types of matters. There are real questions about the use of administrative subpoenas to obtain and gather information while the underlying matter is ongoing and possibly proceeding to trial. Further questions surround the lack of protection for personal and confidential information potentially introduced as evidence in these types of hearings.*

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

Comment: *Noticeably absent from this section is the required burden of proof which is required to determine if a violation has occurred. Perhaps an additional section, 7.9, could clarify this oversight by defining what burden of proof is necessary.*

§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.

Comment: *This section seems rather unfair to insurers. Why should the commissioner have unfettered authority to investigate an insurance carrier who consistently settles 3rd party claims within the 60 day period? This section presumes that every complaint filed will have merit, which we know by prior history will not be the case. Again, there needs to be a provision that appropriately allows a complainant to withdrawal his or her complaint.*

§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.

Comment: *The wording is somewhat awkward and leaves one to question if this section is referring to the hearing discussed in Section 7 above.*

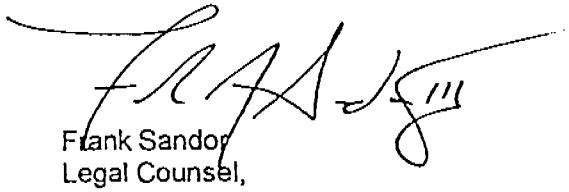
9.3 Judicial review. -- Any person aggrieved by any act, which includes the entry of an order, or failure to act of the commissioner under this rule may seek judicial review as provided in W. Va. Code §33-2-14.

Comment: *This section provides great concern as Section 33-2-14 specifically allows for judicial review of the administrative decision, whereby a Kanawha County Circuit Judge can affirm the decision, reverse or revise the decision, or remand back for further proceedings. It leads one to question: Is the Judge able to revise the penalties imposed by the commissioner? If so, is the Judge limited to imposing only those potential penalties provided to the commissioner by statute? Also, does this section allow the complainant the right to appeal the actual monetary award provided by the commissioner?*

Overall we think many of the proposed rules are vague, overly broad and in need of significant clarification of the procedures. Said changes would create a process for handling these complaints that is fair, impartial and equitable for all parties. We look forward to working you to achieve these goals.

Please feel free to contact me directly at 330.887.0387 to discuss this matter in greater detail.

Respectfully submitted,



Frank Sandor
Legal Counsel,
Product Management

cc: Charlie Neeson
Dan Sondles
David Digman
Chris Paterakis
Mark Cluse

Victor Mullins

From: FrankSandor@westfieldgrp.com
Sent: Thursday, September 29, 2005 10:24 AM
To: Victor Mullins
Cc: CharlieNeeson@westfieldgrp.com; DavidDigman@westfieldgrp.com; DanSondles@westfieldgrp.com; ChristopherPaterakis@westfieldgrp.com; MarkCluse@westfieldgrp.com
Subject: Comments to WV Prop. Rule 114 CSR 76
Attachments: WV Resp Ltr to Prop UTPA Hrg 9.28.05.doc; WV Response Ltr.pdf

Dear Mr. Mullins:

Attached are copies of the response for Westfield Insurance Company to Proposed Procedural Rule 114 CSR 76 titled "Rules and Procedure for Administrative Proceedings Brought by Third Party Claimants," as a word document and a scanned signed document for your review.

Please confirm receipt of this correspondence via e-mail.

If you need, I can have this response faxed to your attention. A hard copy will follow via regular US mail.

If you need to contact me in person, feel free to do so.

Thank you for your time.

Frank Sandor, Esq.
Legal Counsel
Westfield Product Management
One Park Circle
P.O. Box 5001
Westfield Center, OH 44251-5001
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COPY

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September 29, 2005

BY HAND-DELIVERY

Victor A. Mullins
Associate Counsel
Legal Division
West Virginia Insurance Commission
1124 Smith Street
Charleston, West Virginia 25301

RE: American International Group
Comments – Proposed Administrative Rules
Title 114, Series 76

Dear Mr. Mullins:

American International Group ("AIG") respectfully requests consideration of the following comments to the proposed amendments to 114 CSR 76, relating to the Rules of Practice and Procedure for Administrative Proceedings Brought by Third-Party Claimants.

First, generally, these proposed rules make it unclear as to whether the rules are intended to address the accountability of an insurer for what are traditionally considered "unfair trade practices" or whether they extend beyond that to resolve typical claims disputes such as liability decisions and settlement values. The underlying legislation makes clear that good faith disagreements of the value of an action or claim or the liability of any party to any action or claim does not constitute an unfair claims settlement practice. AIG believes that these rules should expressly state their intended purpose: to provide procedures for disputes by third parties arising from unfair claims settlement practices violations.

Second, proposed Section 2.4 refers to "fraudulent or malicious and reckless" conduct, but the term "reckless" is undefined, creating an ambiguous standard by which an insurer's conduct will be measured. The rule could be clarified by deleting the term "reckless" and maintaining the more plain terms "fraud" and "malice."

Finally, AIG believes that the proposed requirement in Section 3.4 that only West Virginia lawyers may appear in these hearings before the Commissioner is unnecessary and will result in an increased cost to insurers. The increased costs from hiring a local attorney and ensuring that claims adjusters are present at every administrative hearing are costs that ultimately will be passed onto consumers through higher premiums and rates.

COPY

Thank you for the opportunity to provide these comments. Naturally, if you have any questions or need additional information of any kind, please let me know.

Very truly yours,

Jill C. Bentz

Jill C. Bentz
Counsel for American International Group

cc: The Honorable Jane L. Cline, Insurance Commissioner
Mary Jane Pickens, General Counsel ✓

West Virginia Insurance Federation

West Virginia Insurance Federation
P.O. Box 273
Charleston, WV 25321
(304) 340-3880
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September 29, 2005

BY HAND-DELIVERY
Victor A. Mullins
Associate Counsel
Legal Division
West Virginia Insurance Commission
1124 Smith Street
Charleston, West Virginia 25301

RE: Comments to Proposed Procedural Rules
Title 114, Series 76

Dear Mr. Mullins:

These comments to the proposed rule at 114 CSR 76, relating to the Rules of Practice and Procedure for Administrative Proceedings Brought by Third-Party Claimants, are submitted on behalf of the West Virginia Insurance Federation ("WVIF"), the trade association for property and casualty insurance companies doing business in West Virginia. Specifically, the WVIF offers the following:

1. **Section 2.1. Definition of "Claimant".** Proposed Section 2.1 defines "claimant" simply as a third-party claimant. The WVIF suggests that the section be amended to further adopt the definition of a third-party claimant as set forth in 114 CSR 14-2.8 under the Unfair Trade Practices Rules, which defines a third-party claimant as "any individual, corporation, association, partnership or other legal entity asserting a claim against any individual, corporation, association, partnership or other legal entity insured under an insurance policy or insurance contract of an insurer."

2. **Section 2.4. Definition of "Egregious Act".** Neither the definition of "egregious act" nor any of the other proposed procedural rules establishes the standard of proof for an "egregious act." Because this section proposes to define "egregious act" as "fraudulent or malicious and reckless" activity, the WVIF suggests an amendment to this section that establishes the burden of proof as "clear and convincing."

3. **Section 3.1. *Pro Hac Vice* Admission.** The provision permitting representation of parties by *pro hac vice* admission is slightly inconsistent with 114 CSR 13, the Rules of Practice and Procedure for Hearings before the West Virginia Insurance Commissioner, and the WVIF recommends that the words "or appearance" be inserted after the term "representation" in the first sentence to ensure consistency between these two provisions.

4. Section 3.4. Representation of corporation. The proposed requirement in Section 3.4 that only West Virginia lawyers may appear in hearings before the Commissioner seems unnecessary and will result in an increased cost to insurers. The increased costs from hiring a local attorney and ensuring that claims adjusters are present at every administrative hearing are costs that ultimately could be passed onto consumers through higher premiums and rates. Smaller companies fear that this requirement will be particularly arduous on them. Indeed, there may be "hearings" where there are limited legal questions, and a *pro se* appearance by a company representative may be all that is necessary to adequately respond to a complaint. This would certainly be more cost effective.

5. Section 3.5. Representation by lay person prohibited. The WVIF has the same concern as it does with Section 3.4 above, that this prohibition will result in increased costs to insurers.

6. Section 4.2. Receipt of complaint. The WVIF urges clarification or deletion of this section because it undermines the reasonable expectation that complaints contain facts sufficient to provide adequate notice to the insurer of the allegations contained therein. A third party complainant should be required to complete the form contemplated by proposed Section 4.3 within the time limit imposed by Section 4.1.

Additionally, proposed Section 4.1 establishes a one year statute of limitations on the filing of an administrative complaint, which time limit is governed by receipt by the Commissioner. However, there is no provision in either Section 4.1 or 4.2 to verify when such a complaint is received by the Commissioner. The WVIF believes it is necessary to require date and time-stamping of all filings with the Commissioner to permit verification that a complaint was timely filed. Therefore, the WVIF proposes the addition of the following language to Section 4.1 or 4.2:

> All administrative complaints received by the Insurance Commissioner shall be date stamped on the face of the document showing the date of receipt by the Insurance Commission.

7. Section 4.3b. Amending Complaints. Section 4.3b permits the Insurance Commissioner to amend an original complaint to clarify and/or delete parties or "make any other necessary changes" if the Commissioner determines that the original administrative complaint is deficient. The WVIF strongly disagrees that the Commissioner should in any way be involved in amending a third-party complaint filed by a consumer because it effectively converts the Commissioner's role as the decision-maker into one of an advocate for the third party complainant. It compromises the Commissioner's role as an impartial arbiter of the dispute and

implicates a perception of impropriety since it is presumed that the Commissioner would only change a pleading previously determined to be insufficient in a manner to make it meritorious. This unfairly prejudices insurers.

If the Commissioner is concerned that a lay person may file deficient pleadings out of time, we would suggest that Section 4.3b be rewritten to state as follows:

> If the complaint does not provide sufficient information, the Commissioner shall contact the claimant within fifteen (15) days of receipt of the complaint advising that the complaint does not provide sufficient information and advising the claimant of an additional fifteen (15) days to amend the original complaint to clarify, add and/or delete parties or make any other necessary changes. Any time limitations for the filing of the administrative complaint pursuant to Rule 4.1 shall be tolled for the fifteen (15) days provided by the Commissioner to the complainant to amend or otherwise clarify the original complaint.

Additionally, the WVIF is very concerned that the Commissioner has been using the procedure outlined in this section for all complaints by third parties. These rules should include a procedure whereby the Commissioner can dismiss complaints that have no merit or which involve no allegation of bad faith, without implicating the new statute or this rule. Insurers fear that routine complaints where, for example, upon a second review of a routine liability complaint, the insurer decides to pay a nominal amount more to settle the claim, can be used by lawyers as purported "evidence" of a general business practice and against insurers in the future.

8. **Section 4.3c. Notification to Insurer.** Section 4.3c requires the Insurance Commissioner to provide within five (5) working days a complete copy of the complaint to the insurance carrier against whom the complaint is filed. There is no provision in the proposed rules, however, to determine where the complaint will be forwarded. This process could lead to significant bureaucratic confusion if complaints are forwarded to offices that are not equipped to timely respond to administrative complaints. The WVIF, therefore, suggests that the Commissioner maintain a list of contact names and addresses to where said complaints should be delivered by the Commissioner pursuant to Rule 4.3c or to amend this Section to require complaints be forwarded to specific locations such as to a company's registered agent for service of process.

The WVIF proposes to amend this Section as follows:

> 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) through the respondent'(s) registered agent for service of process.

9. **Section 4.4. Reporting.** Section 4.4 requires the reporting of the status of negotiations by the insurer within forty-five (45) days after receiving a complaint. This, however, is inconsistent with West Virginia Code § 33-11-4a(4) which provides insurers with sixty (60) days in which to "cure" any issue raised in an administrative complaint. The WVIF, therefore, believes that Section 4.4 is unnecessary.

If the Insurance Commissioner intends to require interim reporting of the status of negotiations, the WVIF recommends that the Rule be amended to insert the term "if any" in the event that an insurer determines that it made an appropriate settlement offer or other decision which may have lead to the filing of an administrative complaint. Otherwise, this proposed section creates an affirmative requirement on an insurer to change its position. The WVIF suggests deleting this section in its entirety.

10. **Section 5. Resolution Without Hearing.** It seems clear upon review of the enabling legislation that the Commissioner is the arbiter of what constitutes a "meritorious" claim of third party bad faith. The procedural rule should make this clear.

11. **Section 5.1. Correction by respondent.** The preamble does not fully cite West Virginia Code § 33-11-4a(4); therefore, the WVIF suggests the insertion of the clause "and no further action shall lie on the matter".

Additionally, ss written, this Section imposes an obligation on an insurer to change its initial liability determination; there is a presumption that the company's position is erroneous and the proposed rule. This clearly is not appropriate. These rules should also permit an insurer to provide an explanation to the Commissioner for its position without having to "correct" or "offer to resolve" the issue. The WVIF, therefore, suggests the addition of subsection "c" to the following language:

c. Has shown that the complaint has no merit

or

c. Provided sufficient information to satisfy the commissioner of the correctness of its position.

This subsection would allow meritless complaints to be disposed of without the added expense of hearings or additional, unnecessary investigation. Given that a good faith disagreement over value or liability is not an unfair claim settlement practice under West Virginia Code § 3-11-4a(g), there should be no reason to change such decisions if previously made in good faith, and this rule should not require it. For example, if an insurer denies a claim based upon no liability on the part of its insured, then this rule should not require the insurer to change its position *because* an administrative complaint is filed. On the other hand, an insurer may offer policy limits or what it believes to be policy limits and said offer is rejected when an administrative complaint is filed. Here, an insurer could take no additional action as required under the proposed rule because it had already offered the policy limits. Therefore, any affirmative duty to change a prior position is improper, and the Commissioner should give consideration to the insurer's position when the complaint is filed.

12. **Section 5.3. Right to Contest Closure.** This proposed section grants a claimant the right to contest the Insurance Commissioner's closing of a complaint after the sixty (60) day "cure period" and makes provisions for the reopening of an administrative complaint. The underlying statute does not provide this remedy. This section also is silent as to whether an insurer shall be granted the right to appeal any decision of the Insurance Commissioner to reopen a previously-closed administrative complaint.

13. **Section 5.4. Effect of Closure.** This rule contemplates that if a complaint is resolved to the satisfaction of the complainant and closed by the Commissioner, then the matter should not thereafter remain open for continuing factual review. This effectively means that "closed" complaints are never really "closed."

The proposed language also is inconsistent with the right of the insurer to correct the circumstances under which the administrative complaint was originally filed and essentially eradicates the effectiveness of the sixty (60) day cure period. The WVIF also believes that if a complaint is closed within the sixty (60) day cure period, then the Insurance Commissioner should be required to issue an order stating that the Commissioner found no merit to the administrative complaint. The WVIF believes that this Section should be deleted in its entirety.

14. **Section 6.1. When Investigation May Begin.** The proposed language permitting the Commissioner to continue "any further investigation he or she considers necessary" is vague and overly broad. Specifically, West Virginia Code § 33-11-4a(c) provides that the initial investigation by the Insurance Commissioner is to determine solely whether the allegations in the complaint are meritorious and does not, at the initial investigation stage,

require any determination as to whether a person has committed an unfair claims settlement practice with such frequency as to constitute a general business practice. Only after making such a determination of merit may the Commissioner, at his or her discretion, forward the complaint to the Office of Consumer Advocacy for further investigation, at which point an investigation will be undertaken to determine if the person has committed an unfair claims settlement practice with such frequency as to constitute a general business practice. West Virginia Code § 33-11-4a(d). Therefore, the WVIF proposes that the last clause of proposed Rule 6.1 be stricken and the sentence should end after the clause "complaint are meritorious."

15. Section 6.3. Representation by Office of Consumer Advocacy. The WVIF is concerned that proposed Section 6.3 is overly broad and runs counter to West Virginia Code §§ 33-2-17(a)(3) and 33-11-4a(d). The new statute permits a referral to the Office of Consumer Advocacy for further investigation *only* after the sixty (60) day cure period and a determination by the Commissioner that the complaint has merit. Proposed Section 6.3, however, seems to call for representation by the Office of Consumer Advocacy at *any* time at the request of a claimant and at proceedings beyond the second stage of investigation in contravention of these two statutes.

First, proposed Section 6.3 states that the Office of Consumer Advocacy may become involved at the request of a claimant. West Virginia Code § 33-2-17(a)(3), however, only permits the Office of Consumer Advocacy to become involved at the request of one or more third-party claimants *who does not have legal representation at a hearing on his or her claim,* or when the public interest is served, with respect to any third-party complaint alleging an unfair claim settlement practice. (Emphasis added). No other subsection of West Virginia Code § 33-2-17 deals with third-party complaints alleging unfair claims settlement practices (with the exception of subparagraph 2, which is not applicable). Notably, West Virginia Code § 33-2-17a(2) indicates that the Office of Consumer Advocacy may become involved at the request of one or more *policyholders.* A policyholder, however, is not a third-party claimant and thus this subsection of the Code is beyond the scope of these proposed Rules.

Second, West Virginia Code § 33-2-17(a)(3) only applies to filings made with the Insurance Commissioner by an insurance company or relating to a third-party complaint alleging an unfair claims settlement practice. It does not encompass any other hearing or proceedings as set forth in proposed Section 6.3, and the WVIF believes that this language must be deleted. Moreover, it appears that the inclusion of the right of the Office of Consumer Advocacy to become involved in other hearings or proceedings involving judicial review of orders issued by the Commissioner or by any Court impermissibly permits collateral attacks on the Commissioner's orders or orders of any court. While West Virginia Code § 33-2-17 permits the Office of Consumer Advocacy to become involved in other proceedings in State and Federal

Courts, that right arises in other contexts, not with respect to allegations of unfair claims settlement practices. See West Virginia Code § 33-2-17(a)(1) and (4).

In addition to the overly broad scope of proposed Section 6.3, the duties of the Consumer Advocate are not set forth in either this or any other proposed Rule. West Virginia Code § 33-11-4a(d) sets forth the right of the Office of Consumer Advocacy to conduct a further investigation and hearing to determine if the person has committed an unfair claims settlement practice with such frequency as to constitute a general business practice and sets forth the notice requirements for any hearing, but does not, for example, identify who will conduct such hearings or the level of proof which must be presented at such hearings. Such omissions should be addressed at this stage. For example, we believe that at any such hearing in which the Consumer Advocate is involved to determine if a person has committed an unfair claim settlement practice with such frequency as to constitute a general business practice, that such proof should be by the preponderance of the evidence unless the Consumer Advocate is attempting to establish an "egregious act" at which point the proof should be a clear and convincing standard.

Therefore, the WVIF proposes that Rule 6.3 be amended as follows:

> At the request of a claimant who does not have legal representation at a hearing on his or her claim, or whenever the public interest is served, the Office of Consumer Advocacy may advocate for the interests of any non-represented claimant or for the public interest in proceedings related to any complaint filed pursuant to the Rules or pursuant to West Virginia Code § 33-11-4a.

In addition, the proposed rules do not appear to permit an insurer the right to appeal the referral of any administrative complaints to the Consumer Advocate after the Insurance Commissioner has made a preliminary finding that the complaint has merit. The WVIF urges the adoption of such a provision.

16. Section 6.5(b). Recording of Hearings. This proposed Section should be consistent with the West Virginia Administrative Procedures Act, West Virginia Code § 29A-5-1, which requires: "All the testimony and evidence at any such hearing shall be reported by stenographic notes and characters or by mechanical means."

17. Section 7.2. Notice of Hearing. Ten days notice of a hearing is insufficient, especially since the notice must only be "mailed" ten days before the hearing, thereby providing less than that time to prepare to defend a complaint. The WVIF believes that fifteen or twenty days' notice of a hearing would provide adequate advance time.

18. Section 7.4. Location of hearing. This section needs some clarification as to whether hearing will occur in geographical towns or cities or some specified "regions."

19. Section 7.5. Conduct of hearings. WV 114 CSR 13 appears not to be designed for these types of hearings and consideration of these types of matters. There are real questions about the use of subpoenas to gain information of which it would not be appropriate to provide when the underlying matter is ongoing and possibly proceeding to trial. The procedures also should contemplate the protection of personal and confidential information which could be provided as evidence in these types of hearings.

20. Section 7.6. Required Finding. Proposed Section 7.6 requires the Commissioner to determine whether or not the respondent committed an unfair claims settlement practice as alleged in the complaint. The proposed Section, however, does not include the language of the newly enacted statutes, specifically West Virginia Code § 33-11-4a(f) and (g).

Subsection (f) states:

> A finding by the Commissioner that the actions of a person constitute a general business practice may only be based on the existence of substantially similar violations in a number of separate claims or causes of action.

Subsection (g) states:

> A good faith disagreement over the value of an action or claim or the liability of any party to any action or claim is not an unfair claims settlement practice.

The WVIF believes that these specific provisions of the statute should be included. Further, we are concerned that the proposed rule contemplates a proceeding whereby the Commissioner makes a finding as to whether the respondent has committed an unfair claims settlement practice as alleged in the complaint given that the Commissioner has already made a preliminary determination that the allegations had merit.

21. Section 7.7. Required Determinations. If an unfair claims settlement practice is found, the Commissioner is required under proposed Section 7.7 to determine, *inter alia,* whether the violation was a result of an egregious act. The WVIF believes that it is necessary that the proof should be by clear and convincing evidence. The WVIF, therefore, suggests an addition to subparagraph (c) as follows: "Whether the violation was a result of an egregious act as demonstrated by clear and convincing evidence."

Additionally, the proposed rules generally are silent as to the effect of any administrative order by the Commissioner. Given the recent ruling of *Holloman v. Nationwide*, the WVIF believes that these procedural rules should clarify that and administrative order issues under these rules shall not have *res judicata* or collateral estoppel effects, but, rather, should be considered an administrative finding only, not equal to a judicial determination of a violation of the Unfair Claims Settlement Practices Act with such frequency as to constitute a general business practice.

Therefore, the WVIF suggests the addition of the following language to proposed Section 7.7:

> No such finding of an unfair settlement practice shall have a preclusive effect on any future administrative complaint.

22. Proposed Section 7.9. These rules are silent as to whether any proof can be set forth through the use of what is commonly characterized as Rule 404(b) evidence. Typically 404(b) evidence is admitted through testimony of either plaintiffs' attorneys or claimants who have presented prior claims against an insurance carrier. Given that West Virginia Code § 33-11-4a(f) requires that a finding by the Commissioner of a general business practice may only be based on the existence of substantially similar violations in a number of separate claims or causes of action, we believe that the propriety or impropriety of such testimony should specifically be set forth in these procedural rules. Similarly, the rules should address what constitutes "substantially similar violations". The WVIF recommends that the proof of a substantially similar violation be established only by the introduction of evidence from other third-party claims involving the same line of coverage involved in the administrative complaint under review with factual circumstances which are similar to those presented in the complaint under review.

As a result, the WVIF proposes the addition of Section 7.9 as follows:

> **Section 7.9. Proof.** Proof of any unfair claim settlement practice with such frequency as to constitute a general business practice may only be based on the existence of substantially similar violations in a number of separate claims or causes of action. Such proof can only be established by evidence from other third party claims involving the same line of coverage as the administrative complaint under review and with factual circumstances substantially similar to those presented in the administrative complaint under review. No testimony from other claimants or their attorneys shall be admissible or considered.

23. Section 8.1. Commissioner's Authority. The WVIF is concerned about the broadness of proposed subsection (b). West Virginia Code § 33-11-4a(i) states that nothing in the statute should limit the rights of the Commissioner to investigate and take action against a person which the Commissioner has reason to believe has committed an unfair claims settlement practice or has consistently resolved administrative complaints within the sixty (60) day "cure" period. Subsection (i), however, does not make any reference to whether a respondent has committed an unfair claims settlement practice with such frequency as to constitute a general business practice. The WVIF urges the deletion of proposed Section 8.1.

24. Section 9.3. Judicial Review. Section 9.3 permits judicial review per West Virginia Code § 33-2-14. West Virginia Code § 33-11-6(g) also permits judicial review, and we believe that this Code section should also be added.

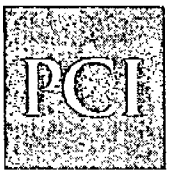
Thank you for the opportunity to provide these comments. Naturally, if you have any questions or need additional information of any kind, we are available to meet or discuss these comments. Please do not hesitate to contact me.

Very truly yours,

Jill C. Bentz

Jill C. Bentz
President

JCB/sll.316559
cc: The Honorable Jane L. Cline, Insurance Commissioner
Mary Jane Pickens, General Counsel



Property Casualty Insurers
Association of America

Shaping the Future of American Insurance

September 29, 2005

Victor Mullins, Associate Counsel
West Virginia Insurance Commission
P.O. Box 50540
Charleston, WV 25305-0540

RE: Proposed Administrative Rules, Title 114, Series 76: Rules of Practice and Procedure for Administrative Proceedings Brought by Third Party Claimants

Dear Mr. Mullins,

The following comments are being provided on behalf of the member companies of the Property Casualty Insurers Association of America (PCI). PCI is a national property casualty trade association comprised of more than 1,000 member companies, representing the broadest cross-section of insurers of any national trade association. PCI members write $154 billion in annual premium, or 38 percent of the nation's property/casualty insurance. In West Virginia, PCI member companies write over 33 percent of the personal lines market, and nearly 30 percent of the commercial lines market.

Our specific comments on the Proposed Rules are as follows:

Section 4.3.c. provides that the Commissioner will forward a *sufficiently complete complaint* to the respondent, after receipt of which, the respondent has 45 to advise the commissioner in writing of the status of the negotiations. We recommend two amendments to this subsection. First, it is possible that the respondent might find that the claim received is not sufficiently complete. The respondent should be permitted to advise the Commissioner that additional information is necessary. The 45 days, then should toll from the time that both the Commissioner *and* the respondent believe the complaint is sufficiently complete to begin an investigation. Second, the Rule should be clarified to state that the respondent may provide the status of the complaint in writing *by mail or electronic means* to the Commissioner.

Section 5 does not specifically provide the Commissioner with the ability to close a complaint if the Commissioner finds that the complaint is frivolous or without merit. We recommend that Section 5.1 be amended to read: "the Commissioner shall close the complaint if he or she determines that:

a. Within the sixty-day period the respondent substantially corrected the circumstances that gave rise to the complaint;
b. Within the sixty-day period the respondent offered to resolve the complaint in a reasonable manner; or
c. *The complaint lacks merit.*

Section 7.1 should restate the provisions listed above to clarify that hearings are not required where the complaint has been closed due to resolution or closed because the complaint was found to lack merit.

Section 7.1 also provides a very restrictive timeframe. At a minimum, this section should be amended to clarify that the timeframe for scheduling the hearing runs from the time that a *sufficiently complete* complaint is filed, rather than from the date the complaint is originally filed.

We believe, however, that the 90-day timeframe may not allow sufficient time to schedule and prepare for a hearing, especially where each of the interim steps to the hearing takes the maximum time allowed by the rule. For example, if the complaint requires the full 60 days to resolve, and 10 days notice of the hearing must be provided, the Commissioner may have only 20 days to schedule the hearing. Further, Section 7.2 provides that the Commissioner shall "mail written notice of the hearing" at least ten days in advance. Such short notice to the parties may create a hardship for all parties. After mailing time, both the claimant and respondents may have less than a week to prepare for and make arrangements to attend the hearing. This time frame is particularly burdensome for corporations, who may only be represented by counsel. We recommend that the timeframe for holding the hearing begin tolling at least from the date the complaint is resolved, and that additional time be permitted for notice.

PCI appreciates the opportunity to provide comment on the proposed Rules.

Sincerely,

Angela Zaydon
Mid-Atlantic Regional Manager
PCI