

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND**

ADMINISTRATIVE LAW DIVISION

Form #5

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2008 OCT 22 PM 4: 13

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: Insurance Commissioner (Workers' Compensation Rules) TITLE NUMBER: 85

CITE AUTHORITY WV Code §§23-2C-22; 33-2-10(b); and 33-2-21(a)

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____ X _____

CITE STATUTE (s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

WV Code §§23-2C-5(c)(2)

AMENDMENT TO AN EXISTING RULE: YES X NO _____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 11

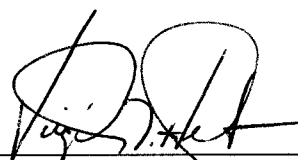
TITLE OF RULE BEING AMENDED: Employer Default, Enforcement, Collections and Related
Matters

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

TITLE OF RULE BEING ADOPTED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE

EFFECTIVE DATE OF THIS RULE IS November 21, 2008



Virgil T. Helton
Cabinet Secretary
West Virginia Department of Revenue

\$7.00

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION RULES OF THE
WEST VIRGINIA INSURANCE COMMISSIONER

SERIES 11
EMPLOYER DEFAULT, ENFORCEMENT, COLLECTIONS
AND RELATED MATTERS

Section

- 85-11-1. General.
- 85-11-2. Definitions.
- 85-11-3. Default Employer Not Permitted to Dissolve or Withdraw.
- 85-11-4. Notice to Employees of Default Employers.
- 85-11-5. Audits of Employers.
- 85-11-6. Methods of Collection of Payments and Enforcement.
- 85-11-7. Statutory Lien.
- 85-11-8. Civil Actions.
- 85-11-9. Injunctions From Carrying On Business.
- 85-11-10. Receivership and Insolvency Proceedings; Bankruptcy.
- 85-11-11. Distrain Upon Personal Property.
- 85-11-12. Payment Agreements.
- 85-11-13. Administrative Hearings.
- 85-11-14. Interest.
- 85-11-15. Reserved.
- 85-11-16. Criminal Penalties
- 85-11-17. Freedom of Information Act.

- 85-11-18. Placement on Workers' Compensation Default List; Due Process and Hearing.
- 85-11-19. Removal From the Default List.
- 85-11-20. Uninsured Fines.
- 85-11-21. Employer Violator System.

**TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION RULES OF THE
WEST VIRGINIA INSURANCE COMMISSIONER**

**SERIES 11
EMPLOYER DEFAULT, ENFORCEMENT, COLLECTIONS
AND RELATED MATTERS**

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

§85-11-1. General.

1.1. Scope. -- This rule implements the provisions of W. Va. Code §§23-1-13; 23-2-1, 1b, 1d, 5, 5a, 5b, 5c, 5d, 8, 9, 13, 14, 15 and 17; and 33-2-22, regarding the determination of workers' compensation employer default; enforcement of compliance by employers with West Virginia's workers' compensation laws; and collection of obligations arising from those requirements and others.

1.2. Authority. -- W. Va. Code §§23-2C-22; 33-2-10(b); and 33-2-21(a). Pursuant to W. Va. Code §23-2C-5(c)(2), workers' compensation rules proposed by the Commissioner and approved by the Industrial Council are not subject to legislative approval as would otherwise be required under W. Va. Code §29A-3-1, et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. -- October 22, 2008.

1.4. Effective Date. -- November 21, 2008.

§85-11-2. Definitions.

2.1. As used in this rule, the following terms, words, and phrases have the meanings stated unless in any instance where such term, word, or phrase is employed the context expressly indicates that another meaning is intended.

2.2. "Default" or "default employer" means an employer that:

- a. Has an outstanding balance or liability to the Old Fund;
- b. Has an outstanding balance or liability to the Uninsured Employers' Fund, including owing money to the fund for benefit payments, administration costs or attorney fees as well as any fines owed to the fund for being uninsured pursuant to W. Va. Code §23-2C-8(d)(3) and this rule;
- c. Is in policy default;
- d. Fails to carry mandatory workers' compensation coverage;

e. Is a former self-insured employer whose status has been revoked but who has remaining unsecured obligations pursuant to its previous status as a self-insured employer; or

f. Has any other outstanding obligation, balance, debt or other liability pursuant to chapter twenty-three of the West Virginia Code or rules promulgated thereunder.

2.3. "Employee" has the meaning ascribed to that term by W. Va. Code §§23-2-1 and 23-2-1a.

2.4. "Employer" means either or both of the following:

a. The term "employer" has the meaning ascribed to that term by West Virginia Code §23-2-1, which includes, but is not limited to, any individual, sole proprietor, firm, partnership, limited partnership, limited liability company, joint venture, association, corporation, company, organization, receiver, estate, trust, guardian, executor, administrator, government entity or any other entity regularly employing another person or persons for the purpose of carrying on any form of industry, service or business in this state.

b. The term "employer" also means, for the purposes of this rule's enforcement provisions at subsection 6.1. and sections 7., 8., 10., and 11. any owners, officers, members, partners and directors of the employer.

2.5. "Commissioner" means the Insurance Commissioner of West Virginia.

2.6. "Payment" means any amount of money owed by an employer pursuant to chapter twenty-three of the West Virginia Code or any rules promulgated there under.

2.7. "Old Fund" means the fund created pursuant to W. Va. Code §23-2C-2(l).

2.8. "Policy Default" means a West Virginia workers' compensation policy holder having their coverage terminated as a result of a failure to comply with the terms of the policy.

2.9. "Self-insured" or "Self-insured employer" means an employer which is eligible and has been granted self-insured status under the provisions of W. Va. Code §23-2-9.

2.10. "Uninsured Employers' Fund" means the fund created pursuant to W. Va. Code §§23-2C-2(o) and 23-2C-8.

2.11. "West Virginia Code," "W. Va. Code" and "Code" mean the West Virginia Code of 1931, as amended.

2.12. "Workers' Compensation Default List" or "Default List," means a paper and/or electronic database maintained by the Commissioner which identifies employers who are in default. This list may be made accessible in the form of either a computerized database or other databases.

§85-11-3. Default Employer not Permitted to Dissolve or Withdraw.

3.1. The Commissioner shall not certify to the secretary of state of West Virginia that all payments and interest due the Commissioner by an employer have been made until the employer cures any default or makes arrangements satisfactory to the Commissioner for that cure or until all payments due by the employer under chapter twenty-three of the West Virginia Code or the rules promulgated thereunder have been made or arranged for by agreement with the Commissioner.

3.2. Pursuant to W. Va. Code §23-2-5a, the secretary of state shall withhold the issuance of any certificate of dissolution or withdrawal in the case of any corporation organized under the laws of West Virginia or organized under the laws of any other state and admitted to do business in this state until the secretary of state receives the subsection 3.1. certification.

§85-11-4. Notice to Employees of Default Employers.

4.1. Upon the policy default or discovery that an employer is otherwise not carrying mandatory West Virginia workers' compensation insurance, the Commissioner shall issue a written notice to the employees of that employer. The notice shall be in the form prescribed by the Commissioner.

4.2. Contents of notice. -- The notice shall inform the employees of the default of their employer and the effective date thereof. The notice shall also inform the employees of the legal consequences, as it affects the employees, of the default or termination of their employer. The notice shall also contain the following statement which shall be printed in conspicuous type: "Any person who shall, prior to the reinstatement to good standing of the said employer, as hereinbefore provided for, or prior to sixty (60) days after the posting of this notice, whichever shall first occur, remove, deface, or render illegible this notice, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined one thousand dollars (\$1,000.00)."

4.3. Posting the notice. -- The Commissioner shall arrange for the posting of the notice as described in this section in a conspicuous place at the chief works of the employer, as the same appears in the records of the Commissioner. If the chief works of the employer cannot be found or identified, then the notice as described in this section shall be posted at the front door of the courthouse of the county in which the chief works are located, according to the Commissioner's records. A copy of the notice shall also be sent to the office of the secretary of state for publication in the State Register.

4.4. The Commissioner may require any sheriff, deputy sheriff, or other official of the state of West Virginia, who may be authorized to serve civil process, to post the notice as described in this section and to make return thereof of the fact of such posting to the Commissioner, and any failure to post any notice within ten (10) days after he or she receives the same from the Commissioner, without just cause or excuse, shall constitute a willful failure or refusal to perform a duty required of him or her by law within the meaning of W. Va. Code §61-5-28. Any person actually injured by reason of such failure shall have an action against said official, and upon any official bond he or she may have given, for such damages as such person

may actually have incurred, but not to exceed, in the case of any surety upon said bond, the amount of the penalty of said bond.

4.5. Fee for posting. -- Any official posting the notice as described in this section shall be entitled to the same fee as is now or may hereafter be provided for the service of process in suits instituted in courts of record in the state of West Virginia, which fee shall be paid by the Commissioner out of any funds at his or her disposal, but shall be charged by him or her against the account of the employer to whose default such notice relates.

§85-11-5. Audits of Employers.

5.1. Pursuant to W. Va. Code §23-2-2(a), the Commissioner has authority to perform audits of any employer in order to determine the amount of money owed to the Old Fund. The audits shall be in a manner as prescribed by the Commissioner, and employers shall be required to comply with all requirements of such audits. Any employer refusing to comply with a Commissioner audit as described in this subsection shall be deemed in default based on the estimated liability to the Old Fund as calculated by the Commissioner based on available and credible information, and shall further be subject to all enforcement provisions as contained in chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

5.2. The Commissioner is entitled to hold administrative hearings, conduct depositions, and issue subpoenas for production of persons for deposition or documents for inspection in order to obtain relevant information for determination of amount owed to the Old Fund. All administrative hearings or depositions shall be convened and conducted in accordance with section 13. of this rule.

§85-11-6. Methods of Collection of Payments and Enforcement.

6.1. Following the default of an employer, in addition to the remedies described in previous sections of this rule, the Commissioner shall have available to him or her the following remedies which shall each be described more fully below:

- a. Initiation of a civil action against the employer.
- b. Filing of a lien or liens enforceable against all the property of the employer.
- c. Initiation of an action in the Circuit Court of Kanawha County to enjoin the employer from continuing to carry on the business in which its liability was incurred or, in the alternative, to accept a bond from the employer.
- d. Filing a claim in any bankruptcy proceeding or in a receivership or insolvency proceeding which involves the employer.
- e. Informing the director of the commission of environmental protection when an employer is in default prior to the director's issuance of a coal mining permit so that the permit

may not be issued until the applicant is in compliance with chapter twenty-three of the West Virginia Code or the Rules promulgated thereunder, as provided in W. Va. Code §22-3-8.

f. Informing the director, commissioner or head of any state agency when an employer is in default, so that the director may take appropriate remedial action against the employer in regard to a contract, license, permit, certificate or other authority to conduct a trade, profession or business.

g. Requesting a criminal prosecution of any person, firm, corporation or other employer whose non-compliance with chapter twenty-three of the West Virginia Code or the rules promulgated thereunder is believed to be in violation of W. Va. Code §23-1-16 and section 16. of this rule.

6.2. In addition to the other remedies set forth herein, the Commissioner may also initiate a proceeding or proceedings in the name of the state to distrain upon any personal property, including intangible property, of any default employer. If the Commissioner has good reason to believe that such property or a substantial portion thereof is about to be removed from the county in which it is situated, the Commissioner may initiate a distraint proceeding in the name of the state before the employer actually enters default. In exercising the power of distraint, the Commissioner may do so as provided for in section 11. of this rule.

6.3. In every case noted in this section where a monetary sum is to be collected, the Commissioner shall include a demand for interest as specified in section 14. of this rule.

6.4. The remedies set forth in subsections 6.1. and 6.2. of this section are described in greater detail in later sections of this rule.

§85-11-7. Statutory Lien.

7.1. Any payment and interest thereon due and unpaid under chapter twenty-three of the West Virginia Code and the rules promulgated thereunder, including, but not limited to, money owed to the Old Fund, money owed to the Uninsured Employers' Fund and money owed pursuant to liabilities accrued by the employer while the employer was self-insured constitutes a lien enforceable against all of the property of the owing employer. The property subject to the lien includes all of the employer's real estate, personal property of all types and combinations thereof.

7.2. In accordance with W. Va. Code §§23-2-5a and 38-10C-2, the Commissioner shall file a written notice of the lien as described in this section in the office of the clerk of the county commission of the county in which the property of the employer or lienee against whom such lien is claimed, is situate, or if the employer's or lienee's property is situated in more than one county, then in each such clerk's office in each such county. The notice shall certify the amount of money that is owed by the employer.

7.3. Pursuant to W. Va. Code §38-10C-2, the clerk or clerks of the county commission or commissions shall, upon the filing of the notice, index the notice in the judgment or tax lien

docket of his or her office against the employer or lienor in favor of the state of West Virginia and the Commissioner. Upon the satisfaction of such lien, a properly acknowledged release thereof for recordation shall be delivered or mailed to the employer or lienor by the Commissioner or shall be delivered or mailed to the clerk of the county commission in the county in which the lien was filed. Such notice or notices of the lien shall be supplemented by additional notices from time to time whenever any additional liability is incurred by the employer or is determined by audit or other proceeding.

7.4. Until the lien is docketed as provided for in subsection 7.3. of this section, the lien is unenforceable against purchasers (including a lien creditor) of real estate or personal property for a valuable consideration except for such purchasers with actual notice of the Commissioner's lien. However, if a purchaser (including a lien creditor) of real estate or personal property for a valuable consideration has actual knowledge of the lien, then that lien shall be enforceable against such a purchaser even before the lien is docketed as provided for in subsection 7.3. of this section. Following the docketing pursuant to subsection 7.3. of this section, the lien is enforceable against any purchaser (including a lien creditor) with or without actual notice of the lien.

7.5. Once all amounts due from the employer are collected by the Commissioner, the Commissioner shall release the lien or liens as provided by law.

§85-11-8. Civil Actions.

8.1. The Commissioner in the name of the State may commence a civil action against a default employer to recover any payment and interest thereon due and unpaid under chapter twenty-three of the West Virginia Code and the rules promulgated thereunder, including, but not limited to, money owed to the Old Fund, money owed to the Uninsured Employers' Fund and money owed pursuant to liabilities accrued by the employer while the employer was self-insured.

8.2. Such a civil action may be pursued under the applicable provisions of W. Va. Code §14-1-1, et seq., chapter thirty-eight of the West Virginia Code, or as otherwise provided by law. It is expressly noted that the provisions of sections 18a, 18b, and 18c of article 1, chapter fourteen of the West Virginia Code are not applicable to a civil action as described in this section, but may be used as is otherwise proper.

8.3. Civil actions as described in this section shall be settled or dismissed only as provided by W. Va. Code §14-1-18 or chapter twenty-three of the West Virginia Code and the rules promulgated thereunder. All such settlement or dismissal orders shall be public information and shall not be placed under seal.

8.4. Pursuant to W. Va. Code §23-2-5a, if the judgment entered in a civil action as described in this section is against the defendant employer, the defendant shall pay the costs of the action. In addition, a civil action as described in this section shall be given preference on the calendar of the court over all other civil actions.

8.5. Upon obtaining a judgment in any civil action prosecuted under this section, the Commissioner shall enforce and execute upon that judgment as provided for by W. Va. Code §14-1-1, et seq., or as otherwise provided for by law. Any agreement to accept less than the full value of the judgment together with interest thereon shall be made solely as set forth in subsection 8.3. of this section and shall be stated in writing and that document shall be a public record.

§85-11-9. Injunctions From Carrying On Business.

9.1. Pursuant to the provisions of W. Va. Code §33-2-22(b), the Commissioner may bring an action against a default employer in the Circuit Court of Kanawha County to enjoin such default employer from continuing to carry on business.

9.2. Pursuant to the provisions of W. Va. Code §33-2-22(c), the Circuit Court of Kanawha County shall issue an injunction prohibiting the default employer from operating its business if the Commissioner proves by a preponderance of the evidence that the employer is in default status.

9.3. The Commissioner may, as an alternative to pursuing such an injunction as described in this section, require a default employer to file a bond in the form prescribed by the Commissioner with satisfactory surety in an amount not less than fifty percent more than the payments and interest due. The bond must be issued by a corporate surety satisfactory to the Commissioner.

§85-11-10. Receivership and Insolvency Proceedings; Bankruptcy.

10.1. In the event that a default employer owing payment and interest due thereon under chapter twenty-three of the West Virginia Code or the rules promulgated thereunder, including, but not limited to, money owed to the Old Fund, money owed to the Uninsured Employers' Fund and money owed pursuant to liabilities accrued by the employer while the employer was self-insured, shall be operated in connection with a receivership or insolvency proceeding in any state court in this state, the court under whose direction such business is operated shall, by the entry of a proper order or decree in the cause, make provisions, so far as the assets in administration will permit, for the regular payment of such payments as the same become due.

10.2. In any such case as is described in subsection 10.1. of this section, the Commissioner may file such pleadings, motions, and other documents and take any other legal action necessary to protect the interests of West Virginia's workers' compensation market during the pendency and resolution of such case.

10.3. In the event that a default employer owing payment and interest under the provisions of chapter twenty-three of the West Virginia Code and the rules promulgated thereunder, including, but not limited to, money owed to the Old Fund, money owed to the Uninsured Employers' Fund and money owed pursuant to liabilities accrued by the employer while the employer was self-insured, files for or is placed in a bankruptcy proceeding under the laws of the United States, the Commissioner may become a party to such proceedings and take

any and all actions needed to protect the interests of West Virginia's workers' compensation market during the pendency and resolution of the proceeding. The Commissioner may institute an involuntary proceeding against an employer in a bankruptcy court of the United States in any proper instance. All former premium tax assessments owed to the Old Fund and all surcharges and assessments owed by employers pursuant to chapter twenty-three of the West Virginia Code or the rules promulgated thereunder, including, but not limited to, the regulatory and Debt Reduction Fund surcharges and assessments pursuant to W. Va. Code §23-2C-3(f), assessments and liabilities owed to the Uninsured Employers' Fund pursuant to W. Va. Code §23-2C-8 and assessments for the Self-Insured Guaranty and Security Risk Pools as established in W. Va. Code §23-2C-1, et seq. and W. Va. Code St. R. §85-19-1, et seq., are special revenue taxes under and according to the provisions of state workers' compensation laws and are deemed to be tax claims, as priority claims or administrative expense claims according to those provisions of law provided in the United States bankruptcy code.

§85-11-11. Distraint Upon Personal Property.

11.1. General authority and provisions.

a. Authority of the Commissioner. -- If any payment required by chapter twenty-three of the West Virginia Code and the rules promulgated thereunder, including, but not limited to, money owed to the Old Fund, money owed to the Uninsured Employers' Fund and money owed pursuant to liabilities accrued by the employer while the employer was self-insured, is due and the employer is in default for nonpayment of such obligation and notice thereof has been given as provided for by this rule and the demand is not then the subject of administrative or judicial review, then, if any employer liable to pay such payment, neglects or refuses to pay the same within the period of time provided for payment after notice and demand as provided in subdivision f. of this subsection hereof, it shall be lawful for the Commissioner to collect the amounts due and such further sums as are sufficient to cover the expense of the levy, by levy in the name of the state and Commissioner upon all personal property, including intangible property, and rights to property belonging to such employer or on which there is a lien as provided for by chapter twenty-three of the West Virginia Code and the rules promulgated thereunder for payment of the obligation due. If the Commissioner finds that the collection of such obligation is in jeopardy, notice and demand for immediate payment may be given by the Commissioner and, upon failure or refusal to pay such obligation, collection thereof by levy shall be lawful without regard to the time period provided in subdivision f. of this subsection. If the Commissioner has good cause to believe that such property or a substantial portion thereof is about to be removed from the state in which it is situated, the Commissioner may likewise distraint before such default occurs.

b. The term "levy" as used in this section includes the power of distraint and seizure by any lawful means. Except as otherwise provided in this section, a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Commissioner may levy upon property or rights to property, the Commissioner may seize and sell such property in accordance with subsection 11.4. of this section.

c. The Commissioner may utilize the services of a sheriff, a sheriff's deputy, or a

member of the department of public safety in levying upon any property under this section or in performing any of the tasks related to the disposition of the property once it is seized as are set forth in the remainder of this section of this rule.

d. Successive seizures. -- Whenever any property or a right to property upon which levy has been made by virtue of subdivision a. of this subsection is not sufficient to satisfy the claim of the Commissioner which levy is made, the Commissioner may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the employer against whom such claim exists until the amount due, together with all expenses, is fully paid.

e. Distress warrant. -- The Commissioner may issue a distress warrant to the sheriff of any county of this state commanding him or her to levy upon and sell any such property or rights to property subject to levy in accordance with the provisions of this section. A distress warrant shall be executed within sixty (60) days from the date the warrant was issued. The sheriff shall return the warrant and any money collected to the Commissioner within sixty-five (65) days from the date the warrant was issued. A sheriff so collecting any payment shall be entitled to such compensation as is provided by law for his or her services in the levy and enforcement of executions.

f. Requirement of notice before levy.

1. In general. -- Levy may be made under subdivision a. of this subsection upon the salary or wages or other property or right to property of any employer with respect to any unpaid obligation only after the Commissioner has notified such employer in writing of his or her intention to make such levy. A notice shall also be given by the Commissioner or other officer in the manner provided by applicable law to all entities other than the employer of whom the Commissioner or other officer has knowledge and who have a higher priority lien or right to the property than that of the Commissioner.

2. Notice time period and hearing requirement. -- The notice required under paragraph 1. of this subdivision shall be given in person, or by attorney-in-fact, or sent by regular United States mail to such employer's last address of record at the Commissioner, no less than twenty (20) days prior to the day of levy; however, no notice need be given prior to levy if the Commissioner has made a finding under either of the last two sentences of subdivision a. of this subsection that collection of the obligation is in jeopardy; or, if the levy is made through the provisions of chapter thirty-eight of the West Virginia Code, including notice and hearing provisions therein, for execution upon liens and a notice of default was given by the Commissioner as required by subsection 18.1. of this rule and a notice of lien was docketed as required by subsection 7.2. of this rule.

3. Continuing levy on salary and wages. -- The effect of a levy on salary or wages payable shall be continuous from the date such levy is first made until the liability out of which such levy arose is satisfied or becomes unenforceable by reason of lapse of time, at which time the Commissioner shall promptly release such levy and notify the employer upon whom such levy was made that such levy has been released.

11.2. Property exempt from levy.

a. Enumeration. -- There shall be exempt from levy the greater of the value of exemptions as provided in chapter thirty-eight of the West Virginia Code or as provided below. In any case where the entity subject to the processes set forth in this section is an individual human being, then the term "individual" as used in this subsection applies solely and exclusively to such a human being and if the entity proceeded against is not an individual human being then the term "individual" does not apply to that entity:

1. Wearing apparel and school books. -- Items of wearing apparel and school books that are necessary for the individual or for members of his or her family.

2. Fuel, provisions, furniture and personal effects. -- If the individual is the head of a family, so much of the fuel, provisions, furniture and personal effects in his or her household and of the arms for personal use, livestock and poultry of the individual, as does not exceed one thousand five hundred dollars (\$1,500.00) in value, if the individual is not the head of a household, this exemption shall not exceed one thousand dollars (\$1,000.00).

3. Books and tools of a trade, business or profession. -- So many of the books and tools necessary for the trade, business, or profession of the individual as do not exceed in the aggregate one thousand dollars (\$1,000.00) in value.

4. Unemployment benefits. -- Any amount payable to an individual with respect to his or her unemployment (including any portion thereof payable with respect to dependents) under an unemployment compensation law of the United States, or of this state, or any other state.

5. Undelivered mail. -- Mail, addressed to any employer, which has not been delivered to the addressee.

6. Annuity and pension payments. -- Annuity or pension payments to any individual under any pension or retirement plan, including social security payments.

7. Workers' compensation. -- Any amount payable to an individual as workers' compensation (including any portion thereof payable with respect to dependents) under a workers' compensation law of the United States, or of this state, or any other state; except that if the individual who will be receiving such payment is a person who as sole proprietor, partner, or corporate officer, employee, or member was responsible for and is liable for the payment of the obligation levied upon, then the amount payable as workers' compensation may be levied upon.

8. Judgments for support of minor children. -- If the individual is required by a judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of minor children, so much of his or her salary, wages or other income as necessary to comply with such judgment.

9. Public assistance. -- Any amount payable to any individual from a public assistance or relief fund created under the law of the United States, of this state, or of any other state.

10. Wages, salary and other income. -- Any amount payable to or receivable by an individual as wages or salary for services provided by an employee to his or her employer, or as income derived from other sources, during any period, to the extent that the total for such period does not exceed the applicable exempt amount determined under the provisions of articles 5A and 5B, chapter thirty-eight of the West Virginia Code, plus twenty-five dollars (\$25.00) for each additional dependent of the individual.

11. If the employer is a natural person and if he or she owns a homestead located in this state, the first five thousand dollars (\$5,000.00) thereof shall be exempt from levy.

b. Appraisal. -- The officer seizing property of the type described in subdivision a. of this subsection shall appraise and set aside to the owner the amount of such property declared to be exempt. If the individual objects at the time of the seizure to the valuation fixed by the officer making the seizure, the Commissioner shall summon three disinterested individuals who shall make the valuation.

c. No other property exempt. -- Unless required by some other law, no personal property or rights to property shall be exempt from levy other than property specifically made exempt by subdivision a. of this subsection.

11.3. Surrender of property subject to levy.

a. Requirement. -- Any person in possession of, or obligated with respect to, property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Commissioner, surrender such property or rights, or discharge such obligation, to the Commissioner, except such part of the property or rights as is, at the time of such demand, subject to any prior attachment, execution or levy.

b. Enforcement of levy and extent of personal liability. -- Any person in possession of or obligated with respect to property subject to levy upon which levy has been made, who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Commissioner, shall be subject to prosecution as provided for in section 16. of this rule.

c. Effect of honoring levy. -- Any person in possession of or obligated with respect to property or rights to property subject to levy upon which levy has been made, who upon demand by the Commissioner, surrenders such property or rights to property or discharges such obligation to the Commissioner shall be discharged from any obligation or liability to the default employer with respect to such property or rights to property arising from such surrender or payment.

d. The term "person" as used in this subsection includes, but is not limited to, any

individual, employee, sole proprietor, partner, officer, member, joint venturer, receiver, trustee, executor, administrator, guardian, committee or official of any sole proprietorship, firm, partnership, limited partnership, limited liability company, company, association, corporation, organization, joint venture, receivership, trust, estate, governmental entity or other entity who as such person is under a duty to surrender the money, property or rights to property or to discharge the obligation or demand.

11.4. Sale of seized property.

a. Notice of seizure. -- At the time of seizure or as soon as practicable after seizure of property, notice in writing shall be given by the Commissioner to the owner of the property, and to the possessor thereof, or shall be left at his or her usual place of abode or business if he or she has such within the county where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such county, the notice may be mailed to his or her last known address by use of the certified mail, return receipt requested. Such notice shall specify the sum demanded and shall state the appraised value and identity of the property seized.

b. Notice of sale. -- The Commissioner may sell any property seized under this section of this rule. As soon as practicable after the seizure of the property, the Commissioner shall give notice to the owner, in the manner prescribed in subdivision a. of this subsection, and shall cause a notice of sale to be published as a class II legal advertisement in some newspaper published or generally circulated within the county wherein such seizure is made, or the county where the property is located, the last date of publication being not less than five (5) days prior to sale. This notice shall identify the property to be sold, and the date, time, place, manner, and conditions of the sale thereof, all of which shall be at the discretion of the Commissioner. The sale shall be conducted by public auction, or by public sale under sealed bids. Before the sale, the Commissioner may determine a minimum price for which the property shall be sold, and if no person offers to purchase such property at the sale for the amount of the minimum price, the property shall be declared to be purchased at such price for the state of West Virginia for the benefit of whichever particular area(s) of workers' compensation the sale benefits (i.e., the Old Fund, Uninsured Fund, etc.); otherwise, the property shall be declared to be sold to highest bidder. In determining the minimum price, the Commissioner shall take into account the expense of making the levy and sale.

c. Sale of indivisible property. -- If any property liable to levy is not divisible, so as to enable the Commissioner by sale of a part thereof to raise the whole amount of the sum due and the expenses of making the levy and sale, the whole of such property shall be sold. However, where the property sold is co-owned or jointly owned by the employer and an innocent third party, the proceeds of the sale shall be divided, based on the respective interests of the entities owning the property immediately prior to the levy and sale, and the proceeds attributable to the interest of the innocent owner or owners shall be distributed to them: *Provided*, that where the property to be sold is so co-owned or jointly owned by an innocent third party, who has no independent liability under chapter twenty-three of the West Virginia Code and the rules promulgated thereunder, such innocent party may petition the circuit court of the county in which the property is located for relief, including postponement of the sale, in

order that the court can determine if the property can be partitioned, so as to avoid sale of the innocent party's portion or grant and afford other relief by the court protective of the rights and interests of such innocent party as well as of the West Virginia's workers' compensation market and whichever particular area(s) of workers' compensation the sale would benefit (i.e., the Old Fund, Uninsured Fund, etc.).

11.5. Sale of perishable goods. -- If the Commissioner determines that any property seized is liable to perish or become greatly reduced in price or value by keeping, or that such property cannot be kept without great expense, the Commissioner shall appraise the value of such property and shall take one of the following actions:

a. Return to owner. -- If the owner of the property can be readily found, the Commissioner shall give him or her notice of such determination of the appraised value of the property. The property shall be returned to the owner if, within such time as may be specified in the notice, the owner either: (a) pays to the Commissioner an amount equal to the appraised value; or, (b) gives bond in such form, with such sureties, and in such amount as the Commissioner shall prescribe, to pay the appraised amount at such time as the Commissioner determines to be appropriate under the circumstances.

b. Immediate sale. -- If the owner does not pay such amount or furnish such bond in accordance with this subsection, the Commissioner shall, as soon as practicable, make public sale of the property.

11.6. Redemption of property.

a. Before sale. -- Any entity whose property has been levied upon shall have the right to pay the amount due, together with the expenses of the proceeding, if any, to the Commissioner at any time prior to the sale thereof, and upon such payment, the Commissioner shall restore such property to that entity and all further proceedings in connection with the levy on such property shall cease from the time of such payment.

b. Subrogation to Commissioner's lien. -- Any entity redeeming the interest of another shall be subrogated to the lien of the Commissioner on such interest. Such entity shall lose his, her or its right to this lien, however, unless within thirty (30) days after receiving the certificate of sale of personal property, he, she or it shall file with the clerk of the county commission of the county in which the personal property is located or where the default employer resides or has its business location, or if neither be in this state, the clerk of the county commission of Kanawha County, his, her or its claim against the default employer and a copy of the certificate of sale of personal property.

11.7. Certificate of sale. -- In the case of property sold as provided in subsection 11.4. of this section, the Commissioner shall provide to the purchaser a certificate of sale upon payment in full of the purchase price.

11.8. Legal effect of certificate of sale of personal property.

a. Certificate of sale of property. -- In all cases of sale of property pursuant to subsection 11.4. of this section, the certificate of such sale:

1. As evidence. -- Shall be prima facie evidence of the right of the officer to make such sale, and conclusive evidence of the regularity of the proceedings in making the sale; and,

2. As conveyances. -- Shall transfer to the purchaser all right, title and interest of the employer in and to the property sold; and,

3. As authority for transfer of corporate stock. -- If such property consists of stocks, shall be notice of such transfer when received by any corporation, company or association and shall be authority to such corporation, company or association to record the transfer on its books and records in the same manner as if the stocks were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not; and,

4. As receipts. -- If the subject of sale is securities or other evidences of debt, shall be a good and valid receipt to the person holding the same, as against any person holding or claiming to hold possession of such securities or other evidences of debt; and,

5. As authority for transfer of title to motor vehicle. -- If such property consists of a motor vehicle, shall be notice, when received, to any public official charged with the registration of title to motor vehicles, of such transfer and shall be authority to such official to record the transfer on the books and records in the same manner as if the certificate of title to such motor vehicle has been transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

b. Effect of junior encumbrances. -- A certificate of sale of personal property given pursuant to subsection 11.7. of this section shall discharge such property from all liens, encumbrances and titles over which the lien of the Commissioner with respect to which the levy was made had priority.

11.9. Records of sale. -- The Commissioner shall for each county, keep a record of all sales of property under subsection 11.4. of this section and of redemptions of such property. The record shall set forth the debt for which any such sale was made, the date of seizure and sale, the name of the debtor and all proceedings in making such sale, the amount of expenses and the names of the purchasers and the date and a copy of the certificate of sale. A copy of such report, or any part thereof, certified by the Commissioner shall be evidence in any court of this state of the truth of the facts therein stated.

11.10. Expense of levy and sale. -- The Commissioner shall determine the expenses to be allowed in all cases of levy and sale under this article.

11.11. Application of levy.

a. Collection of liability. -- Any money realized from a levy shall be applied as follows: (a) first, against the expenses of the proceedings; (b) second, any amount remaining shall then be applied against the liability in respect of which the levy was made and the sale was conducted; and, (c) third, any amount still remaining shall then be applied against any other default liability of the employer for which levy may be made under this rule.

b. Surplus proceeds. -- Any surplus proceeds remaining after the application of subdivision a. of this subsection shall, upon application and satisfactory proof in support thereof, be credited or refunded by the Commissioner to the person or persons legally entitled thereto.

11.12. Authority to release levy and return property.

a. Release of levy. -- It shall be lawful for the Commissioner to release the levy upon all or part of the property or rights to property levied upon where the Commissioner determines that such action will facilitate the collection of the liability, but such release shall not operate to prevent a subsequent levy.

b. Return of property. -- If the Commissioner determines that property has been wrongfully levied upon, it shall be lawful for the Commissioner to return: (a) the specific property levied upon; (b) an amount of money equal to the amount of money levied upon; or, (c) an amount of money equal to the amount of money received by the Commissioner from a sale of such property. Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of nine (9) months from the date of such levy or thereafter if a demand in writing to the Commissioner has been made within such time period. For purposes of this subsection, if property is declared purchased by the Commissioner at a sale pursuant to subsection 11.4. of this section, the Commissioner shall be treated as having received an amount of money equal to the minimum price determined pursuant to such subsection or, if larger, the amount received by the Commissioner from the resale of such property.

c. Public information. -- The Commissioner shall, upon request, make public the names and persons in whose favor a release of levy or return of property has been made as provided in subdivisions a. and b. of this subsection.

§85-11-12. Payment Agreements.

12.1. Any default employer owing payment and interest due thereon under chapter twenty-three of the West Virginia Code or the rules promulgated thereunder, including, but not limited to, money owed to the Old Fund, money owed to the Uninsured Employers' Fund and money owed pursuant to liabilities accrued by the employer while the employer was self-insured, may, at the discretion of the Commissioner, make application, on a form provided by the Commissioner, to enter into a payment agreement with the Commissioner which provides for payment of the entire default liability payment owed in installments.

12.2. As a prerequisite to entering into a payment agreement, a default employer as described in subsection 12.1. of this section must make a good faith payment of ten percent

(10%) of the total current outstanding liability owed. The Commissioner has discretion to increase or reduce the required amount of the good faith payment if, in the sole discretion of the Commissioner, such reduction would be in the best interest of the State's workers' compensation market.

12.3. A default employer as described in subsection 12.1. of this section who enters into a payment agreement and also provides the Commissioner with a current certificate of workers' compensation insurance shall be removed from the Default List.

12.4. Pursuant to section 5. of this rule, the Commissioner may direct that a complete audit of the employer be made at any time after an application to enter into a payment agreement is received from the employer. Failure by the employer to comply with the audit shall be cause for the application to be denied, or for immediate nullification of the payment agreement, if entered into, and placement of the employer on the Default List.

12.5. An employer may make application to enter into a payment agreement despite the pendency of some other remedial action that may have been instituted by the Commissioner. The Commissioner may then delay or continue further pursuit of that remedial action if, in the Commissioner's sole discretion, the interests of the State's workers' compensation market will be protected or furthered despite such delay or continuance. One factor that the Commissioner may rely upon, but not to the exclusion of other possible factors, is whether the employer has previously defaulted on a payment agreement with the Commissioner or on a reinstatement agreement with the Commissioner or former Workers' Compensation Commission or its predecessors. In the event of a default by the employer on a previous agreement, the Commissioner will generally, unless some other good cause exists to the contrary, continue to proceed with the other remedies.

12.6. Permitting an employer to enter into a payment agreement is discretionary with the Commissioner. Such discretion shall be exercised with regard to the best interests of the State's workers' compensation market, including, but not limited to, the administration of the Old Fund, Uninsured Employers' Fund and the self-insured community. Should the Commissioner decline to enter into a payment agreement, then the Commissioner may proceed with any of the collection and enforcement efforts provided for by these rules; by W. Va. Code §23-2-5a or as otherwise provided for by the West Virginia Code.

12.7. The Commissioner may permit the payment of all amounts due to the Old Fund, Uninsured Employers' Fund, or owed pursuant to liabilities accrued by the employer while the employer was self-insured, or any combination thereof, upon the terms stated in a payment agreement. The Commissioner shall exercise discretion to enter into such an agreement and shall prescribe the terms of an agreement.

12.8. Pursuant to W. Va. Code §33-2-22(d), the Commissioner shall have authority, as part of a payment agreement, to waive or reduce penalty or interest due to the Old Fund. Additionally, pursuant to W. Va. Code §23-2C-8(d)(2)(C), and W. Va. Code St. R. §85-9-7.3., the Commissioner shall have authority, as part of a payment agreement, to waive or reduce any amount owed to the Uninsured Employers' Fund as part of a payment agreement. In all cases

when the Commissioner agrees to waive or reduce amounts owed to the Old Fund and/or Uninsured Employers' Fund as described in this subsection, such decision shall be made consistent with the best interests of the Old Fund and/or Uninsured Fund, as the case may be. If the employer defaults on the payment agreement, the waiver or reduction will be null and void, and the employer will be deemed to owe the original amount.

12.9. The interest rate agreed to in a payment agreement shall not change over the term of the agreement.

12.10. Generally, absent exigent circumstances, the term of an agreement shall not exceed three (3) years, and in no instance shall the term of an agreement exceed five (5) years. The Commissioner shall set the payment agreement's term of payment for that period of months in which the Commissioner believes the applicant is financially capable of repaying the default liability. Upon written request, an employer currently under a payment agreement and in good standing in regard to such agreement may make a written request for the time frame of the payment agreement to be extended by up to two (2) years, or an amount of time which would make the total time frame of the payment agreement five (5) years, whichever time period is longer. The granting of an extension to a payment agreement shall be in the sole discretion of the Commissioner based on the Commissioner's determination of good cause for the same. If an extension is granted, it shall be done by a new written draft of the previous payment agreement.

12.11. The breach of a payment agreement by the employer shall render the agreement void and of no legal effect and the breaching employer shall be immediately placed on the Default List retroactive from the date that the employer's account originally entered default or delinquency in the case of certain Old Fund accounts: *Provided*, That the employer shall be credited for any amounts paid by the employer under the payment agreement prior to defaulting on the agreement. Nothing in this section shall apply to any other type of collection or enforcement method under chapter twenty-three of the West Virginia Code or the rules promulgated thereunder.

§85-11-13. Administrative Hearings.

All administrative hearings conducted pursuant to this rule will be held in accordance with the provisions of W. Va. Code §29A-5-1, et seq., and with the provisions of Sections 4. through 10. of 85 C.S.R. 7, "Rules for Selected Hearings."

§85-11-14. Interest.

14.1. Any and all payments unpaid on the date on which due and payable, as prescribed by the Commissioner, shall immediately begin bearing interest. Interest shall be compounded quarterly until payment plus accrued interest is received by the Commissioner; except that future interest for payment agreements shall be calculated and provided at a simple rate of interest. Interest collected pursuant to this subsection shall be paid into the Old Fund, Uninsured Employers' Fund or Self-Insured Guaranty Risk Pool or Security Risk Pool (as established in W. Va. Code St. R. §85-19-1, et seq.), whichever is applicable.

14.2. Notwithstanding the provisions of subsection 14.1. of this section, in no event shall the rate of interest charged a political subdivision of the State or a volunteer fire department exceed ten percent per annum.

§85-11-15. Reserved.

§85-11-16. Criminal Penalties.

In addition to all other remedies available to the Commissioner, in accordance with W. Va. Code §61-3-24e, the Commissioner may elect to request prosecution of any person, firm, partnership, association, corporation or other entity who violates certain provisions of chapter twenty-three of the West Virginia Code or the rules promulgated thereunder. Notice should also be taken of the provisions of subsections 4.2. and subdivision b., subsection 11.3. of this rule for other specific provisions concerning criminal penalties.

§85-11-17. Freedom of Information Act.

Pursuant to the Freedom of Information Act, W. Va. Code §29B-1-1, et seq., as part of any hearing or proceeding held under this rule, all of the evidence and records submitted during a hearing, or as part of a stipulation, except insofar as those records contain confidential medical information or other information confidential to a workers' compensation claimant, employer, or other person or entity shall be subject to public inspection and copying; except that, if under the rules of evidence certain testimony or documentary evidence may be deemed privileged or confidential and placed under seal, then upon such a ruling by the hearing officer, such testimony or documentary evidence shall not be disclosed. If the privileged or confidential information cannot be excised from a record, then the record as a whole will be deemed confidential and sealed; however, the Commissioner shall release in its place a statement explaining in detail the basis for the withholding of the record.

§85-11-18. Placement on Workers' Compensation Default List; Due Process and Hearing.

18.1. When the Commissioner is made aware that an employer is in default, the Commissioner shall send the alleged default employer a notice informing the employer of the circumstances causing the employer to be in default and warning the employer that they will be placed on the default list within fifteen (15) days of the date on the letter. The notice shall also inform the employer that the employer may request an expedited administrative hearing before the Commissioner if the employer believes that the impending action by the Commissioner is factually or legally erroneous.

18.2. A request for an expedited administrative hearing, as described in subsection 18.1. of this section, shall clearly identify why the employer believes the Commissioner's impending action of placing it on the Default List is legally or factually erroneous. Upon receiving the request, the Commissioner shall, within five (5) business days, schedule a hearing which shall be conducted in accordance with the provisions of article five [§29A-5-1, et seq.], chapter twenty-nine-a of this code and W. Va. Code St. R. §85-7-4 through 10. An appeal from a final decision of the Commissioner shall be taken in accordance with the provisions of articles five and six

[§29A-6-1, et seq.] of said chapter: *Provided*, That all appeals shall be taken to the Circuit Court of Kanawha County.

18.3. If an employer files a request for an expedited hearing pursuant to subsections 18.1. and 18.2. of this section, the fifteen (15) day time frame for placing the employer on the default list shall be postponed until the Commissioner's final order upon the expedited hearing is issued.

18.4. If the final decision of the Commissioner following the hearing is that the employer should be placed on the Default List, the employer shall immediately be placed on the Default List.

18.5. The administrative appeal process described in this section does not interfere with or toll a private carrier's right to terminate the employer's workers' compensation coverage. The private carrier's right to terminate an employer's workers' compensation coverage is based upon the provisions of the insurance policy and the applicable law in chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

§85-11-19. Removal From the Default List.

19.1. If an employer has met all of its legal, fiscal or other obligations, including providing proof of current mandatory West Virginia workers' compensation coverage, thereby removing the employer from being in default, the Commissioner shall remove the employer from the Default List.

19.2. An employer on the Default List shall be permitted at any time to make a written request to the Commissioner for removal from the Default List: *Provided*, That such request is accompanied by evidence not previously submitted to the Commissioner which indicates that the employer making the request has met its legal, fiscal or other obligations and therefore is entitled to be removed from the Default List. The Commissioner shall render a written decision on employers' request for removal within ten (10) days of the receipt of the same.

19.3. Employers may file a petition with the Commissioner requesting an administrative hearing before the Commissioner if they disagree with the decision of the Commissioner in regard to a request for removal pursuant to subsection 19.2. of this section, and the Commissioner shall schedule a hearing within thirty (30) days, to otherwise be conducted as described in the above section 18. of this rule: *Provided*, That the Commissioner reserves the right to summarily deny an employer's petition for a hearing if the Commissioner determines that the employer presented no new evidence to the Commissioner in support of its written request for removal, is presenting evidence of no probative value or is otherwise making a frivolous request.

§85-11-20. Uninsured Fines.

20.1. Any employer that is in policy default shall be fined by the Commissioner an amount equal to twice the amount of premium they would have owed to their private carrier for

coverage up to the date on which the employer entered policy default. The fine shall be increased on a monthly basis using the same methodology until the employer obtains a West Virginia workers' compensation policy.

20.2. Any employer discovered to be operating without mandatory West Virginia workers' compensation coverage, but who has never obtained a West Virginia workers' compensation policy, shall be fined an amount equal to twice the amount of premium they would have paid for coverage during the current half calendar year term had they obtained a West Virginia workers' compensation policy. The fine shall be increased on a monthly basis using the same methodology until the employer obtains a West Virginia workers' compensation policy. The estimate of premium in this section shall be based on information available to the Commissioner through a reasonable investigation of the default employers' employment operations. If the default employer refuses to fully cooperate with the investigation, the maximum fine as set forth in subsection 20.3. of this rule shall be imposed.

20.3. Pursuant to W. Va. Code §23-2C-8(d)(3), no fine imposed in this section for any single instance of default shall exceed ten thousand dollars (\$10,000). However, if an employer is removed from default status and re-enters default, a new fine as described in this section may be imposed.

§85-11-21. Employer Violator System.

21.1. Every employer subject to placement on the Default List shall also be placed in the Employer Violator System {W. Va. Code §23-1-1b(g)(25)}, and shall remain in the Employer Violator System until such time as the employer is removed from the Default List.

21.2. All individuals who own, are officers, members or partners of, control, have a 10% ownership interest in, or are otherwise deemed to have a substantive or active ownership interest in an employer company which is on the Default List shall be placed in the Employer Violator System, and shall remain in the Employer Violator System until such time as the employer is removed from the Default List.

PUBLIC HEARING
SEPTEMBER 11, 2008

**OFFICES OF THE WEST VIRGINIA INSURANCE COMMISSIONER
WORKERS' COMPENSATION INDUSTRIAL COUNCIL**

**TITLE 85, SERIES 11
"EMPLOYER DEFAULT, ENFORCEMENT, COLLECTIONS
AND RELATED MATTERS"**

Transcript of the Public Hearing held on Thursday, September 11, 2008, at 3:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

Industrial Council Members Present:

Charles Bayless, Chairman
Bill Dean
Kent Hartsog
Dan Marshall
Walter Pellish (via telephone)

Chairman Bayless: As I read this about a month ago I thought you do not want to be an employer in default. I think you left out the part about the firstborn – taking the firstborn as collateral. But other than that the basis are pretty well covered. Mr. Sims or Ms. Pickens, do you have anything to say?

Mary Jane Pickens (General Counsel OIC): No.

Ryan Sims (Associate Counsel, OIC): Not at this time.

Chairman Bayless: Does any member of the Council wish to comment on this rule? Does any member of the public wish to speak? There have already been comments submitted, but if you wish to say anything you are more than welcome.

[There were no comments.]

PUBLIC HEARING

Title 85, Series 11

Employer Default, Enforcement, Collections and Related Matters

Offices of the West Virginia Insurance Commissioner

1124 Smith Street, Room 400, Charleston, WV

September 11, 2008

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