

Senate Bill No. 607

(By Senators Barnes and Tucker)

[Introduced February 15, 2012; referred to the Committee on the
Judiciary.]

10 A BILL to amend and reenact §33-11-4a of the Code of West Virginia,
11 1931, as amended, relating to third-party bad faith actions;
12 creating a cause of action for third parties to remedy unfair
13 claims settlement practices; requiring written notice to
14 potential defendant before filing action; stating certain
15 requirements for the notice; setting statute of limitations;
16 establishing certain criteria to proceed to jury trial;
17 requiring proof of claim by clear and convincing evidence;
18 setting a certain presumption of bad faith; and declaring the
19 types of damages that are recoverable and when certain damages
20 are recoverable.

21 *Be it enacted by the Legislature of West Virginia:*

22 That §33-11-4a of the Code of West Virginia, 1931, as amended,
23 be amended and reenacted to read as follows:

1 **ARTICLE 11. UNFAIR TRADE PRACTICES.**

2 **§33-11-4a. Complaints by third-party claimants.**

3 (a) A third-party claimant may ~~not~~ bring a private cause of
4 action ~~or any other action~~ against any person for an unfair claims
5 settlement practice. ~~A third-party claimant's sole remedy against~~
6 ~~a person for an unfair claims settlement practice or the bad faith~~
7 ~~settlement of a claim is the filing of an administrative complaint~~
8 ~~with the Commissioner in accordance with subsection (b) of this~~
9 ~~section. A third-party claimant may not include allegations of~~
10 ~~unfair claims settlement practices in any underlying litigation~~
11 ~~against an insured. If a third-party claimant desires to make a~~
12 ~~claim for an unfair claims settlement practice, the claimant shall~~
13 ~~follow the requirements stated in this section.~~

14 ~~(b) A third-party claimant may file an administrative~~
15 ~~complaint against a person for an alleged unfair claims settlement~~
16 ~~practice with the commissioner. The administrative complaint shall~~
17 ~~be filed as soon as practicable but in no event later than one year~~
18 ~~following the actual or implied discovery of alleged unfair claims~~
19 ~~settlement practice.~~

20 ~~(1) The administrative complaint shall be on a form provided~~
21 ~~by the Commissioner and shall state with specificity the following~~
22 ~~information and such other information as the Commissioner may~~
23 ~~require.~~

1 ~~(A) The statutory provision, if known, which the person~~
2 ~~allegedly violated;~~

3 ~~(B) The facts and circumstances giving rise to the violation;~~

4 ~~(C) The name of any individual or other entity involved in the~~
5 ~~violation; and~~

6 ~~(D) Reference to specific policy language that is relevant to~~
7 ~~the violation, if known.~~

8 ~~(2) If the administrative complaint is deficient, the~~
9 ~~Commissioner shall contact the third-party claimant within fifteen~~
10 ~~days of receipt of the complaint to obtain the necessary~~
11 ~~information.~~

12 ~~(3) Upon receipt of a sufficiently complete administrative~~
13 ~~complaint, the Commissioner must provide the person against whom~~
14 ~~the administrative complaint is filed written notice of the alleged~~
15 ~~violation.~~

16 ~~(4) If the person against whom the administrative complaint~~
17 ~~was filed substantially corrects the circumstances that gave rise~~
18 ~~to the violation or offers to resolve the complaint in a manner~~
19 ~~found reasonable by the Commissioner within sixty days after~~
20 ~~receiving the notice from the Commissioner pursuant to subdivision~~

21 ~~(3) of this subsection, the Commissioner shall close the complaint~~
22 ~~and no further action shall lie on the matter, either by the~~
23 ~~Commissioner or by the third party.~~

1 ~~(5) The person that is the recipient of a notice from the~~
2 ~~Commissioner pursuant to subdivision (3) of this subsection shall~~
3 ~~report to the Commissioner on the disposition of the alleged~~
4 ~~violation within fifteen days of the disposition but no later than~~
5 ~~sixty days from receipt of notice of the complaint from the~~
6 ~~Commissioner.~~

7 (b) A third-party claimant shall file a civil action under
8 this section as soon as practicable but in no event later than one
9 year following the actual or implied discovery of the alleged
10 unfair claims settlement practice. As a condition precedent to
11 bringing an action under this section, the third-party claimant
12 shall provide written notice of the alleged violation to the person
13 sixty days prior to initiating a civil action. The written notice
14 shall include the following:

15 (1) A specific explanation of the facts and circumstances
16 giving rise to the alleged violation, including all assertions
17 required by this section;

18 (2) The specific section of code that the person allegedly
19 violated;

20 (3) The identity, if known, of any individual involved in the
21 alleged violation;

22 (4) Reference to the specific policy language that is relevant
23 to the violation, if known by the third-party claimant; and

1 (5) A statement that the notice is given in order to perfect
2 the right to pursue a civil action as provided by this section.

3 The insurer has the sixty-day notice period to evaluate the
4 allegations and attempt to resolve the matter prior to the
5 initiation of a civil action. The one-year statute of limitations
6 stated in this subsection shall be tolled during the sixty-day
7 notice period.

8 ~~(c) If the third party claim is not resolved within the sixty-~~
9 ~~day period described in subdivision (4), subsection (b) of this~~
10 ~~section through either the person's substantial correction of the~~
11 ~~circumstances giving rise to the alleged violation or an offer from~~
12 ~~the person to resolve the administrative complaint that is found to~~
13 ~~be reasonable by the Commissioner, the Commissioner shall conduct~~
14 ~~any investigation he or she considers necessary to determine~~
15 ~~whether the allegations contained in the administrative complaint~~
16 ~~are meritorious.~~

17 ~~(d) Following the time period and investigation provided in~~
18 ~~subsection (c) of this section, if the Commissioner finds that~~
19 ~~merit exists for a complaint and the complaint has not been~~
20 ~~resolved, the Commissioner shall forward a complete copy of the~~
21 ~~complaint to the Office of Consumer Advocacy and, if at his or her~~
22 ~~discretion, may order further investigation and hearing to~~
23 ~~determine if the person has committed an unfair claims settlement~~

~~1 practice with such frequency as to constitute a general business
2 practice. Notice of any hearing shall be provided to all parties.
3 The Commissioner shall assign a time and place for a hearing and
4 shall notify the parties of the hearing by written notice at least
5 ten days in advance thereof. The hearing shall be held within
6 ninety days from the date of filing the complaint unless the
7 complaint has been successfully resolved pursuant to subdivision
8 (4), subsection (b) of this section or continued by agreement of
9 all parties or by the Commissioner for good cause. The
10 Commissioner shall cause hearings to be conducted in the
11 geographical region of the state where the complainant resides.
12 The Commissioner may promulgate rules pursuant to article three,
13 chapter twenty-nine-a of this code necessary, pursuant to the
14 authority of this chapter, to establish procedures to conduct
15 hearings pursuant to this section and chapter.~~

~~16 (e) If the Commissioner finds that the person has committed the
17 unfair claims settlement practice with such frequency as to
18 constitute a general business practice; the Commissioner may
19 proceed to take administrative action he or she considers
20 appropriate in accordance with section six of this article or as
21 otherwise provided in this chapter. If the Commissioner finds that
22 the person engaged in any method of competition, act or practice
23 that involves an intentional violation of subdivision (9), section~~

~~1 four of this article, and even though it has not been established
2 that the person engaged in a general business practice, the
3 Commissioner may proceed to take administrative action he or she
4 considers appropriate in accordance with subsection (b), section
5 six of this article. The person is entitled to notice and hearing
6 in connection with the administrative proceeding.~~

~~7 (f) A finding by the Commissioner that the actions of a person
8 constitute a general business practice may only be based on the
9 existence of substantially similar violations in a number of
10 separate claims or causes of action.~~

~~11 (g) A good faith disagreement over the value of an action or
12 claim or the liability of any party to any action or claim is not
13 an unfair claims settlement practice.~~

~~14 (h) The Commissioner, pursuant to article three, chapter
15 twenty-nine-a of this code, may promulgate by emergency rule
16 standards for subsection (9), section four of this article.~~

17 (c) In order to bring a cause of action under this section,
18 the third-party claimant shall allege either or both of the
19 following:

20 (1) That the person has committed the unfair claims settlement
21 practice with such frequency as to constitute a general business
22 practice; or

23 (2) That the specific unfair claims settlement practice was

1 committed flagrantly and in conscious disregard of section four of
2 this article.

3 Before the cause of action can proceed to trial, the presiding
4 judge must determine whether the claimant can present sufficient
5 evidence such that a reasonable jury could find by clear and
6 convincing evidence that the person both committed an unfair claim
7 settlement practice in the specific allegation at issue and either
8 or both of the following:

9 (1) That the person has committed the practice with such
10 frequency as to constitute a general business practice; or

11 (2) That the unfair claim settlement practice was committed
12 flagrantly and in conscious disregard of section four of this
13 article.

14 If the presiding judge determines that the claimant cannot
15 present sufficient evidence, as outlined in this section, then
16 summary judgment shall be granted to the defendant.

17 (d) In order to succeed on a claim under this section at
18 trial, the jury or judge must find by clear and convincing evidence
19 that the person both committed an unfair claim settlement practice
20 in the specific instance at issue and that either or both of the
21 following occurred:

22 (1) The person has committed the practice with such frequency
23 as to constitute a general business practice; or

1 (2) The unfair claim settlement practice was committed
2 flagrantly and in conscious disregard of section four of this
3 article.

4 (e) A good faith disagreement over the value of an action or
5 claim or the liability of any party to any action or claim is not
6 an unfair claims settlement practice. However, evidence showing
7 that a jury returned an award greater than the third-party
8 claimant's greatest settlement demand for an underlying claim in
9 underlying litigation creates a presumption of an unfair claims
10 settlement practice.

11 (f) If a third-party claimant succeeds at trial on a claim
12 under this section, the third-party claimant may recover all actual
13 damages, including damages for mental anguish, annoyance and
14 inconvenience and actual damages suffered by the third-party
15 claimant by reason of the commission of an unfair claims settlement
16 practice. In addition, the third-party claimant is entitled to
17 recover the costs of litigation and reasonable attorneys fees from
18 any defendant that did not resolve the dispute during the sixty-day
19 notice period provided by this section.

20 No punitive damages may be awarded under this section unless
21 the acts giving rise to the violation occur with such frequency as
22 to indicate a regular business practice and the acts are willful,
23 wanton or malicious.

1 ~~(i)~~ (g) Nothing in this section in any way limits the rights
2 of the commissioner to investigate and take action against a person
3 which the commissioner has reason to believe has committed an
4 unfair claims settlement practice or has consistently resolved
5 administrative complaints by third-party claimants within the
6 sixty-day period set forth in subdivision (4), subsection (b) of
7 this section.

8 ~~(j)~~ (h) Definitions:

9 (1) "Third-party claimant" means any individual, corporation,
10 association, partnership or any other legal entity asserting a
11 claim against any individual, corporation, association, partnership
12 or other legal entity insured under an insurance policy or
13 insurance contract for the claim in question.

14 (2) "Unfair claims settlement practice" means a violation of
15 subsection (9), section four of this article.

16 (3) "Underlying litigation" means a third-party claimant's
17 lawsuit involving a claim against an insured.

18 (4) "Underlying claim" means the claim by a third-party
19 claimant against an insured.

NOTE: The purpose of this bill is to establish a third-party
bad faith claim against insurance companies.

Strike-throughs indicate language that would be stricken from
the present law, and underscoring indicates new language that would

be added.