STATE OF WEST VIRGINIA

Offices of the Insurance Commissioner

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Insurance Commissioner

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WEST VIRGINIA INFORMATIONAL LETTER

NO. 199

TO: All Insurance Companies Doing Business in the State of West Virginia, Insurance Trade Associations, Insurance Media Publications and Other Interested Persons

RE: Summary of 2017 Legislation

This Informational Letter summarizes significant insurance and workers' compensation legislation enacted during the 2017 Regular Session and First Special Session of the West Virginia Legislature. It does not necessarily include all legislation that may affect the insurance industry or insurance consumers and is only intended to highlight the major points in the more important bills. The explanations contained herein should in no way be construed as being indicative of the Insurance Commissioner's views on or interpretation of the legislation. The bills are available on the Legislature's website at www.legis.state.wv.us.

2017 REGULAR SESSION

Senate Bill 127 – Relating to Adoption of NAIC's Valuation Manual and Repeal of Legislative Rules (Effective March 24, 2017)

This bill authorized a new legislative rule proposed by the Insurance Commissioner. The rule, 114 CSR 98 (effective May 19, 2017), adopts the National Association of Insurance Commissioners' valuation manual, which sets forth minimum reserve and related requirements of life insurance, accident and health insurance, and deposit-type contracts. The valuation manual addressed the need to develop standards that enhanced uniformity among the principle-based valuation requirements across the states. In accordance with W. Va. Code §33-7-9(n)(2), the operative date of the Valuation Manual for the State of West Virginia shall be January 1, 2017.

The legislation further repealed two insurance rules, effective March 24, 2017. The nullified rules, 114 CSR 17 and 114 CSR 51, had been superseded by the promulgation of 114 CSR 24 and 114 CSR 95 respectively.

Senate Bill 151 – Relating to Amended Rules of Board of Risk and Insurance Management (Effective April 4, 2017)

This bill authorized two amended legislative rules of the Board of Risk and Insurance Management ("BRIM"). Under W. Va. Code § 33-30-1 *et seq.*, insurers issuing policies to cover structures in the state, with the exception of certain designated counties, are required to provide mine subsidence insurance unless such coverage is waived by the insured. The premium charged for this coverage is set by BRIM in 115 CSR 1, with BRIM acting as a reinsurer. The amended rule provision reflects the statutory change made by House Bill 4734, enacted during the 2016 regular session of the Legislature, which raised the available coverage for mine subsidence insurance to $200,000 by increasing the total value that BRIM may reinsure from $75,000 to $200,000.

BRIM also proposed amendments to 115 CSR 7 relating to the Patient Injury Compensation Fund ("PICF"), which was created to provide compensation to claimants in medical malpractice actions for any portion of certain economic damages awards that are uncollectable because of statutory limitations on economic damages. The rule changes were necessary to implement statutory amendments made by the Legislature in 2016. The rule amendments (1) closed PICF to claims filed after June 30, 2016; (2) expanded the options available to BRIM in the event claims received by BRIM through June 30, 2016 cannot be paid in full at the beginning of the next fiscal year; (3) provided that BRIM may pay awards in lump sums or via structured settlements; (4) mirrored the statutory provision that attorney fees may not be paid from PICF; (5) clarified that BRIM may retain experts in the fields of accounting, economics, medicine, life care planning, or other fields relevant to one or more claims as necessary to implement the authority of BRIM to review claims; and (6) specified that BRIM must be afforded the opportunity to review the evidence, cross examine witnesses, and present evidence in support of its position in administrative hearings requested by claimants.

Senate Bill 338 – Relating to Medical Professional Liability (Effective June 29, 2017)

This legislation amended state law concerning a medical professional liability lawsuit against a nursing home, assisted living facility, or a distinct part of an acute care hospital providing intermediate care or skilled nursing care that arises or accrues on or after July 1, 2017. Pursuant to the legislative amendments, such an action must be commenced within one year of the date of injury or within one year of the date when the person discovers, or with the exercise of reasonable diligence should have discovered, the injury. If a complainant has insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable statute of limitations, the claimant must furnish the health care provider with a statement of intent to provide the certificate within one hundred eighty days of the date the health care provider receives a notice of claim. Also, such suits must be brought in the circuit court of the county in which the alleged act of medical professional liability occurred, unless the health care facility and the plaintiff agree to another venue.

Senate Bill 360 – Relating to the Coalition on Diabetes Management (Effective July 6, 2017)

This bill created the Coalition on Diabetes Management. The Coalition is to be comprised of various health care professionals, with the Dean of the School of Public Health at West Virginia University serving as chair. The principle objective of the Coalition is to address pertinent issues related to diabetes by providing guidance to the Legislature regarding potential statutory solutions for the proper regulation of diabetes management. The Insurance Commissioner is one of the state agencies assigned to assist the Coalition with respect to the exchange of data, information and expertise, if so requested by the Coalition.

Senate Bill 362 – Relating to the Redirection of Certain Amounts to the General Revenue Fund (Effective July 7, 2017)

This legislation permits the Governor to redirect, from the Workers' Compensation Debt Reduction Fund to the General Revenue Fund, seventy-five percent of the proceeds generated from surcharge assessments for workers' compensation "Old Fund" debt reduction.

Senate Bill 522 – Relating to Pharmacy Audits (Effective July 3, 2017)

This bill defines audit procedures between pharmacy benefits managers (or other auditing entities) and pharmacies with respect to the administration or management of prescription drug benefits provided by a covered entity to a covered individual under a health insurance policy. The legislation requires that the entity conducting an audit establish an appeals process to allow the pharmacy an opportunity to challenge the final audit report. The bill also requires auditing entities to register with the Insurance Commissioner. An insurer or other entity licensed by the Insurance Commissioner, or a pharmacy benefits manager that is registered as a third-party administrator pursuant to Article 46, Chapter 33 of the West Virginia Code, are not required to register as an auditing entity.

Senate Bill 581 – Relating to the Insurable Interest of a Trustee (Effective July 4, 2017)

This legislation provides that a trustee of a trust has an insurable interest in the life of an individual insured under a life insurance policy that is owned by the trustee acting in a fiduciary capacity or that designates the trust itself as the owner if, on the date the policy is issued, the insured is a grantor of the trust or an individual in whom a grantor of the trust has, or would have had if living at the time the policy was issued, an insurable interest pursuant to W. Va. Code § 33-6-2. The life insurance proceeds must also be primarily for the benefit of one or more trust beneficiaries that have an insurable interest in the life of the insured as provided by W. Va. Code § 33-6-2.

Senate Bill 636 – Relating to a Pilot Project Program to Address Problems Facing Volunteer Fire Departments (Effective July 5, 2017)

This bill permits the State Fire Commission to establish a pilot project program for the purpose of implementing changes to standards imposed on volunteer firefighting in order to address problems that volunteer fire departments are encountering in the state. Beginning July 1, 2018, the State Fire Commission must annually provide a full summary report of the status of the program to the Legislature's Joint Committee on Government and Finance.

House Bill 2119 – Relating to the Repeal of the West Virginia Health Benefit Exchange Act (Effective July 4, 2017)

This legislation repealed the West Virginia Health Benefit Exchange Act. The provisions of the Act were never implemented as a result of West Virginia choosing to partner with the federal government in facilitating a health insurance exchange.

House Bill 2300 – Relating to Step Therapy Protocols in Health Benefit Plans (Effective June 19, 2017)

This law requires health benefit plans to have a clear and convenient process by which a patient or prescribing healthcare provider may request and, if appropriate, receive an exception to a step therapy protocol. The process must be easily accessible on the health plan issuer's website. "Step therapy protocol" means a protocol or program that establishes the specific sequence in which prescription drugs for a specified medical condition, and medically appropriate for the patient, are covered by a health plan issuer. A request for an exception to a step therapy protocol must be

promptly approved by the health plan issuer if: (1) the required prescription drug is contraindicated or will likely cause an adverse reaction by or physical or mental harm to the patient; (2) the required prescription drug is expected to be ineffective based on the known relevant physical or mental characteristics of the patient and the known characteristics of the prescription drug regimen; (3) the patient has tried the required prescription drug while under their current or a previous health insurance or health benefit plan, or another prescription drug in the same pharmacologic class or with the same mechanism of action and such prescription drug was discontinued due to a lack of efficacy or effectiveness, diminished effect, or an adverse event; (4) the required prescription drug is not in the best interest of the patient, based upon medical appropriateness; or (5) the patient is stable on a prescription drug selected by their health care provider for the medical condition under consideration. The health plan issuer is required to provide a prescription drug for treatment of the medical condition at least until the step therapy exception determination is made. Upon approval of a step therapy exception, the health plan issuer must authorize coverage for the prescription drug prescribed by the patient's treating healthcare provider, as long as such prescription drug is a covered drug under the policy or contract.

House Bill 2301 – Relating to Direct Primary Medical Care (Effective June 13, 2017)

This bill permits a person to enter into a "direct primary care membership agreement" with a primary care provider and pay a periodic fee for the provision of medical services and products. The provider may accept payment for medical services or medical products outside of an insurance plan or outside of the Medicaid or Medicare program. However, a patient does not forfeit insurance benefits, Medicaid benefits or Medicare benefits by purchasing medical services or medical products outside the system. The provider may not bill third parties on a fee for service basis for services provided under the agreement. The agreement is not insurance or a discount medical plan and is not subject to regulation by the Insurance Commissioner. The agreement must, among other things, describe the scope of primary care services that are covered by the periodic fee, specify the duration of the agreement including any automatic renewal periods and prominently state in writing that the agreement is not health insurance.

House Bill 2402 – Relating to Salvage Certificates for Vehicles Involved in Total Loss Claims (Effective July 7, 2017)

This legislation allows an insurance company that is unable to obtain a properly endorsed certificate of title for a motor vehicle within thirty days of the payment of a total loss claim, to apply to the Division of Motor Vehicles for a salvage certificate, a cosmetic total loss salvage certificate or a nonrepairable motor vehicle certificate, as applicable. The application must include: (1) evidence that the insurer has paid a total loss claim on the vehicle; (2) a copy of a written request for the certificate of title sent to the vehicle owner and any known lienholder by the insurer; (3) proof that the request was sent by certified mail, return receipt requested, to the last known address of the vehicle owner and any known lienholder; and (4) the required application fee. A salvage certificate, cosmetic total loss salvage certificate or nonrepairable motor vehicle certificate must be issued free and clear of all liens and claims of ownership. The insurer must indemnify and hold harmless the Division of Motor Vehicles from any liability arising from an error or misrepresentation made during the application process.

House Bill 2459 – Relating to Small Group Health Benefit Plans (Effective March 30, 2017)

This bill transfers certain obligations of the Health Care Authority to the Insurance Commissioner with respect to small group health benefit plans. Specifically, the Commissioner must annually provide a written notice by regular mail to all known in-state health care providers. The notice must inform the provider regarding the provisions of W. Va. Code § 33-16D-16 and advise the provider that if he/she/it does not give written refusal to the Commissioner within thirty days from receipt of the notice, the provider must participate with and accept the products and provider reimbursements authorized under W. Va. Code § 33-16D-16. Once a provider has filed a notice of refusal to participate, the notice shall remain effective until rescinded by the provider and the provider shall not be required to renew the notice each year.

House Bill 2486 – Relating to Medical Records Obtained by Insurers (Effective June 29, 2017)

This legislation concerns medical records and medical billing records obtained by insurers in connection with insurance claims or civil litigation. It provides that such records shall be confidentially maintained by insurers in accordance with state and federal law. The bill further provides that, with respect to the housing or release of such records, no additional restrictions or conditions may be imposed that contradict or are inconsistent with any applicable policy of insurance or the performance of insurance functions, or otherwise authorized by state and federal law.

House Bill 2619 – Relating to the Risk Management and Own Risk and Solvency Assessment Act (Effective January 1, 2018)

This law adopts the National Association of Insurance Commissioners' Risk Management and Own Risk Solvency Assessment Model Act (Model #505) for implementation by West Virginia insurers so that they are better equipped to assess their financial condition and remain solvent. This bill fosters effective enterprise risk management practices of licensed insurers and provides a group level perspective on the risks potentially posted to policyholders. The "ORSA Summary Report" required by the bill is intended to provide the Insurance Commissioner with a description of an insurer's risk management framework, an insurer assessment of risk exposures, and a group risk capital and prospective solvency assessment. The provisions of the bill become effective on January 1, 2018, with the initial filing of the ORSA Summary Report due in 2018.

House Bill 2678 – Relating to Prejudgment and Post-Judgment Interest (Effective January 1, 2018)

This bill provides that any court-ordered judgment or decree for the payment of money must bear simple, not compounding, interest. For judgments or decrees containing special damages or liquidated damages, the court may award prejudgment interest on all or some of the amount of the special or liquidated damages, as calculated after the amount of any settlements. Special damages include lost wages and income, medical expenses, damages to tangible personal property and similar out-of-pocket expenditures. The rate of prejudgment interest is two percentage points above the Fifth Federal Reserve District secondary discount rate in effect on January 2 of the year in which the right to bring the action has accrued, as determined by the court. The established rate shall remain constant from that date until the date of the judgement or decree, notwithstanding changes in the

federal reserve district discount rate in effect in subsequent years prior to the date of the judgment or decree. For all cases in which the right to bring the action accrued prior to 2009, the court may award prejudgment interest on all or some of the amount of the special or liquidated damages, as calculated after the amount of any settlements, at the interest rate that was in effect as of January 2 of the year in which the right to bring the action accrued. The rate of post-judgment interest on judgments and decrees for the payment of money, including prejudgment interest, is two percentage points above the Fifth Federal Reserve District secondary discount rate in effect on January 2 of the year in which the judgment or decree is entered. The rate of pre-judgment and post-judgment interest may not exceed nine percent per annum or be less than four percent per annum.

House Bill 2683 – Relating to the West Virginia Insurance Guaranty Association Act (Effective July 7, 2017)

This legislation made substantial amendments to the West Virginia Guaranty Association Act. The Association was created to provide a mechanism for the payment of covered claims under certain insurance policies, to avoid excessive delays concerning claim payments and to minimize financial loss to claimants or policyholders because of the insolvency of an insurer. The cost of these protections is spread among licensed insurers through assessments made by the Association. The bill limits the amount payable for covered claims, including claims for deliberate intention and return of unearned premium. The bill modifies the time limits for filing claims with the Association and specifies when the obligation of the Association to the insured ceases. It further confers to the Association the rights, duties and obligations of the insolvent insurer. The legislation permits the Association to hire legal counsel for the defense of covered claims and to contest settlements, releases, compromises, waivers and judgments to which the insolvent insurer or its insured was a party prior to the entry of the final order of liquidation. The bill requires the Association to establish procedures for requesting financial information from insurers, insureds and claimants, and sets forth actions the Association may take should such information be refused to be given. The bill indicates the persons from whom the Association may recover amounts paid by the Association on behalf of that person. The legislation requires that the Association, or any similar association of another state, be permitted to be a claimant in the liquidation of the insolvent insurer. It also sets forth what constitutes a claim relating to exhaustion of coverage and requires the Association to be reimbursed for any paid deductible claim. The bill permits the Board of Directors of the Association to make recommendations to the Insurance Commissioner on matters generally related to improving regulation for insurer solvency, including the submission of reports pertaining to insurer insolvency that triggered claims to the Association. Finally, the bill provides that the liquidator, receiver, or statutory successor of an insolvent insurer must permit access by the Association to the insolvent insurer's records so that the Association may carry out its duties.

House Bill 2850 – Relating to Product Liability Actions (Effective July 6, 2017)

This bill prohibits a product liability action against the seller of a product except in certain circumstances. Included among the circumstances when an action may be maintained against a seller are: (1) the seller had actual knowledge of the defect in the product that was a proximate cause of the harm for which recovery is sought; (2) the seller exercised substantial control over the aspect of the manufacture, construction, design, formula, installation, preparation, assembly, testing, labeling, warnings or instructions of the product that was a proximate cause of the harm for which recovery is

sought; (3) the seller made an express warranty regarding the product that was independent of any express warranty made by the manufacturer regarding the product, the product failed to conform to that express warranty by the seller and that failure was a proximate cause of the harm for which recovery is sought; (4) the manufacturer cannot be identified, despite a good-faith exercise of due diligence, to identify the manufacturer of the product; (5) the manufacturer is not subject to service of process under the laws of West Virginia; and (6) the court determines by clear and convincing evidence that the party asserting the product liability action would be unable to enforce a judgment against the product manufacturer.

2017 FIRST SPECIAL SESSION

Senate Bill 1010 – Relating to Volunteer Fire Department Workers' Compensation Premium Subsidy Fund (Effective May 24, 2017)

This legislation extends the Volunteer Fire Department Workers' Compensation Premium Subsidy Fund until June 30, 2020. The Fund was created for the benefit of volunteer fire departments to help defray workers' compensation insurance premium increases.

Senate Bill 1014 – Relating to Physician Assistants (Effective September 7, 2017)

This bill provides that a physician assistant licensed by the West Virginia Medical Board is among the health care providers to which a health care plan or contract may not differentiate concerning payment for the provision of medical services, benefits or procedures that are within the scope of the physician assistant's license.

Please e-mail any questions concerning this Informational Letter to OICInformationalLetters@wv.gov or call (304) 558-0401.

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