

H. B. 4380

(By Delegates Manchin, Poore, Ellem,
Hunt and Reynolds)

[Introduced February 1, 2012; referred to the
Committee on Banking and Insurance then the Judiciary.]

A BILL to amend and reenact §33-6-31 of the Code of West Virginia,
1931, as amended, relating to the motor vehicle insurance
policy; and to remove the fictional defendant from civil
litigation involving first-party claims for uninsured and
underinsured motorist benefits and identify the real party in
interest.

Be it enacted by the Legislature of West Virginia:

That §33-6-31 of the Code of West Virginia, 1931, as amended,
be amended and reenacted to read as follows:

ARTICLE 6. THE INSURANCE POLICY.

**§33-6-31. Motor vehicle policy; omnibus clause; uninsured and
underinsured motorists' coverage; conditions for
recovery under endorsement; rights and liabilities
of insurer.**

(a) No policy or contract of bodily injury liability

1 insurance, or of property damage liability insurance, covering
2 liability arising from the ownership, maintenance or use of any
3 motor vehicle, ~~shall~~ may be issued or delivered in this state to
4 the owner of ~~such~~ the vehicle, or ~~shall~~ may be issued or delivered
5 by any insurer licensed in this state upon any motor vehicle for
6 which a certificate of title has been issued by the Division of
7 Motor Vehicles of this state, unless it ~~shall contain~~ contains a
8 provision insuring the named insured and any other person, except
9 a bailee for hire and any persons specifically excluded by any
10 restrictive endorsement attached to the policy, responsible for the
11 use of or using the motor vehicle with the consent, expressed or
12 implied, of the named insured or his or her spouse against
13 liability for death or bodily injury sustained or loss or damage
14 occasioned within the coverage of the policy or contract as a
15 result of negligence in the operation or use of ~~such~~ the vehicle by
16 the named insured or by ~~such~~ that person: *Provided*, That in any
17 such automobile liability insurance policy or contract, or
18 endorsement thereto, if coverage resulting from the use of a
19 nonowned automobile is conditioned upon the consent of the owner of
20 ~~such~~ the motor vehicle, the word "owner" shall be construed to
21 include the custodian of ~~such~~ the nonowned motor vehicles.
22 Notwithstanding any other provision of this code, if the owner of
23 a policy receives a notice of cancellation pursuant to article six-
24 a of this chapter and the reason for the cancellation is a

1 violation of law by a person insured under the policy, ~~said the~~
2 owner may by restrictive endorsement specifically exclude the
3 person who violated the law and the restrictive endorsement shall
4 be effective in regard to the total liability coverage provided
5 under the policy, including coverage provided pursuant to the
6 mandatory liability requirements of section two, article four,
7 chapter seventeen-d of this code, but nothing in ~~such the~~
8 restrictive endorsement shall be construed to abrogate the "family
9 purpose doctrine".

10 (b) Nor ~~shall~~ may any such policy or contract be so issued or
11 delivered unless it ~~shall contain~~ contains an endorsement or
12 provisions undertaking to pay the insured all sums which he or she
13 shall be legally entitled to recover as damages from the owner or
14 operator of an uninsured motor vehicle, within limits which shall
15 be no less than the requirements of section two, article four,
16 chapter seventeen-d of this code, as amended from time to time:
17 *Provided, That* ~~such the~~ policy or contract shall provide an option
18 to the insured with appropriately adjusted premiums to pay the
19 insured all sums which he or she shall be legally entitled to
20 recover as damages from the owner or operator of an uninsured motor
21 vehicle up to an amount of \$100,000 because of bodily injury to or
22 death of one person in any one accident and, subject to ~~said the~~
23 limit for one person, in the amount of \$300,000 because of bodily
24 injury to or death of two or more persons in any one accident and

1 in the amount of \$50,000 because of injury to or destruction of
2 property of others in any one accident: *Provided, however, That*
3 ~~such~~ the endorsement or provisions may exclude the first \$300 of
4 property damage resulting from the negligence of an uninsured
5 motorist: *Provided further, That* ~~such~~ the policy or contract shall
6 provide an option to the insured with appropriately adjusted
7 premiums to pay the insured all sums which he or she shall legally
8 be entitled to recover as damages from the owner or operator of an
9 uninsured or underinsured motor vehicle up to an amount not less
10 than limits of bodily injury liability insurance and property
11 damage liability insurance purchased by the insured without setoff
12 against the insured's policy or any other policy. Regardless of
13 whether motor vehicle coverage is offered and provided to an
14 insured through a multiple vehicle insurance policy or contract, or
15 in separate single vehicle insurance policies or contracts, no
16 insurer or insurance company providing a bargained for discount for
17 multiple motor vehicles with respect to underinsured motor vehicle
18 coverage ~~shall~~ may be treated differently from any other insurer or
19 insurance company utilizing a single insurance policy or contract
20 for multiple covered vehicles for purposes of determining the total
21 amount of coverage available to an insured. "Underinsured motor
22 vehicle" means a motor vehicle with respect to the ownership,
23 operation or use of which there is liability insurance applicable
24 at the time of the accident, but the limits of that insurance are

1 either: (i) Less than limits the insured carried for underinsured
2 motorists' coverage; or (ii) has been reduced by payments to others
3 injured in the accident to limits less than limits the insured
4 carried for underinsured motorists' coverage. No sums payable as
5 a result of underinsured motorists' coverage ~~shall~~ may be reduced
6 by payments made under the insured's policy or any other policy.

7 (c) As used in this section, the term "bodily injury" ~~shall~~
8 ~~include~~ includes death resulting therefrom and the term "named
9 insured" ~~shall mean~~ means the person named as such in the
10 declarations of the policy or contract and ~~shall also include such~~
11 includes the person's spouse if a resident of the same household
12 and the term "insured" ~~shall mean~~ means the named insured and,
13 while resident of the same household, the spouse of any such named
14 insured and relatives of either, while in a motor vehicle or
15 otherwise, and any person, except a bailee for hire, who uses, with
16 the consent, expressed or implied, of the named insured, the motor
17 vehicle to which the policy applies or the personal representative
18 of any of the above; and the term "uninsured motor vehicle" ~~shall~~
19 ~~mean~~ means a motor vehicle as to which there is no: (i) Bodily
20 injury liability insurance and property damage liability insurance
21 both in the amounts specified by section two, article four, chapter
22 seventeen-d of this code, as amended from time to time; or (ii)
23 there is such insurance, but the insurance company writing the same
24 denies coverage thereunder; or (iii) there is no certificate of

1 self-insurance issued in accordance with the provisions of ~~said~~
2 section two. A motor vehicle ~~shall be deemed to be~~ is uninsured if
3 the owner or operator thereof ~~be~~ is unknown: *Provided, That*
4 recovery under the endorsement or provisions shall be subject to
5 the conditions hereinafter set forth.

6 (d) Any insured intending to rely on the coverage required by
7 subsection (b) of this section shall, if any action ~~be~~ is
8 instituted against the owner or operator of an uninsured or
9 underinsured motor vehicle, cause a copy of the summons and a copy
10 of the complaint to be served upon the insurance company issuing
11 the policy, in the manner prescribed by law, as though ~~such~~ the
12 insurance company were a named party defendant; ~~such~~ the company
13 shall thereafter have the right to file pleadings and to take other
14 action allowable by law ~~in the name of the owner, or operator, or~~
15 ~~both, of the uninsured or underinsured motor vehicle or~~ in its own
16 name.

17 Nothing in this subsection ~~shall~~ may prevent ~~such~~ the owner or
18 operator from employing counsel of his or her own choice and taking
19 any action in his or her own interest in connection with ~~such~~ the
20 proceeding.

21 (e) If the owner or operator of any motor vehicle which causes
22 bodily injury or property damage to the insured ~~be~~ is unknown, the
23 insured, or someone in his or her behalf, in order for the insured
24 to recover under the uninsured motorist endorsement or provision,

1 shall:

2 (i) Within twenty-four hours after the insured discover, and
3 being physically able to report the occurrence of ~~such~~ the
4 accident, the insured or someone in his or her behalf, shall report
5 the accident to a police, peace or to a judicial officer, unless
6 the accident ~~shall already have~~ already has been investigated by a
7 police officer;

8 (ii) Notify the insurance company, within sixty days after
9 ~~such~~ the accident, that the insured or his or her legal
10 representative has a cause or causes of action arising out of ~~such~~
11 the accident for damages against a person or persons whose identity
12 is unknown and setting forth the facts in support thereof; and,
13 upon written request of the insurance company communicated to the
14 insured not later than five days after receipt of ~~such~~ that
15 statement, shall make available for inspection the motor vehicle
16 which the insured was occupying at the time of the accident; and

17 (iii) Upon trial establish that the motor vehicle, which
18 caused the bodily injury or property damage, whose operator is
19 unknown, was a "hit and run" motor vehicle, meaning a motor vehicle
20 which causes damage to the property of the insured arising out of
21 physical contact of ~~such~~ the motor vehicle therewith, or which
22 causes bodily injury to the insured arising out of physical contact
23 of such motor vehicle with the insured or with a motor vehicle
24 which the insured was occupying at the time of the accident. If

1 the owner or operator of any motor vehicle causing bodily injury or
2 property damage ~~be~~ is unknown, an action may be instituted against
3 the unknown defendant as "John Doe", in the county in which the
4 accident took place or in any other county in which ~~such~~ the action
5 would be proper under the provisions of article one, chapter
6 fifty-six of this code; service of process may be made by delivery
7 of a copy of the complaint and summons or other pleadings to the
8 clerk of the court in which the action is brought, and service upon
9 the insurance company issuing the policy shall be made as
10 prescribed by law as though ~~such~~ the insurance company were a party
11 defendant. The insurance company ~~shall have the right to~~ may file
12 pleadings and take other action allowable by law in the name of
13 John Doe and in its own name.

14 (f) An insurer paying a claim under the endorsement or
15 provisions required by subsection (b) of this section shall be
16 subrogated to the rights of the insured to whom ~~such~~ the claim was
17 paid against the person causing ~~such~~ the injury, death or damage to
18 the extent that payment was made. The bringing of an action
19 against the unknown owner or operator as John Doe or the conclusion
20 of such an action ~~shall~~ may not constitute a bar to the insured, if
21 the identity of the owner or operator who caused the injury or
22 damages complained of, becomes known, from bringing an action
23 against the owner or operator theretofore proceeded against as John
24 Doe. Any recovery against ~~such~~ the owner or operator shall be paid

1 to the insurance company to the extent that ~~such~~ the insurance
2 company ~~shall have~~ has paid the insured in the action brought
3 against ~~such~~ the owner or operator as John Doe, except that ~~such~~
4 the insurance company shall pay its proportionate part of any
5 reasonable costs and expenses incurred in connection therewith,
6 including reasonable attorney's fees. Nothing in an endorsement or
7 provision made under this subsection, nor any other provision of
8 law, ~~shall~~ may operate to prevent the joining, in an action against
9 John Doe, of the owner or operator of the motor vehicle causing
10 injury as a party defendant, and ~~such~~ the joinder is hereby
11 specifically authorized.

12 (g) No such endorsement or provisions ~~shall~~ may contain any
13 provision requiring arbitration of any claim arising under any such
14 endorsement or provision, nor may anything be required of the
15 insured except the establishment of legal liability, nor ~~shall~~ may
16 the insured be restricted or prevented in any manner from employing
17 legal counsel or instituting legal proceedings.

18 (h) The provisions of subsections (a) and (b) of this section
19 ~~shall~~ may not apply to any policy of insurance to the extent that
20 it covers the liability of an employer to his or her employees
21 under any workers' compensation law.

22 (i) The commissioner of insurance shall formulate and require
23 the use of standard policy provisions for the insurance required by
24 this section, but use of such standard policy provisions may be

1 waived by the commissioner in the circumstances set forth in
2 section ten of this article.

3 (j) A motor vehicle ~~shall be deemed to be~~ is uninsured within
4 the meaning of this section, if there has been a valid bodily
5 injury or property damage liability policy issued upon ~~such~~ the
6 vehicle, but which policy is uncollectible, in whole or in part, by
7 reason of the insurance company issuing ~~such~~ the policy upon ~~such~~
8 the vehicle being insolvent or having been placed in receivership.
9 The right of subrogation granted insurers under the provisions of
10 subsection (f) of this section ~~shall~~ may not apply as against any
11 person or persons who is or becomes an uninsured motorist for the
12 reasons set forth in this subsection.

13 (k) Nothing contained herein ~~shall~~ may prevent any insurer
14 from also offering benefits and limits other than those prescribed
15 herein, nor ~~shall~~ may this section be construed as preventing any
16 insurer from incorporating in such terms, conditions and exclusions
17 as may be consistent with the premium charged.

18 (l) The Insurance Commissioner shall review on an annual basis
19 the rate structure for uninsured and underinsured motorists'
20 coverage as set forth in subsection (b) of this section and shall
21 report to the Legislature on said rate structure on or before
22 January 15, 1983, and on or before January 15, of each of the next
23 two succeeding years.

NOTE: The purpose of this bill is to remove the fictional defendant from civil litigation involving first-party claims for uninsured and underinsured motorist benefits and identify the real party in interest.

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