NATIONAL CONFERENCE OF INSURANCE LEGISLATORS
PROPERTY-CASUALTY INSURANCE COMMITTEE
BILOXI, MISSISSIPPI
FEBRUARY 25, 2012
MINUTES

The National Conference of Insurance Legislators (NCOIL) Property-Casualty Insurance Committee met at the Beau Rivage Hotel & Casino in Biloxi, Mississippi, on Saturday, February 24, 2012, at 1:00 p.m.

Rep. Steve Riggs of Kentucky, chair of the Committee, presided.

Other members of the Committee present were:

Rep. Greg Wren, AL
Rep. Barry Hyde, AR
Sen. Travis Holdman, IN
Rep. Matt Lehman, IN
Rep. Ron Crimm, KY
Sen. Dan Morrish, LA
Rep. Barb Byrum, MI
Rep. Pete Lund, MI
Sen. Dean Kirby, MS
Rep. George Keiser, ND
Sen. Jerry Klein, ND
Sen. Carroll Leavell, NM
Sen. Neil Breslin, NY
Assem. Nancy Calhoun, NY
Sen. William Larkin, Jr., NY
Sen. James Seward, NY
Rep. Michael Stinziano, OH
Sen. Jake Corman, PA
Rep. Brian Kennedy, RI
Rep. Charles Curtiss, TN
Rep. Charles Sargent, TN

Other legislators present were:

Rep. Buddy Lovell, AR
Rep. Reginald Murdock, AR
Rep. Greg Cromer, LA
Rep. Denise Garlick, MA
Rep. Manly Barton, MS
Rep. Charles Busby, MS
Rep. Scott DeLano, MS
Rep. Jeff Guice, MS
Rep. Henry Zuber, MS
Sen. David O'Connell, ND
Sen. Kevin Bacon, OH
Sen. Keith Faber, OH
Rep. Marguerite Quinn, PA
Rep. Cindy Ryu, WA

Also in attendance were:

Susan Nolan, Nolan Associates, NCOIL Executive Director
Candace Thorson, Nolan Associates, NCOIL Deputy Executive Director
Mike Humphreys, Nolan Associates, NCOIL Director of State-Federal Relations

MINUTES

After a motion made and seconded, the Committee voted unanimously to approve the minutes of its November 18 and 20, 2011, meetings in Santa Fe, New Mexico.

GULF COAST INSURANCE CONCERNS

Rep. Wren said that both the Gulf and Atlantic Coasts faced similar natural catastrophe risks and that reduced competition and insurance capacity were problems in both regions. He said that market disruptions in coastal states can have national consequences, and he expressed support for NCOIL efforts to promote catastrophe insurance reform.

Rep. Kennedy noted that the NCOIL Insurance Legislators Foundation (ILF) had partnered with the Federal Emergency Management Agency (FEMA) in 2002 to develop a *Legislators' Guide to Flood Insurance*, and he requested that NCOIL staff distribute copies to legislators.

Ms. Nolan added that staff was working with FEMA on a possible second flood insurance study and was "cautiously optimistic" that it would come to fruition.

FLOOD INSURANCE EFFORTS/IMPACTS

Jim Sadler, director of claims for the National Flood Insurance Program (NFIP), overviewed recent flood activity, reporting that federal officials had opened floodways along the Mississippi River in an effort to lower water levels and help prevent a major disaster downstream. He said that properties in North Dakota, including along the Souris River, also had suffered extensive loss.

Hurricane Irene, Mr. Sadler said, had affected numerous states along the Atlantic Coast, resulting in 51,000 claims, and was followed by flooding from Tropical Storm Lee. He said that despite thousands of flooded properties, the NFIP had paid very little in claims because most properties, particularly in New England states, were not protected by flood insurance.

Mr. Sadler acknowledged that there had been "a little bit of rust in our claims operating system" following Hurricane Irene and Tropical Storm Lee. He attributed this to a three-year lull in major hurricane-related flooding, an aging claims-adjuster workforce, and difficulty accessing certain properties, among other causes.

NCOIL AUTO INSURANCE FRAUD MODEL ACT

Ms. Thorson said that the Committee was scheduled to review, as per NCOIL bylaws, an NCOIL *Auto Insurance Fraud Model Act*, which she said would establish penalties for acting as a runner, capper, or steerer and/or for participating in a staged accident. She said that the model, which the Committee adopted in July 2006, would set restrictions on access to accident reports and call for a one-year license or registration suspension for a person who commits auto fraud while driving a vehicle.

Howard Goldblatt of the Coalition Against Insurance Fraud outlined recent state anti-fraud efforts, including proposals in Michigan and New York, and among other things urged the Committee to readopt the NCOIL model.

Upon a motion made and seconded, the Committee readopted the model via unanimous voice vote.

STATE AUTHORITY/HUD REGULATION

Sen. Faber, chair of the State-Federal Relations Committee, said that on the previous day his Committee had considered a proposed *Resolution Urging the U.S. Department of Housing and Urban Development to Refrain from Promulgating Any Regulation Intruding on the States' Traditional Role as the Primary Regulator of Homeowners' Insurance* and that the Committee had referred the resolution to the P-C Committee for final review.

Sen. Faber said that the resolution, which he sponsored, addressed a proposed HUD rule that listed the provision of homeowners' insurance as a practice that could have a disparate impact on certain policyholders. Sen. Faber said the HUD rule cited a Texas court case as proof that HUD had some regulatory authority over homeowners' coverage. Sen. Faber asserted that the Texas Supreme Court had overruled that decision, however, on grounds that states regulate insurance under the

McCarran-Ferguson Act. He said, among other things, that the proposed NCOIL resolution reaffirmed state oversight authority.

Birny Birnbaum of the Center for Economic Justice (CEJ) spoke in opposition to the draft resolution, saying that if insurers cannot intentionally discriminate against a certain class of policyholders, then companies should also be banned from engaging in practices that inadvertently discriminate in an unfair way, otherwise known as having a disparate impact. He said that HUD had been applying federal *Fair Housing Act (FHA)* requirements to insurance since 1989 and that the proposed rule was only seeking to establish a uniform standard for doing so.

Mr. Birnbaum then spoke to the Texas court case, saying the court had ruled that inadvertent discrimination could have a disparate impact and could be regulated by HUD when a state did not regulate the underlying practice. If state oversight was in place, he said, than the McCarran-Ferguson Act took precedence. He said that HUD authority complemented rather than preempted state regulation. In response to Committee questions, Mr. Birnbaum said that the Texas ruling had cited other court cases in which FHA provisions were deemed to apply to insurance and that HUD allowed the continued use of a practice with a disparate impact when insurers could prove there was a "business necessity" for using it.

Julie Gackenbach of Confrere Strategies, offering an insurer perspective, commented on the Texas litigation. She said it had focused on intentional discrimination, not disparate impact. She also said that numerous other courts, in addition to the Texas Supreme Court, had ruled that HUD disparate-impact oversight would "frustrate" existing state regulation. She then spoke to the "business necessity" standard, saying that the proposed HUD rule would impose a lower, "legitimate goal" threshold. Ms. Gackenbach predicted that HUD would take final action on its proposed rule before the NCOIL Summer Meeting.

Because the resolution was submitted after the 30-day deadline, the Committee voted by two-thirds to suspend the 30-day rule. The Committee then voted 19 to 2 to adopt the resolution. Those opposed to adoption were Sen. Leavell and Sen. Breslin.

THIRD-PARTY LITIGATION FINANCING

Ms. Thorson reported that the Committee had first discussed third-party non-recourse legal funding at the Annual Meeting and had adopted a 2012 Committee charge to explore concerns. She said that a proposed *Resolution Regarding Third-Party Litigation Financing*, sponsored for discussion by Sen. Ruth Teichman (KS), expressed concern over impacts on consumers and the judiciary system and supported banning the practice, among other things.

Jack Kelly, representing J.D.G.W. Peachtree and on behalf of the American Legal Finance Association (ALFA), said that a funding company will not interfere with an underlying case, pay referral fees, use false or misleading advertising, or provide funds exceeding a consumer's needs. He said that legal funding pays for consumer expenses during a trial and does not encourage frivolous lawsuits, since the funding company is not repaid unless the consumer wins. Mr. Kelly opposed the draft resolution, describing it as anti-consumer. He also stated, after Assem. Calhoun commented that interest rates on funding transactions were very high, that the loans were not the same as bank loans and that there was no guaranty that a funding company would be repaid.

Eric Schuller of Oasis Legal Finance said that the average Oasis funding transaction was $1,600. He said that consumers can only apply for legal financing after they have already filed a lawsuit. He said, among other things, that legal financing filled an important need because a significant percentage of Americans faced financial challenges, including having no bank account.

Professor Anthony Sebok of the Benjamin N. Cardozo School of Law at Yeshiva University said third-party financing raised no new ethical issues for attorneys. He said that countries around the world accepted legal funding and did not share the same degree of consumer-protection concerns as expressed in the U.S. Mr. Sebok said there was no proof that litigation financing encouraged frivolous lawsuits. He then suggested that the U.S. follow the lead of other nations and establish appropriate regulations.

Eric Goldberg of the American Insurance Association (AIA) asserted that attorney ethical pressures did exist because state bar associations were instructing attorneys on how to avoid such problems. He said third-party funding violated champerty laws, that its interest rates violated state usury laws, and that the practice ultimately led to higher claims settlements.

Mr. Birnbaum of CEJ said that third-party funding to consumers was different than other types of legal funding and that the proposed resolution failed to distinguish between the two. He commented that insurers themselves were a kind of third-party funder because they defended policyholders in court. He stated litigation financing, from an economics perspective, would not encourage frivolous lawsuits, and he urged the Committee to oppose the draft resolution.

In discussion that followed:

- Sen. Breslin and Rep. Curtiss said there were important consumer benefits to third-party funding that NCOIL should not ignore.
- Mr. Kelly, responding to questions from Sen. Leavell, said that plaintiff attorneys did not directly benefit from legal financing.
- Mr. Sebok said that regulation should work to weed out “bad actors” rather than to ban legal funding, that officials should distinguish between personal and commercial litigation financing, and that champerty laws were outdated, among other things.
- Eli Lehrer of the Heartland Institute said that the number of Americans without bank accounts was not as significant as mentioned earlier in the meeting, that it was inappropriate to compare legal financing in the U.S. to that in Australia because Australia had a very different legal system, and that state banking regulators might wish to offer input as NCOIL moved forward.

Rep. Keiser noted that the resolution’s sponsor was not in attendance and said that the Committee, as per NCOIL tradition, would likely defer final action on the proposal. However, after describing the resolution as “unsalvageable,” Rep. Keiser moved to postpone it indefinitely and to consider at the Summer Meeting a new proposal that might be based on recent state efforts. After Sen. Leavell seconded the motion, the Committee approved it via unanimous voice vote.

ADJOURNMENT
There being no further business, the meeting adjourned at 2:30 p.m.