

NATIONAL COUNCIL OF INSURANCE LEGISLATORS  
PROPERTY AND CASUALTY INSURANCE COMMITTEE  
PHOENIX, ARIZONA  
NOVEMBER 16, 2017  
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Property & Casualty Insurance Committee met at the Sheraton Grand Phoenix Hotel on Thursday, November 16, 2017 at 2:15 p.m.

Senator Jerry Klein of North Dakota, Vice Chair of the Committee, presided.

Other members of the Committee present were:

Sen. Jason Rapert, AR	Asw. Maggie Carlton, NV
Rep. Richard Smith, GA	Sen. Neil Breslin, NY
Rep. Martin Carbaugh, IN	Asm. Kevin Cahill, NY
Rep. Matt Lehman, IN	Asw. Pamela Hunter, NY
Rep. Peggy Mayfield, IN	Sen. James Seward, NY
Rep. Joseph Fischer, KY	Sen. Bob Hackett, OH
Rep. Steve Riggs, KY	Rep. Michael Henne, OH
Sen. Dan "Blade" Morrish, LA	Sen. Jay Hottinger, OH
Rep. Michael Webber, MI	Rep. Marguerite Quinn, PA
Rep. Lois Delmore, ND	Rep. Bill Botzow, VT
Rep. George Keiser, ND	

Other legislators present were:

Rep. David Livingston, AZ	Rep. Lewis Moore, OK
Rep. Bryon Short, DE	Rep. Jim Dunnigan, UT
Asm. Andrew Garbarino, NY	Rep. Tom Oliverson, TX

Also in attendance were:

Commissioner Tom Considine, NCOIL CEO  
Paul Penna, Executive Director, NCOIL Support Services, LLC  
Will Melofchik, Legislative Director, NCOIL Support Services, LLC

## MINUTES

Upon a motion made and seconded, the Committee unanimously approved the minutes of its July 14, 2017 meeting in Chicago, Illinois.

## CONSIDERATION OF MODEL TOWING ACT

Rep. Matt Lehman, NCOIL Treasurer, stated that the Committee has discussed drafting a Model Towing Act for several years and the current draft represents the most progress towards a final Model thus far. There are two main parts to the current draft: the actual towing process; and the issues that arise once a vehicle has been towed and stored. Rep. Lehman stated that he believes the current draft is a strong framework but that it still needs some work through discussions from interested parties on both sides of the

issues. One of the Model's main sections is Section 5 – Emergency Towing Requirements – which, among other things, makes it a violation for a towing company to stop or cause a person to stop at the scene of an accident or near a disabled vehicle for the purpose of soliciting an engagement for “emergency towing” services, to provide towing services, to move a vehicle from a highway, street, or when there is an injury as the result of an accident, or to accrue charges for services provided under those circumstances, unless requested to perform that service by a law enforcement officer or public agency pursuant to that agency's procedures, or unless summoned to the scene or requested to stop by the owner or operator of a disabled vehicle, or unless the owner of the disabled vehicle previously provided consent to the towing company. The Model calls for the specific nature of the violation to be established by the adopting State.

Rep. Lehman further noted Section 6 of the Model – Private Property Towing Requirements – requires owners of private property that have established a private towaway zone, to post a sign that is clearly visible to the public and include on the sign a statement that the property is a tow-away zone, and a description of persons authorized to park on the property. Pursuant to Section 6, prior to towing a vehicle, a towing company shall take photographs, video or other visual documentation to evidence that the vehicle is clearly parked on private property in violation of a private tow-away zone, and the towing company shall record the time and date of the photographs and retain the records for at least two years after the date of which the vehicle was towed. Rep. Lehman stated that Section 7 – Estimate Requirements – and Section 8 – Itemized Invoice Requirements - are very important for consumers and that both sections can be improved through further discussions with interested parties.

Bart Giesler from the Indiana Towing and Wrecker Association thanked the Committee for allowing him to comment on the Model and stated that unfortunately representatives from the Towing and Recovery Association of America could not be here today due to scheduling conflicts. Mr. Giesler noted that the towing industry has not done a good job of explaining its functionality and that by understanding said functionality, the Model can be improved. Mr. Giesler stressed that it is difficult to generalize the towing industry – tows are different from State to State. In most but not all States, towers are on a “rotation” list administered by the State police department and in order get on that list, towers must submit their towing rates. Additionally, several factors affect the rates such as the type of equipment needed for different types of tows, as well as whether the tow is emergency or non-emergency (just like in the healthcare industry when comparing emergency vs. non-emergency prices). Further, a problem that the industry is facing is that of abandoned vehicles – a large number of those vehicles are never picked up by the owner which results in a tremendous amount of uncollected costs that ultimately have to be picked up by someone. At the end of the day, those factors drive up the cost of insurance.

Mr. Giesler stated that the Model should also differentiate between consensual and nonconsensual towing as that is a factor that effects the price. Mr. Giesler stated that there are also several concerns with the Model and its lack of consideration given to safety. For example, the Model requires, prior to attaching a vehicle to the tow truck, if the vehicle owner or operator is present at the time and location of the anticipated tow, the towing company shall furnish the vehicle's owner or operator with a written itemized estimate of all charges and services to be performed – that would take a lot of time and could put those present at risk of a secondary accident. Mr. Giesler stated that he understands that Section 7B.a. tries to address that concern by allowing the itemized

estimate to be completed after the vehicle is attached and removed to the nearest safe shoulder or street, but noted that it does not address the problem of the person disputing the invoice. Ultimately, it will be a staring contest between the parties on the side of a road which is not safe. Additionally, if the driver is a teenager, they would most likely call their parents to come view the invoice which would result in more time on the side of a road. Another concern related to safety in the Model is the requirement to take photos of the vehicle prior to towing – there are no exceptions for inclement weather and, to capture the proper images in the photo, it may require the tower to be in unsafe positions on the side of a road.

Mr. Giesler stated that some of the Model's provisions will actually raise costs rather than lowering them, such as: within 24 hours of commencement of towing, the towing company or storage facility must commence a search of the records of the bureau of motor vehicles to ascertain the identity of the owner and any lienholder of the motor vehicle. The Model states that no storage charges beyond the initial 24-hour charge can accrue until the notice requirement has been met. That will increase the cost of towing because towers will be forced to have employees working nights and weekends. Indiana has a 72-hour requirement that is more workable. Requiring towers to accept credit cards and checks as forms of payment will also increase towing costs, as will requiring that the towing company "properly secure all towed vehicles and make all reasonable efforts to prevent further damage, weather damage or theft to all towed vehicles, including the vehicle's cargo and contents." (emphasis added). Mr. Giesler closed by requesting that the Model be tabled so that it can be improved through further dialogue between interested parties.

Joe Thesing from the National Association of Mutual Insurance Companies (NAMIC) stated that NAMIC has been in discussions with Rep. Lehman and other interested parties throughout the Model drafting process and there have been several attempts to respond to issues and concerns that have been raised. NAMIC believes that the current draft of the Model is a very strong framework and it is a good attempt to regulate an industry that is largely un-regulated at the moment. Safety is a concern for everyone involved but in response to Mr. Giesler's statement that the Model's itemized invoice requirements are not safe, as soon as the vehicle is secured, the police are in charge who can provide a safe environment. Accordingly, from a rational person's perspective, that would seem to provide towers with an opportunity to provide an itemized invoice. Mr. Thesing urged the Committee to move forward with the Model.

Rep. George Keiser (ND) asked why can't insurers notify consumers as to who are qualified and approved towers, similar to what North Dakota did when it had problems with auto glass manufacturers. Mr. Thesing stated that is an interesting point and he will explore that with NAMIC's member companies.

Tim Lynch from the National Insurance Crime Bureau (NICB) stated that the problems consumers are facing in the towing industry is a national epidemic, with the brunt of the problems being in big cities. Only about a handful of States have taken action to address the problems so NCOIL's timing regarding consideration of Model legislation is very appropriate. Mr. Lynch stated that he believes there is room for compromise on these issues and he looks forward to discussing such issues with interested parties. One example of compromise is that Philadelphia recently enacted a law that grants an enforcement agency the ability to require a towing company to file an annual or other regularly updated list of all signs posted by the towing company – the sign shall give

notice of: that unauthorized parking is prohibited and unauthorized vehicles will be towed; that vehicles whose authorized parking time has elapsed will be towed; the name, address, and telephone number of the towing company; the charges for the towing and storage of towed vehicles; the place where the towed vehicle can be redeemed after paying the allowable charges and the hours of operation; and that towing related complaints shall be reported to 3-1-1. That was previously thought to be nonnegotiable.

Sen. Klein asked Mr. Giesler if he was satisfied with the work that has been done in other States on these issues. Mr. Giesler stated that he is not familiar with all of those State's towing laws, but that he and his colleagues are committed to working with NCOIL to ensure a good work product.

Rep. Lehman stated that one thing that NCOIL can offer the States on these issues is uniformity, and the quicker interested parties can get together and work on the Model, the better. Rep. Lehman stated that he would like the Committee to consider a final version of the Model at the NCOIL Spring Meeting in March 2017.

Rep. Keiser stated that it is difficult to have a one-sized-fits-all approach on these issues. A tow in North Dakota in the winter presents its own unique set of circumstances. Rep. Keiser stated that there seems to be a better strategy for solving the industry's problems than this much regulation. Rep. Lehman stated that he understood Rep. Keiser's concern about a lot of regulation, but at the opposite end of the spectrum, there cannot be little to no regulation which is the way the industry operates currently in most States.

Rep. Bill Botzow (VT) asked if the Model differentiates between large commercial vehicles and small private vehicles. Mr. Giesler stated that he believes the Model treats said vehicles the same.

#### DISCUSSION/CONSIDERATION OF AMENDMENTS TO NCOIL MODEL STATE UNIFORM BUILDING CODE

Rep. Lewis Moore (OK) stated that the proposed amendments to the NCOIL Model State Uniform Building Code are based on legislation he sponsored in Oklahoma - Oklahoma HB 1720, which was drafted and enacted in response to the tornadoes experienced in Oklahoma. The bill allows insurance companies to provide a discount, rate reduction or other related adjustment for new insurable property built to resist loss due to tornado or catastrophic windstorm events, only when the company determines the discount or reduction to be actuarially justified and there is sufficient and credible evidence of cost savings, which can be attributed to the construction standards set forth in the legislation. Rep. Moore stated that, being a supporter of the free-market, he did not want to impose a mandate on insurance companies to provide discounts, which is why the "actuarially justified" language was included.

Sen. Bob Hackett (OH) asked Rep. Moore to clarify if the legislation required insurers to provide the discount to policyholders or if it was voluntary. Rep. Moore stated that the legislation makes it voluntary for the insurers to provide the discount. Rep. Michael Henne (OH) questioned why something voluntary/optional has to be set forth in legislation.

Ken Waters, Warning Coordination Meteorologist from the National Weather Service,

provided some background on the original Fujita scale, and the new, enhanced Fujita scale. Mr. Waters stated that the original Fujita scale was developed by Dr. T. Theodore Fujita in 1971 and published as "Proposed Characterization of Tornadoes and Hurricanes by Area and Intensity." The scale was: F0 (gale); F1(weak); F2(strong); F3 (severe); F4(devastating); and F5(incredible). That scale was categorized by area and intensity with an estimated wind speed, and became the standard for tornado ratings. There were some limitations to the scale, such as: it was subjective since it was based solely on the damage caused by a tornado; there was no recognition in difference in construction; difficult to apply with no damage indicators, i.e. if the tornado does not hit any structures, what F-scale would be assigned; it was based on the worst damage (even if it is one building or house); it overestimated wind speeds greater than F3; it relied too much on the estimated wind speeds; it oversimplified the damage description; it did not recognize weak structures such as mobile homes or modified homes.

Because of those limitations, a new enhanced Fujita scale (EF) was developed from 2000 to 2004 by cross-disciplinary experts and scientists, and first used in 2007. The EF identified 28 "damage indicators" (DI) which, importantly, can be added to or modified. Each DI has several Degrees of Damage (DOD). The wind speeds were also changed in the EF scale. For example, the old scale measured an F5 at wind speeds of 262-317 mph, whereas the new EF measures an F5 at wind speeds of 200-234 mph. Mr. Waters stated that the main strengths of the EF scale are: the 28 DI's; it accounts for differences of structural integrity within a DI; wind speeds are determined from damage; there is continuity from the old F scale; and its expandability, flexibility, and extensibility. However, limitations to the EF scale include: changing scales may introduce artifacts into the historical record; complexity; wind speeds are subject to change for each rating. For further information on the EF-scale tools, Mr. Waters recommended reading "A Recommendation for the Enhanced Fujita Scale" and the EF-kit.

John Doak, Oklahoma Insurance Commissioner, stated that legislation like OK HB 1720 is not a partisan issue and it is something that needs to be given more attention since natural disasters are becoming more common across the country. In Oklahoma, after tornadoes hit in 2013, there were nearly 100,000 insurance claims filed in response with insurance payments totaling more than \$1.1 billion. If homeowners construct or retrofit their homes to meet stronger building code standards, those numbers would be drastically less. In 2016: the U.S. had 1,059 tornadoes; 43 States had one or more tornado; and only 6 States saw zero tornadoes. Cmsr. Doak then discussed the Insurance Institute for Business & Home Safety (IBHS), and stressed that the Fortified Home Program is something that was thought of and promoted by IBHS which is funded by the insurance industry. Cmsr. Doak stated that legislation such as OK HB 1720 calls for a "backwards mandate" – meaning that when the company determines the discount or reduction to be actuarially justified and there is sufficient and credible evidence of cost savings, which can be attributed to the construction standards set forth in the legislation, the consumer gets the discount; if those requirements are not met, the consumer does not get the discount – it is that simple. Cmsr. Doak also noted that results show that switching from a conventional construction standard to a Fortified designation increases the value of a home by nearly 7%, and that we cannot continue to build homes the same way in the same areas and expect different results when natural disasters occur. Cmsr. Doak stressed again that this is not just an Oklahoma issue – it is a national issue of incentivizing consumers to build to a higher standard.

Rep. Lehman asked what the cost estimates are for consumers to build/retrofit to the

standards. Cmsr. Doak stated that he can get that specific information to Rep. Lehman after the Committee adjourns but that, approximately, it is 2 to 5% of the cost of the house. Rep. Moore stated that for a roof, which is the biggest exposure for a homeowner, it adds about \$500 to the cost.

Frank O'Brien from the Property Casualty Insurance Association of America (PCI), stated that PCI is not supportive of legislation like OK HB 1720. It has been styled as a mandatory-voluntary discount. PCI believes in market-driven discounts and therefore cannot support the proposed amendments to the NCOIL Model as currently drafted. Mr. O'Brien stated that there is of course room for negotiations and looks forward to discussions after the Committee. Cmsr. Doak noted that when OK HB 1720 was introduced, PCI was neutral, so something has obviously changed since between then and now.

Mr. Thesing stated that building codes are a very important issue and that Rep. Moore, Cmsr. Doak, and others, did a tremendous job of gathering support for OK HB 1720. However, Mr. Thesing stated that such legislation might not be a good idea for every State. NAMIC does not believe such legislation is supportive of the free-market, and instead supports voluntary decisions by individual insurers to provide discounts, rate reductions, or other financial incentives to policyholders who meet the criteria established by that insurance company.

Cmsr. Doak stressed again that this is a bi-partisan issue and is what's best for consumers. When looking to natural disasters in places like Oklahoma, someone needs to lead on this issue.

#### REMARKS FROM ARIZONA SPEAKER OF THE HOUSE – J.D. MESNARD

Rep. David Livingston (AZ) then introduced Rep. J.D. Mesnard – Arizona Speaker of the House. Speaker Mesnard thanked everyone for visiting Arizona and for working on important insurance-related issues.

#### DISCUSSION ON FLOOD INSURANCE MARKET DEVELOPMENTS INCLUDING IMPACT OF RECENT HURRICANES ON INSURERS AND POLICYHOLDERS

Cmsr. Doak stated that although there is limited interest in the admitted market, there is growing interest in the surplus lines insurance market to provide private flood insurance. In recognition of the growing private flood insurance market, the NAIC has required insurers to include in their financial statements their level of flood insurance activity to provide State insurance regulators with a comprehensive overview of the size of the private flood insurance market and insight into market growth. The initial filings are positive. The NAIC hopes to partner with States to promote growth of the private flood insurance market and, and believes in the re-authorization of the National Flood Insurance Program (NFIP). The NAIC supports the notion of providing consumers with more choices related to flood insurance. Specifically, the NAIC supports H.R. 1422 – the Flood Insurance Market Parity and Modernization Act, sponsored by Reps. Dennis A. Ross (R-FL) and Kathy Castor (D-FL). This bill clarifies state insurance regulators' authority over private flood insurance and provides a clear definition of private flood to remove the confusing language in current law to help prompt more insurers to enter the market if they are willing. Facilitating the entry of additional carriers into the market will provide consumers with access to additional options for flood insurance products. Over

time, this additional competition and shift of risk from a federal program to the private market could help lessen the exposure of U.S. taxpayers to the types of catastrophic flood losses that now reside as unpaid debt on the NFIP's books. The bill also includes important provisions ensuring that private flood insurance meets the continuous coverage requirement so policyholders have a choice to return to the NFIP without penalty, including not losing any subsidy they previously had with the NFIP.

The NAIC also recommends reauthorization legislation require the Federal Emergency Management Agency (FEMA) to reinstate its prior rules allowing policyholders to cancel their NFIP policies mid-term and receive refunds on a pro-rated basis if they decide to replace their NFIP policies with private flood insurance. FEMA's policy change discourages consumers' use of private flood insurance. The Government Accountability Office has also noted concerns about this change and recommended FEMA reconsider these rules in its July 2016 report, "Potential Barriers Cited to Increased Use of Private Insurance." The NAIC does not believe consumers should be penalized by a prohibition on pro-rata NFIP refunds because they chose to obtain a private flood insurance policy mid-term and encourage support for including language to reestablish the prior rules. In order to help facilitate the growth of the private flood insurance market, Congress should also encourage FEMA to share its NFIP data with state insurance regulators and insurers to provide meaningful statistical information to help the private market be able to accurately assess flood risks. Further, the NAIC supports requiring FEMA to eliminate the non-compete clause to allow the Write Your Own insurance companies to sell private flood insurance outside of the NFIP.

Rep. Keiser asked if the NAIC had concerns as to whether adverse selection would occur with growth of the private flood insurance market. Cmsr. Doak stated that the NAIC is in favor of such growth as long as adequate consumers protections are present.

Frank O'Brien stated that on Nov. 14, the House passed H.R. 2874 which will reform and reauthorize the NFIP – the bill includes provisions from H.R. 1422. PCI is concerned that the reauthorization package reduces write-your-own reimbursement for administration by 3% over three years. H.R. 2874 includes claims reforms; sets up a program for States to address affordability issues; addresses mapping and map appeals issues; and allows lenders to require flood insurance even if outside the floodplain. Most importantly, H.R. 2874 extends the NFIP to September 30, 2022. Mr. O'Brien stated that unfortunately it is still questionable as to how the Senate will react to the legislation, and there are not a lot of working days between now and the end of the year, in addition to there being other reform efforts Congress is considering.

Ned Dolese, President of Coastal American Insurance Company, stated that Coastal American is the first insurance company to insure flood on a homeowner's policy. Mr. Dolese stated that doing business in this manner allows flood insurance to be regulated on a State level because as an admitted carrier, the State Insurance Commissioner sees everything they do before they do it. When including flood on a homeowner's policy rather than a standalone policy, a lot of the chatter that comes with discussing the NFIP and FEMA goes out the window. Coastal American, along with its actuaries, designed an algorithm that is meant for any State with a coastline. The three main components of the algorithm are: the distance between the household and any body of water; the elevation of the household; and how many times that area has previously flooded. Mr. Dolese stated that his experience is that if you provide a product that has affordable rates, people will buy it.

Rep. Henne asked Mr. Delose what the Company's limits on flood were. Mr. Delose stated that the limits are all the limits on the homeowner's policy.

Amy Bach, Executive Director of United Policyholders, stated that consumers need more options in the flood insurance market and that unfortunately, politics is playing a big part in discussions surrounding the reauthorization of the NFIP and the growth of the private flood insurance market. Ms. Bach stated that when looking at the recent hurricanes, the role of the lending industry is critical in spreading flood risk appropriately. Additionally, there is a lot of room for innovation in the flood insurance mitigation market. An example is a company called Smart Vent – the vents will open and allow water into the interior space. By allowing water in, they equalize the pressure on the foundation walls so that the home does not collapse with the force of the water against the weakest section of the home's foundation. Purchasers of a vent can receive a reduction in their flood insurance premium. Ms. Bach closed by stating that whatever one thinks of climate change, flood incidents are on the rise and all signs point to that continuing. Now is a great opportunity for State legislators to work on innovative efforts to help consumers.

Cmsr. Doak then provided a summary of the impact that the recent hurricanes have had on policyholders and insurance companies, and noted that the NAIC has worked hard to help those affected. Cmsr. Doak noted that regarding Hurricane Maria, the NAIC has worked closely with the Office of the Insurance Commissioner of Puerto Rico and the U.S. Virgin Islands' Office of the Lieutenant Governor – Division of Banking, Insurance and Financial Regulation to provide communications to consumers, media and the insurance industry. Insurance regulators in Puerto Rico and the U.S. Virgin Islands, with the help of the NAIC, have responded to more than 100 toll-free calls and provided more than 8,000 users with emergency bulletins and other information through NAIC-hosted websites.

#### RESOLUTION ENCOURAGING THE AMERICAN LAW INSTITUTE TO MATERIALLY CHANGE THE PROPOSED RESTATEMENT OF THE LAW OF LIABILITY INSURANCE

Sen. Breslin stated that Restatements, authored by the American Law Institute (ALI), are supposed to state what the law currently is in a specific area – not what the law should be. This past May, Commissioner Tom Considine, NCOIL CEO, wrote to the ALI expressing concern over its proposed Restatement of the law on Liability Insurance (proposed Restatement). Cmsr. Considine noted that several of the proposed Restatement's provisions are inconsistent with well-established law and purport to address matters which are properly within the legislative prerogative. That letter ultimately led to this morning's general session titled "Restatement or NEWstatement? Examining the ALI's Proposed Restatement of the Law of Liability Insurance" during which one of the Restatement's Reporters, Tom Baker, provided background on the proposed Restatement and the ALI in general. Sen. Breslin stated that based on the general session earlier today, no or minimal substantive changes to the proposed Restatement are anticipated before it is submitted to the ALI Council and then the ALI membership for final approval.

Accordingly, Sen. Breslin and Sen. James Seward (NY) offered a Resolution for consideration that encourages the ALI to materially change the proposed Restatement so that it is consistent with well-established insurance law and respectful of the role of state legislators in establishing insurance legal standards and practice. And if no



changes are made, NCOIL will oppose the proposed Restatement and work towards ensuring that the proposed Restatement not be afforded recognition by courts as an authoritative reference regarding established rules and principles of insurance law, as Restatements traditionally have been afforded. Sen. Breslin noted that it is his intent for the Resolution to be adopted by this Committee, but not for it to be considered by the Executive Committee this Sunday. Rather, a copy of the Resolution can be sent to ALI leadership along with a letter stating that the Executive Committee is prepared to adopt the Resolution and take the aforementioned actions if changes are not made to the proposed Restatement.

Rep. Richard Smith (GA) voiced his support for the Resolution and stated that it is important for the Committee to realize that judges across the country are already looking to the proposed Restatement for guidance even though it is still in draft form.

Rep. Matt Lehman (IN) stated that he agrees that this is a very important issue but questioned how far NCOIL should take the "fight." Sen. Breslin stated that a strong response in the form of this Resolution is needed since the ALI did not respond to Cmsr. Considine's letter and that this morning's general session indicated that the ALI will not make any changes.

Cmsr. Considine clarified that the Resolution, if adopted by the Committee, would not go to the Executive Committee for consideration on Sunday. Rather, it would be tabled so that a letter could be sent to the ALI along with a copy of the Resolution to initiate discussions. Rep. Steve Riggs (KY) voiced his support for the Resolution and stated that it is important for State legislators, and NCOIL, to stay involved in this issue.

Upon a Motion made by Rep. Lehman and seconded by Rep. Riggs, the Committee voted without opposition by way of a voice vote to adopt the Resolution.

#### ADJOURNMENT

There being no further business, the Committee adjourned at 4:00 p.m.