

NATIONAL COUNCIL OF INSURANCE LEGISLATORS
EXECUTIVE COMMITTEE
INTERIM COMMITTEE CALL
MAY 2, 2018
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Executive Committee held an interim meeting via conference call on May 2, 2018 at 3:00 P.M. (EDT).

NCOIL President, Senator Jason Rapert of Arkansas, Chair of the Committee, presided.

Other members of the Committees present were:

Rep. Sam Kito, AK	Rep. George Keiser, ND
Rep. Deborah Ferguson, AR	Sen. Bob Hackett, OH
Asm. Ken Cooley, CA	Rep. Marguerite Quinn, PA
Rep. Richard Smith, GA	Rep. Tom Oliverson, TX
Rep. Joe Fischer, KY	

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

DISCUSSION OF PROPOSED FINAL DRAFT NO.2 OF THE PROPOSED
RESTATEMENT OF THE LAW OF LIABILITY INSURANCE

NCOIL President Sen. Jason Rapert (AR) thanked everyone for participating in this meeting and stated that upon first learning of the ALI's Proposed Restatement of the Law of Liability Insurance (Proposed Restatement), NCOIL has been heavily involved due to the concern that several provisions of the Proposed Restatement go beyond established law, and either chart new territory, present a minority perspective, or address matters properly within the legislative prerogative. Sen. Rapert stated that it is important to note that just because legislatures may not have passed laws in an area doesn't mean the legislatures haven't considered the issue. The decision not to pass something, such as bad-faith legislation, is an exercise of the legislative prerogative.

Sen. Rapert stated that the purpose of our meeting today is to discuss Proposed Final Draft No. 2 of the Proposed Restatement before the ALI's Annual Meeting (May 21-23), during which the ALI will consider a final vote on the Proposed Restatement. Sen. Rapert then introduced the invited participants for the meeting:

- Stephanie Middleton - Deputy Director – ALI
- Lorie Masters, Partner - Hunton & Williams
- Victor Schwartz, Chair, Public Policy Group - Shook, Hardy & Bacon, LLP
- Peter Kochenburger - Associate Clinical Professor of Law and Executive Director of the Insurance LLM Program and Deputy Director of the Insurance Law Center - University of Connecticut School of Law
- Laura Foggan, Partner - Crowell & Moring, LLP

Sen. Rapert noted that the ALI has made changes to the Proposed Restatement, and that he looks forward to hearing everyone's perspective as to whether those changes alleviate NCOIL's concerns.

Commissioner Tom Considine, NCOIL CEO, stated that at the NCOIL Spring Meeting in March, it was determined that the nature of the changes made in Proposed Final Draft No.2 would dictate NCOIL's next steps. Accordingly, this is a great opportunity to hear directly from the ALI and others about the changes made to said draft, and to determine how NCOIL should proceed before and after the ALI's Annual Meeting later this month. Cmsr. Considine stated that after discussing the changes to the draft, the Executive Committee will discuss some actions he believes it needs to consider in light of the ALI's changes and if the ALI proceeds with final adoption at its Annual Meeting.

If the Committee embraces the changes, it could endorse the Proposed Restatement. If the Committee does not embrace the changes and remains opposed, NCOIL could: send a follow-up letter to State Judicial Presiding Judges informing them of the Restatement's adoption by the ALI, urging them to not afford it recognition as an authoritative reference; send a letter to state legislators across the country, informing them of the Restatement's adoption by the ALI, urging them to adopt Resolutions declaring that the Restatement should not be afforded recognition by courts as an authoritative reference; develop model legislation intended to accurately state what the settled law is in certain areas of liability insurance. On behalf of NCOIL, Cmsr. Considine thanked the ALI for the changes made thus far to the Proposed Restatement.

Ms. Middleton thanked the Committee for inviting her to participate in the meeting, and thanked NCOIL for following the Proposed Restatement and providing input. The ALI wants to "get it right" with regard to the Proposed Restatement as the ALI does not have an agenda. Ms. Middleton stated that the ALI tries to stay in its lane and respect the legislative prerogative as the ALI knows that statutes trump common law. Ms. Middleton stated that she believes almost everyone can agree that most of the Proposed Restatement is helpful and that both policyholder and insurer representatives have stated that a Restatement of liability insurance law would be helpful and would cut down on litigation.

Ms. Middleton stated that from the beginning of the project the plain-meaning rule has been heavily discussed, and this past January at the ALI Council meeting changes were made to that section (§ 3). Ms. Middleton acknowledged that there still have been concerns voiced about comment (c) to § 3 which deals with when custom, practice, and usage can be considered when deciding whether a term has a plain meaning and, if so, what that plain meaning is. Changes have also been made to § 12 regarding an insurer being liable for the negligence of outside independent counsel representing the policyholder.

Ms. Middleton noted that there is still some controversy regarding § 12, but that she thinks generally, most agree that if the insurer overrides the independent judgment of the independent counsel then it could be liable in circumstances for the bad results of overriding the independent judgment. Ms. Middleton noted the concern that § 12 still states that the insurer could be liable for breach of a duty of care in selecting an independent counsel. The thought there is that if the insurer decides to recommend a son-in-law of someone at the company who does not have any relevant experience, then there should be liability.

Ms. Middleton then noted that key changes have been made to § 19 regarding the consequences for an insurer if it breaches the duty to defend a legal action. The prior draft stated that there were forfeiture of coverage defenses if there is a breach of the duty to defend – that has now been moved to the bad-faith remedies section. Ms. Middleton noted that this is an example of when states have conflicting case law on an issue, the ALI must choose a rule when drafting a Restatement and it has to be clear in the comments why that rule was chosen so courts are clear on the ALI's reasoning. Another substantial change made in the current draft was the elimination of fee-shifting as a remedy.

Ms. Middleton acknowledged that concerns still exist regarding terminating the duty to defend and that she believes there is a drafting issue as she does not believe the Reporters intended to say that you always must go to court to get approval to terminate the duty to defend. Lastly, Ms. Middleton stated that the Reporters may need to clarify that for the remedies available for a breach of contract, whether mitigation is relevant.

Ms. Masters stated that she does not consider herself a “proponent” of the Proposed Restatement – she is a proponent of the process and of the ALI. The point of the ALI's process in drafting Restatements is to reach the best possible result which means that not all interested parties will get everything they want included in the Restatement. Ms. Masters stated that as a policyholder attorney, there are many provisions of the Proposed Restatement that she does not agree with. Ms. Masters stated that she supports the current draft's revised plain-meaning rule section, specifically its provisions dealing with extrinsic evidence and custom and practice.

Ms. Masters stated that with regard to § 27 dealing with damages for breach of the duty to make reasonable settlement decisions, it should be re-examined as it causes confusion. The point of the section is to discuss what kind of damages can be assessed when an insurance company breaches the duty to make reasonable settlement decisions but the discussion in the draft talks about two different issues: it starts with talking about damages that can be assessed but then it gets into the law on insurability of punitive damages. Lastly, Ms. Masters stated that she believes § 24 needs clarification as she does not support its provision that whether claimants are willing to settle can be used in defense in coverage actions.

Professor Schwartz discussed three sections of the Proposed Restatement that do not seem to align with the goal of reducing litigation. Section 8 of the Proposed Restatement deals with rescission and the law in all of the states is if a misrepresentation to an insurer is material, the insurer can modify the policy. However, in the Proposed Restatement the Reporters added a “substantiality” requirement for the misrepresentation to be material. Prof. Schwartz stated that “substantiality” is widely known as a “weasel” word in the legal community and it is a litigation-driver.

Additionally, in § 12, an insurer is under a duty to select good counsel, and to ensure that said counsel has “adequate” malpractice insurance – that is another litigation-driver. Lastly, § 27 is problematic because if there is a breach of a duty to settle, the carrier will be liable for an excess compensatory verdict, but under the provisions of the Proposed Restatement, the insurer is also liable for punitive damages. It is the policy of many states to not insure punitive damages – the bad actor is supposed to “feel the sting” of punitive damages to prevent recidivism.

Professor Kochenburger began by stating that he agrees with Sen. Rapert's statement made earlier that just because legislatures may not have passed laws in an area doesn't mean the legislatures haven't considered the issue. The decision not to pass something, such as bad-faith legislation, is an exercise of the legislative prerogative. Prof. Kochenburger stated that is where common law serves its role – filling in those gaps not addressed by legislatures. When there is significant difference among states on a specific topic, the ALI exists to step in and recommend what they think is the best statement of the law. At any time, legislatures can step in and enact a statute.

Prof. Kochenburger stated that insurance law and contract law blend together in many instances since insurance itself is a contract. There are instances with the Proposed Restatement where the insurance industry wants it both ways as the industry has argued that some provisions are inconsistent with common law contract principles while arguing that other provisions, when consistent with common law contract principles, represent a minority opinion of a specific liability insurance issue. An example is that the Proposed Restatement states that if there is an excess verdict and there was a reasonable opportunity to settle, the insurer is liable for that excess verdict. That is the law in some states and is also a basic element of contract law: consequential damages.

Laura Foggan stated that she agreed with Ms. Masters' statement that the goal of a Restatement is to get it right – it is not to draft something that is beneficial to one industry/group. However, there are some sections in the Proposed Restatement that go too far in one direction and that carry some troubling consequences. There have been important changes made in the current draft but there remain several problematic provisions. Ms. Foggan agreed with Prof. Schwartz's concerns regarding § 8 dealing with rescission. The "substantiality" requirement is a litigation driver and is problematic because it is at odds with existing statutory and common law governing misrepresentation and rescission.

Ms. Foggan stated that § 36 dealing with late notice under a claims made and reported policy is also problematic. That section creates a question of whether late notice under a claims made and reported policy will still be recognized as late if it comes close to the end of the policy and the policy does not contain an extended reporting period. That overrides insurance contract terms and makes a judgment about when a late notice defense should be permitted. Ms. Foggan also shared Prof. Schwartz's concerns about § 12 dealing with adequacy of malpractice insurance. This is a precise example of where the Proposed Restatement goes too far since it takes on what is obviously a very substantial public policy judgment about whether professional liability insurance should be required for attorneys. There are only two (2) jurisdictions that mandate attorney malpractice insurance: Idaho and Oregon. Interestingly, Oregon's attorney malpractice insurance statute derived from a goal of making insurance affordable to attorneys, not consumer protectionism.

Prof. Kochenburger stated that by definition, the Proposed Restatement cannot "go too far" since statutes will always trump any of its provisions. Also, the "substantiality" requirement referenced in § 8 is the law in many states. Prof. Schwartz stated that he agrees with the goal of § 8 but including the word "substantially" is nothing but a litigation-driver.

Asm. Ken Cooley (CA), NCOIL Secretary, stated that it is concerning that some of the characterizations of the issues in the Proposed Restatement will affect how judges evaluate fact patterns. In California, some insurance laws have been decided by voters and it is a very complex task to try and set forth state liability insurance law. Sen. Rapert stated that a proposal to cap damages in certain instances is on the ballot this year in Arkansas.

Rep. George Keiser (ND) stated that he believes there are two alternatives on how to proceed: put together policy statements/best practices on certain liability insurance issues and send them to courts; or, preferably, have courts request that legislatures take up some of the issues mentioned in the Proposed Restatement and enact statutes - that is what happened several years ago with transportation network company (TNC) legislation. It is discouraging that the ALI has considered itself so important that it would draft the Proposed Restatement without consulting legislators, and the result will end up being that legislatures will step in and enact statutes that address certain issues in the Proposed Restatement.

Rep. Matt Lehman (IN), NCOIL Treasurer, stated that he does not believe that the changes made to the current draft are enough to make the Committee comfortable. Rep. Lehman agreed that there are some instances where the insurance industry has wanted it both ways, but he feels that some of the Proposed Restatement's provisions will make it harder on insurance agents and questioned what the next step should be for the Committee to take.

Sen. Rapert stated that the Committee has put its voice behind the Resolution adopted in January encouraging the ALI to make material changes to the Proposed Restatement and asked Cmsr. Considine if the changes made in the current draft are in fact material and enough to alleviate the Committee's concerns.

Cmsr. Considine stated that some of the changes made are substantive and meaningful but there remain many problematic provisions. Cmsr. Considine offered the following course of action for the Committee to consider: if the ALI adopts the Proposed Restatement without any further changes, the Committee could pass an omnibus Model Liability Insurance Law that clarifies what NCOIL believes is the law in specific areas; or pass a series of more specific liability insurance Model Laws that deal with one issue per-Model.

Rep. Lehman stated that one concern is what to do in states that have addressed some of these issues through the ballot as Sen. Rapert and Asm. Cooley mentioned. Rep. Lehman stated that he believes the Committee needs to continue discussing the Proposed Restatement and it can react accordingly after the ALI's Annual Meeting.

ADJOURNMENT

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