

NATIONAL COUNCIL OF INSURANCE LEGISLATORS  
PROPERTY & CASUALTY INSURANCE COMMITTEE  
NCOIL SUMMER MEETING - SALT LAKE CITY, UTAH  
JULY 12, 2018  
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Property & Casualty Insurance Committee met at the Little America Hotel in Salt Lake City, Utah on Thursday, July 12, 2018 at 10:15 a.m.

Representative Richard Smith of Georgia, Chair of the Committee, presided.

Other members of the Committee present were:

Rep. David Santiago (FL)	Rep. Lois Delmore (ND)
Sen. Jason Rapert (AR)	Rep. George Keiser (ND)
Rep. Martin Carbaugh (IN)	Sen. Neil Breslin (NY)
Rep. Matt Lehman (IN)	Asw. Pamela Hunter (NY)
Rep. Joseph Fischer (KY)	Sen. Bob Hackett (OH)
Rep. Bart Rowland (KY)	Sen. Jay Hottinger (OH)
Rep. Edmond Jordan (LA)	Rep. Glen Mulready (OK)
Sen. Dan "Blade" Morrish (LA)	Rep. Tom Oliverson, M.D. (TX)
Rep. Michael Webber (MI)	

Other legislators present were:

Rep. Deborah Ferguson (AR)	Rep. Joe Hoppe (MN)
Rep. David Livingston (AZ)	Sen. Paul Utke (MN)
Rep. Bryon Short (DE)	Asw. Ellen Spiegel (NV)
Rep. Jim Gooch (KY)	Rep. Rodney Anderson (TX)
Sen. Brian Feldman (MD)	Rep. Joe Schmick (WA)

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 March 2, 2018 meeting in Atlanta, GA.

## CONSIDERATION OF CONSUMER PROTECTION TOWING MODEL ACT

Rep. Matt Lehman (IN), NCOIL Treasurer, and sponsor of the Consumer Protection Towing Model Act, stated that at the NCOIL Spring Meeting in March, it was decided that a meeting was necessary among interested parties to ensure that a final version of the Model was ready for consideration at the Summer Meeting. Accordingly, on May 22, representatives from both the towing and insurance industries met to discuss and address some of the concerns from both industries. The version before the Committee

today is a result of that meeting and Rep. Lehman stated that he believes it represents a good and fair work product.

Rep. Lehman noted that there are three minor amendments to the Model that he would like to propose. First – in Section 6, Rep. Lehman proposed that the title be changed from “Private Property Towing” to “Commercial Private Property Towing” because the intent of the section is meant to apply to commercial properties that have parking lots, not for all private properties. We don’t want to bring someone’s home into the equation. Second – in Section 8A, after the last line, add: “If a state does not have a mechanism to provide the above requested information electronically, then the tow company will make all reasonable efforts to obtain the vehicle owner and lien holder information.” The reasoning for that amendment is that the Model requires towing companies to conduct data searches for the owner of the vehicle, but some states may not have that mechanism available. Third, in Section 11, change the title from “Certification Requirements” to “Tow Company Certificate Requirements.” The reasoning for that amendment is that “certification” within the towing industry refers to job related knowledge-based certification, such as the National Driver Certification Program, and that is not the intent of the section. Rep. Lehman urged the Committee to support the Model, as amended.

Erin Collins of the National Association of Mutual Insurance Companies (NAMIC) thanked Rep. Lehman and NCOIL staff for facilitating the interested parties meeting in May. The concerns that NAMIC had with the prior draft have been addressed. Accordingly, NAMIC supports the Model and urged the Committee to adopt it.

Upon a Motion made by Sen. Bob Hackett (OH) and seconded by Rep. Tom Oliverson, M.D. (TX), the Committee voted without objection to pass the Model, as amended, by way of a voice vote.

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

Rep. Richard Smith (GA), Chair of the Committee, stated that Rep. Lewis Moore (OK), sponsor of the proposed amendments to the NCOIL Model State Uniform Building Code had informed him and others prior to the Committee that he is withdrawing said amendments.

#### UPDATE ON THE ALI RESTATEMENT OF THE LAW OF LIABILITY INSURANCE

Cmsr. Tom Considine, NCOIL CEO, stated that on May 2, 2018, the NCOIL Executive Committee held an interim meeting via conference call to discuss the ALI Liability Insurance Restatement (Restatement) before it was voted on at the ALI’s Annual Meeting later that month. Guest speakers participating on the call were: 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; and Laura Foggan – Partner – Crowell & Moring, LLP.

Cmsr. Considine stated that the ALI did make some positive changes to the Restatement before it was adopted at their Annual Meeting, but overall, there remain

several problematic provisions. A Restatement is supposed to re-state the law on a certain issue and, historically, all Restatements have been well-respected and objective in nature. However, this Restatement is not objective but rather a re-statement of what the ALI would like the law to be in the area of liability insurance. Notably, the Restatement started out as a “Principles Project” – which are aspirational in nature – but it somehow transformed into a Restatement.

Cmsr. Considine noted that prior to the NCOIL Spring Meeting in March, on behalf of NCOIL, he wrote a letter to each state’s presiding jurist urging them to get involved and noting that the Restatement should not be utilized as a source for researching liability insurance law. Some jurists wrote back stating that they could not get involved since there was no “case or controversy” before them.

Cmsr. Considine stated that he believes the next step for NCOIL is for staff to compile a list of the provisions in the Restatement that are problematic, and then present to the P&C Committee either an omnibus Model Liability Insurance Law that accurately states the law on those provisions, or to present several “rifle shot” Models. Cmsr. Considine stated that he believes the better approach is the “rifle shot” approach, and that it is critically important to ensure that the Models are drafted in such a way as to make it clear that they are dealing with insurance topics, not court topics, because if the Models get presented to state Judiciary Committees, it will be very difficult for them to advance.

John Ashenfelter of State Farm thanked NCOIL for its involvement with the Restatement and stated that the ALI is apparently still considering some changes to the Restatement. Provisions of the Restatement that the ALI are still examining are: misrepresentation and rescission; insurer liability for the conduct of defense counsel; requiring judicial adjudication for withdrawal of defense; insurer recoupment of costs of the defense; duty to make reasonable settlement decisions; the Effect of a Reservation of Rights on Settlement Rights and Duties (notably – this issue has been dealt with in a different way in a separate Restatement); settlement without insurer consent; damages for insurer’s breach of settlement duties; late notice under claims made and reported policies; and remedies.

Mr. Ashenfelter stated that the Tennessee legislature has acted in response to the Restatement which may be a good approach for other states to follow (TN SB 1862). There appears to be ample opportunity for NCOIL to step in and act in a way so as to affirm that state insurance legislators, as elected public policymakers, are those who are to make liability insurance law – not the ALI.

Rep. Smith asked Cmsr. Considine if any Model legislation would be prepared for the Committee to examine at the NCOIL Annual Meeting in December, and whether it would be in the form of an omnibus model or “rifle shot” models. Cmsr. Considine stated that the plan is to have a draft for the Committee to look at in December, and his recommendation is for the Committee to take the “rifle shot” approach.

Rep. Joseph Fischer (KY) asked if there is a list available of the provisions in the Restatement that identifies which are correct and incorrect restatements of the law. Mr. Ashenfelter stated that Laura Foggan is working on that list and can distribute it when finished.

Sen. Hackett asked what Tennessee did that was different than Ohio's approach which passed a proposed bill providing that the Restatement "does not constitute the public policy of this state." Mr. Ashenfelter stated that he does not have the Tennessee bill in front of him, but he believes it walks a very careful line in acknowledging that the ALI gets it right in some areas but points out areas where the ALI mis-stated the law. Mr. Ashenfelter also noted that Restatements are very important pieces of work because courts look to them for guidance, and in this instance, some courts have already cited to the liability insurance restatement.

Rep. George Keiser (ND) stated that, in part, the problem is that it is not only the laws already enacted, but that when legislatures decide not to address a certain issue – that is also an exercise of the legislative prerogative. Rep. Keiser stated that represents a dilemma of sorts and asked how NCOIL can cover both sides in its response. Mr. Ashenfelter stated that is a great point and that could possibly be addressed by NCOIL adopting "rifle shot" models and states could examine them and determine whether or not to adopt them. Cmsr. Considine stated that an example of that approach is reflected in bad-faith legislation. More than two dozen states have considered that issue and decided not to adopt any legislation, but the ALI has taken a forward-leaning approach on that issue in the Restatement. Mr. Ashenfelter then clarified that the Tennessee approach (SB 1862) only dealt with the plain-meaning rule and accurately stated what the law is on that issue.

#### DISCUSSION ON THE ROLE OF INSURANCE IN PUBLIC-PRIVATE PARTNERSHIPS

Rep. Lehman stated that the issue of public-private partnerships (P3s) is quickly growing and it came to light in Indiana when a \$325 million road project was defaulted on and there was a 25% bond requirement. That drove a discussion in the Indiana legislature about what is the proper percentage to require on P3s regarding bonding. Rep. Lehman stated that this issue is going to become part of a larger issue with the Trump Administration's infrastructure plans which P3s are going to be a part of.

Lynn Schubert, President of the Surety & Fidelity Association of America (Ass'n), agreed with Rep. Lehman's statement that P3s are going to be a big issue in state legislatures. The Ass'n wears three hats: a.) a licensed advisory organization to every state insurance department on issues of surety and fidelity; b.) statistical agent for sureties and fidelities; and c.) a trade ass'n whose members are global and regional insurance companies. Those Assn's members write over 97% of the premium volume for surety and fidelity in the U.S. The U.S. over the years has adopted a public policy of encouraging and requiring the use of surety bonds.

Ms. Schubert stated that a surety bond is an insurance policy but different from traditional insurance where you have two parties and the risk is shifted to one party. A surety bond is essentially a guarantee. By way of example, if Chairman Smith wants to hire Ms. Schubert to complete a construction project but is not sure if she can do it, he can ask an insurance company to "stand behind her" by issuing a surety bond which has two implications. The surety bond determines that the independent party believes she can perform the construction and if they are wrong, they must perform the construction project. There are different types of surety bonds but over 60% are issued for construction projects.

Ms. Schubert stated that over 100 years ago the Federal government decided that construction projects needed protection because people who are funding the projects are taxpayers; and the people working on the projects should be able to have guaranteed payment since subcontractors have no recourse if the general contractor refuses to pay. Unlike being able to put a lien on someone's house, you can't put a lien on public property. Indiana is a very interesting example because the payment bond on that project was only 5% so there were subcontractors who didn't believe they had protection, so they stopped working.

Ms. Schubert stated that in the U.S. there is a public policy with the Federal government of 100% performance bonds which means whatever the contract price is must be bonded 100% with both a performance and payment bond. All states have similar laws called "Little Miller Acts" since the Federal statute is called "The Miller Act." Europe has much less stringent requirements.

Ms. Schubert stated that P3s are interesting and different from municipal bonds since entities are created specifically to invest in infrastructure projects. The first people to bid on those projects were European contractors and it was controversial that people called for European bonding policy to be accepted. Many states in enabling statutes have required 100% performance and payment bonds and Ms. Schubert stated that there is no reason to change that when someone else is just providing the financing. Ms. Schubert stated that a P3 is when someone else provides financing upfront and at the end of the day it is still "your" bridge/highway and "your" citizens who will come to you asking what happened if it is not complete – they don't care that a private entity is involved financing it. Accordingly, from a political and financing standpoint, it is still "your" project – the private entity is simply putting up the money upfront when there is a lack of public financing.

Ms. Schubert stated that many P3 enabling statutes either require 100% performance and payment bonds or they require conforming to other existing statutes which sets forth the public policy of that state. Ms. Schubert stated that is a good approach. Ms. Schubert stated that the Ass'n is a resource for anyone to reach out to determine what their state policy is. Ms. Schubert stated that recently, the push around the world has been to increase the protection so she would hate to see states decrease protections in P3 enabling statutes.

Ms. Schubert stated that if states are to permit alternative security for public works, they should only consider cash, municipal/government bonds, or a letter of credit for the same amount. Ms. Schubert stated that Pennsylvania used to have a law for its public works that required 100% performance and payment bonds. PA changed the law to still require 100% but to allow alternative security. A contractor wanted to do the incinerator project in Harrisburg. The contractor couldn't get bonds, so PA accepted a parental guarantee for 100%. The contractor ended up not completing the project and Harrisburg went bankrupt and the taxpayers of Harrisburg are still paying for it. There was even an indictment issued by a grand jury on Harrisburg public officials. At the end of the day, the grand jury's recommendation was to re-institute the law that required 100% performance and payment bonds.

Ms. Schubert stated that in Ontario, Canada, they did not have a requirement for performance or payment bonds and a study was conducted that provided great quotations such as: "non-bonded construction firms are 10 times more likely than

bonded companies to suffer insolvency”; and “surety bonds could protect 25 times more Ontario economic activity than their premium cost.” Ontario has since passed a law to require 100% performance and payment bonds.

Ms. Schubert closed by stating that states will not restrict capacity, help local contractors get work, or save money by allowing discretion or looking for small penalty bonds. Sub-contractors will increase their price and be cautious with their work if the projects aren't backed by 100% performance and payment bonds. The cost of a 100% performance and payment bond costs the same as a 50% or 30% performance and payment bond. That may sound crazy but it's true because they bond the whole contract, not the first or last 30% of the contract.

Rep. Lehman stated that years ago, pooling bond requirements (i.e. \$1 million each to 10 contractors to meet a contractual \$10 million bonding requirement) was common but many states have moved away from that practice. Rep. Lehman stated that he believes that has hurt smaller contractors and asked Ms. Schubert if she recommended going back to that practice. Ms. Schubert stated that it's not necessarily the fact that the smaller contractors can't get the bonding for the project, it's that the subcontractors can't meet the size of the project so what happens is that they need to enter into a joint venture and each party to the venture brings their bonding capacity to the table. Ms. Schubert also stated that states have pushed back on co-surety.

Sen. Dan “Blade” Morrish (LA), NCOIL Vice President, asked Ms. Schubert's thoughts on services bonds rather than construction bonds. Louisiana has a P3 with private hospitals to provide their safety net services for healthcare and asked if it is common to bond those services. Ms. Schubert stated that those bonds are available, although not as common as construction bonds, in addition to operational and maintenance bonds. In a P3 project, there is a financing phase which typically requires a surety bond to get to closing (or a letter of credit); a construction/design/build phase which is in the surety bond wheelhouse; and then the operation and maintenance phase which surety bonds are available for as well. The issue with the operation and maintenance phase with P3s is timing as many projects have a 30-year operation/maintenance period and it is difficult to predict what a contractor will do 30 years out.

Sen. Brian Feldman (MD) asked how complicated it gets with projects that cross state lines and asked how a national organization such as NCOIL can figure out ways to mitigate any of those complications. Ms. Schubert stated that many of those projects have specific enabling authority with specific requirements. Ms. Schubert also stated that the Ass'n is starting a new practice called The Model Contractor Development Program which teaches small construction contractors how to improve their company's operations and increase their bonding capacity.

Rep. Tom Oliverson, M.D. (TX) asked where the bond writers gets their financing from, and if the Ass'n has information lists each state's bonding requirements. Ms. Schubert stated that surety bonds are required to be written by licensed insurance companies which are regulated by state insurance departments. On the federal level, there is something called the Treasury List – for any surety bond written for any public entity, the list states a maximum number which a company may write a bond for. The Treasury List also allows co-surety and reinsurance to take a bond larger than that. So the beauty is that those bonds are written by companies that are regulated and have the reserves and capital to do so. Rep. Oliverson asked if there has ever been a situation where the

insurance company defaults on its bonds. Ms. Schubert stated that there are instances where there are disputes as to whether the contractor has defaulted but no construction project has ever fallen apart because the surety ran out of money. Ms. Schubert closed by stating that she is happy to provide the Committee with a list of all state bonding requirements.

Asm. Ken Cooley (CA), NCOIL Secretary, stated that as the size of these projects begins to grow rapidly, it is the obligation of policymakers to be aware of all of these issues stated today. Asm. Cooley stated that the role of companies is very important because they are in essence making judgments about an entity's ability to perform on very large transactions. Asm. Cooley stated that he believes in the function of sureties, but they can go insolvent and last month, a specialty surety company dealing with student loans in either North or South Dakota went belly up. Accordingly, it is important to analyze each and every aspect of these types of situations and projects.

#### RE-ADOPTION OF MODEL LAWS

Upon a Motion made by Rep. Keiser and seconded by Asm. Cooley, the Committee voted without objection by way of a voice vote to re-adopt for 5 years, per NCOIL bylaws, the Model Act Regarding Auto Airbag Fraud, the Model State Uniform Building Code, the Model Act Regarding Disclosure of Rental Vehicle Damage Waivers, the Model Anti-Runners Fraud Bill, the Property/Casualty Insurance Modernization Act, and the Property/Casualty Insurance Domestic Violence Model Act.

Rep. David Santiago (FL), Vice Chair of the Committee, offered amendments to the State Flood Disaster Mitigation and Relief Model Act (Relief Model) that is scheduled for re-adoption. Rep. Santiago stated that no one knows what will happen at the end of the month when the National Flood Insurance Program (NFIP) is set to expire but noted that everyone he met with during the NCOIL D.C. fly-in last month agreed that the NFIP is broken. Rep. Santiago offered proposed amendments to the Relief Model based on legislation Florida passed 4 years ago to allow the private flood insurance market to participate.

Rep. Santiago stated that the Florida legislation is working, and the reinsurance players immediately started diving into the market to find a way to find a marketplace for Florida's domestic carriers to start writing private flood. Rep. Santiago stated that he believes Florida currently has 12 domestic carriers that are writing private flood, and, in many cases, they have lowered the premiums for consumers and provided better coverage. For example, consumers can now get both replacement cost on dwelling and contents. Rep. Santiago stated that he believes the amendments can be a roadmap for the rest of the nation and can also send a signal to Congress that the states can act appropriately when it does not.

Lisa Miller, CEO of Lisa Miller & Associates, stated that Florida finally said, "enough is enough" and the legislation was a result of all interested parties sitting through painful but necessary negotiations to get the private flood insurance market involved to help consumers. FEMA was thankful for the legislation and the current FEMA Administrator, Brock Long, has said he is willing to help see the Florida legislation serve as the basis for a national Model law.

Ms. Miller stated that the proposed amendments are actually comprised of very simple concepts: prior approval of forms – to ensure that the forms meet or exceed NFIP coverage; flexible rates; authorized insurers must notify the [State entity for regulating insurance] at least 30 days before writing flood insurance in the state and file a plan of operation and financial projections or revisions to such plan; ensuring the agent properly educates the consumer about the coverages available; and permitting the Insurance Commissioner to certify the validity of the product so that the banks are satisfied. Ms. Miller stated that she looks forward to working with the Committee and interested parties to see the amendments progress at the NCOIL Annual Meeting in December.

Paul Martin of NAMIC stated that if you look at the private flood insurance market as it existed in 2016, specifically the Herfindahl-Hirschman Index (HII), which is a measure of competitiveness and market concentration, only 1 state was rated as moderately competitive. In 2017, 20 states were rated as moderately competitive and 1 state, Alabama, was rated as competitive. In that 12-month period, the private flood insurance market grew 51%. The concern is introducing a Model law that would impede that organic growth. NAMIC looks forward to working with all interested parties to arrive at a workable solution that would continue that growth.

Rep. Santiago stated that he has heard that information before and it is fantastic, but there are challenges that remain and there is a need to address and create a common set of principles that allow the Federal government to get involved and embrace private flood insurance and allow more mortgages to be properly recognized by Fannie Mae and Freddie Mac. Mr. Martin stated that NAMIC agrees and understands that this is not just in insurance issue – it encompasses mortgages and insurance agents – but NAMIC just wants to be sure that NCOIL gets it right with this Model the first time. Ms. Miller stated that Florida revisits its flood insurance law every year and this is an evolving issue so expectations need to be managed.

Sen. Morrish asked if the NFIP still has rules that state if you leave NFIP you cannot come back. Ms. Miller replied yes, and that is still a major concern for insurance agents but when you look at the private market rates compared to the NFIP rates it makes the argument moot.

Upon a Motion made by Asm. Cooley and seconded by Rep. Oliverson, M.D., the Committee voted without objection to re-adopt the Relief Model until December by way of a voice vote so that Rep. Santiago can continue to develop his proposed amendments.

#### ADJOURNMENT

There being no further business, the Committee adjourned at 11:45 a.m.