

NATIONAL COUNCIL OF INSURANCE LEGISLATORS  
PROPERTY & CASUALTY INSURANCE COMMITTEE  
OKLAHOMA CITY, OKLAHOMA  
DECEMBER 7, 2018  
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Property & Casualty Insurance Committee met at The Renaissance Oklahoma City Convention Center Hotel in Oklahoma City, Oklahoma on Friday, December 7, 2018 at 9:00 a.m.

Representative Matt Lehman of Indiana, NCOIL Treasurer and Acting Chair of the Committee, presided.

Other members of the Committees present were:

Asm. Ken Cooley (CA)	Sen. Dan "Blade" Morrish (LA)
Rep. Lois Landgraf (CO)	Rep. Michael Webber (MI)
Rep. Martin Carbaugh (IN)	Rep. George Keiser (ND)
Rep. Joseph Fischer (KY)	Sen. Jerry Klein (ND)
Rep. Steve Riggs (KY)	Asm. Kevin Cahill (NY)
Rep. Bart Rowland (KY)	Rep. Lewis Moore (OK)
Rep. Edmond Jordan (LA)	Rep. Tom Oliverson, M.D. (TX)

Other legislators present were:

Rep. Sam Kito (AK)	Sen. Paul Wieland (MO)
Sen. Gary Dahms (MN)	Rep. Joe Schmick (WA)
Sen. Paul Utke (MN)	

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

A motion was first made by Rep. Joseph Fischer (KY) and seconded by Rep. Michael Webber (MI) to waive the quorum requirement which the Committee approved without objection by way of a voice vote. A motion was then made by Rep. Bart Rowland (KY) and seconded by Rep. Tom Oliverson, M.D. (TX) to approve the minutes of the Committee's July 12, 2018 meeting in Salt Lake City, UT, which the Committee approved without objection by way of a voice vote.

## UPDATE ON NATIONAL FLOOD INSURANCE PROGRAM AND PRIVATE FLOOD INSURANCE MARKET

Dr. Daniel Kaniewski, Deputy Administrator - Resilience, of the Federal Emergency Management Association (FEMA), began by applauding NCOIL in its efforts to close the insurance gap, something FEMA is very passionate about. 2017 and 2018 were very busy years for FEMA due to hurricanes, wildfires, earthquakes, and flooding. Dr.

Kaniewski stated that his first day at FEMA was when Hurricane Maria made landfall. FEMA has three main priorities that make up its 5-year strategic plan: building a culture of preparedness; readying the nation for catastrophic disasters; and reducing the complexity of FEMA.

Dr. Kaniewski stated that FEMA has actually re-organized its agency in order to carry out the first priority: building a culture of preparedness. In June of 2018, FEMA launched the FEMA-Resilience organization, which Dr. Kaniewski leads, that for the first time brings together FEMA's preparedness, mitigation, insurance, grants, and continuity programs all under one organization which consists of about 2,500 civil servants, \$3 billion in preparedness grants and mitigation grants, and \$1.2 trillion in insurance coverage through the NFIP. Under the culture of preparedness there are 4 objectives, the first of which is mitigation. One of the country's biggest challenges has been investing upfront prior to a disaster. In many cases that is mitigation. For those that question the value of mitigation, a report from the National Institute of Building Sciences earlier this year updated the return on investment for mitigation. It was 1 to 4 - \$1 invested in federal mitigation grants will save \$4 in response costs; it is now 1 to 6. That makes a very strong case for the notion that mitigation can make a difference.

FEMA is doing everything it can to make those investments. For example, after Hurricane Maria, FEMA began mitigation investments in Puerto Rico because the goal is not to just re-build, but to re-build better. FEMA has also put in place a \$10 million code adoption in place in order to bring Puerto Rico's building codes up to 2018 standards. FEMA has also invested \$79 million in a building code enforcement project so that Puerto Rico will be able to hire up to 273 personnel to oversee and enforce building codes. FEMA views those as very worthwhile investments.

Dr. Kaniewski stated that mitigation experts at FEMA and throughout the nation continue to be in close contact with local officials, especially floodplain managers, to provide detailed information and expert advice on repairing and rebuilding those homes in the floodplain. Bringing homes and businesses into compliance with local floodplain ordinances is not only required but may reduce individual flood insurance premiums. To be clear, mitigation does not just save money; it saves lives. Going back to 2001, Tropical Storm Allison hit the Texas Medical Center and caused a great deal of damage. As a result of the Presidential Declaration, it was not just rebuilt, but rebuilt better, and thanks to that mitigation investment, the Texas Medical Center was able to stay open and operating, serving the victims of Hurricane Harvey last year.

Dr. Kaniewski stated that a major piece of legislation recently passed called the Disaster and Recovery Reform Act (DRRA) which is transformative to the field of emergency management. DRRA authorizes FEMA to have a major pre-disaster mitigation program. Many may not realize that currently, FEMA's mitigation funds follow a disaster. In other words, states and local governments are only eligible for mitigation funds after a disaster strikes. Accordingly, DRRA authorizes a major new pre-disaster mitigation program that allows FEMA to provide 6% of all disaster costs as a competitive program across the nation before a disaster strikes.

Dr. Kaniewski further stated that FEMA cares deeply about all types of insurance, not just flood insurance. The insurance gap is huge and the difference between what is insurable and what is currently insured is simply too large. On average, Swiss Re sets losses on natural disasters at \$55 billion each year which is a striking number but when

you consider that \$30 billion of that is uninsured, it shows that we have our work cut out for us. If more than half of disaster losses in this country are not covered by insurance, we have work to do. FEMA is focused on transferring those risks off the individual's back and off the disaster survivor's back and into the private insurance and reinsurance markets. FEMA cannot control a lot of this, only flood, but FEMA believes that through innovative programs and public education programs, FEMA can be a strong partner to NCOIL and other organizations and companies to make this happen.

Nationwide, only 1/3 of those in the highest risk flood areas have flood insurance. Additionally, only 4-5% of American's have flood insurance nationwide. Those numbers signify that we all have a lot of hard work to do. Dr. Kaniewski further stated that 2 out of 3 homes in America are underinsured. Also, only 40% of renters nationwide have insurance. Dr. Kaniewski noted that FEMA's individual assistance programs are offered to those disaster-survivors without insurance. However, using Hurricane Harvey as an example, FEMA put, on average, \$4,000 in the hands of uninsured disaster-survivors, which obviously is not enough money to rebuild a home. The only way to rebuild after a disaster is through insurance. Another FEMA program, the National Flood Insurance Program (NFIP), paid, on average, to Hurricane Harvey survivors with flood insurance \$110,000.

With regard to closing the insurance gap, Dr. Kaniewski stated that state governments have important roles to promote insurance coverage. Obviously, insurance is regulated at the state level but more broadly, state governments should be setting and enforcing building standards and promoting and funding mitigation to reduce these risk exposures. State legislators are in a strong position to partner with FEMA and close the insurance gap by: talking to colleagues and constituents about the value of being insured; working with state insurance leadership to provide effective regulatory environments to foster a private flood insurance market, enabling easier access to purchase affordable flood insurance; and advancing legislation. Legislators should facilitate the development of the private flood insurance market, something which Dr. Kaniewski noted that this Committee is considering.

Legislation passed in North Carolina following Hurricane Florence that places conditions on recovery; prohibits the use of state funds for construction of new residences in hazard areas; and conditions state-funded housing assistance in those areas on a homeowner obtaining flood insurance. Additionally, a constitutional amendment was passed in Virginia that set forth tax exemptions for real property that is subject to recurrent flooding if improvements have been made on the property to address the flooding. Numerous other states have laws that require disclosure of a property's flood-risk and flood-loss history before completing a sale; that is a key way to help homeowners and renters understand their true flood-risk.

There are also great ways to partner with Insurance Commissioners and state emergency managers. Dr. Kaniewski stated that one of the most worthwhile conversations he has had since his time in his current position has been with state emergency managers and explaining to them that they need to have a positive relationship with state insurance commissioners. Unfortunately, many of those state emergency managers had no idea who their insurance commissioner was. FEMA has been fostering dialogue and discussion through the 10 FEMA-regions, which can be more productive when state insurance commissioners and state emergency managers are present. In many of those regions, such discussions have been a huge success

because FEMA has been able to convene those groups towards a common interest: reducing disaster losses and increasing the resilience of the American public, largely through insurance.

Dr. Kaniewski stated that the private flood insurance market is key to closing the nation's insurance gap. The private flood insurance market does exist but is much less robust than the NFIP, especially in areas with the highest flood-risk. According to recent analysis, 14% of residential and commercial flood insurance policies are placed through the private market, 4% of which are residential. There is tremendous growth in the private flood insurance market as some of the estimates range from 50% and up to a 130% increase in activity between 2016 and 2017. FEMA's goal is to double the number of its insurance policies by 2022. Meeting that goal will be very difficult. Meeting the goal of doubling the number of policies nationwide through all types of avenues, including the private market, is eminently achievable.

Dr. Kaniewski stated that FEMA agrees that growth in the private flood insurance market and improving the NFIP are both important to expanding coverage. While FEMA does not have a regulatory role with respect to the private flood insurance market, FEMA does want to facilitate said market's growth, and FEMA has taken actions to do so. First, FEMA has recently included a change that allows write-your-own (WYO) companies to also sell competing private flood insurance projects. Second, FEMA is working with the insurance industry to share more data, including access to NFIP policy and historical claims data while of course being cognizant of federal regulations that touch upon privacy concerns. Third, FEMA is funding research to determine the best ways to move forward to close the insurance gap, including consideration of the private market. For example, in September, the Wharton Risk Management Center, using FEMA funding, published a report on the state of Florida's private residential flood market. The report addresses Florida's unique regulatory environment that reflects statutory changes adopted by the Florida legislature.

Dr. Kaniewski stated that FEMA believes private insurers can play a vital role in closing the nation's insurance gap. Helping customers understand the risks they face for all disasters and taking action to protect the lives they have built by means of insurance is very important. Providing customers with options and resources to mitigate their homes to bring down the cost of insurance should also be a priority. FEMA has also taken efforts to share the importance of flood insurance through existing networks and marketing channels by way of social media and distributing materials. FEMA would appreciate state legislators helping those efforts go viral.

Private insurers can bring the expertise and innovation to longstanding challenges around the product such as distribution and accumulation risk which the industry must solve to help the nation better manage risk. Dr. Kaniewski also stated that FEMA is very focused on individual preparedness, notably financial preparedness for disasters. For example, the Federal Reserve recently conducted a study that found that only 44% of Americans can put their hands on \$400 in the case of an emergency. Those that fall within that 44% will, in the case of a disaster, be completely reliant on state and local governments and FEMA. FEMA recently put out an emergency financial first-aid kit which can be found at [ready.gov](https://www.ready.gov). To improve its overall financial preparedness department, FEMA partnered with a non-governmental organization called Operation Hope to focus on financial literacy and financial education. FEMA believes that financial preparedness is a key part of financial education and financial literacy. To that end,

FEMA is partnering with non-governmental organizations including the private sector, financial services organizations, and the insurance industry, to implement pilot programs and test behavioral economics models such as nudging, and other ways to show Americans not only why they need to be financially prepared, which includes having insurance, but how they can do that.

Rep. George Keiser (ND) asked what the current financial status of the NFIP is, and what is Congress' attitude going forward regarding continuation of funding for the NFIP. Dr. Kaniewski stated that FEMA continues to confront many challenges with the NFIP, the biggest being the program's debt. The program is not going to get out of debt anytime soon and certainly not without major action by Congress. Even if tomorrow there were to be risk-adjusted rates, an affordability program, or increase in NFIP-accessibility and availability, the program would not be out of debt. FEMA is looking for Congress to give them the necessary reforms FEMA has been asking for which would enable the NFIP to operate much more like a private sector insurer, and help meet the goal of having a robust private flood insurance market. The NFIP is currently operating under a short-term re-authorization, but a long-term re-authorization is needed, something which Dr. Kaniewski urged the Committee members to advocate for because a long-term re-authorization would provide everyone some time to figure out the best strategy going forward. FEMA has been unsuccessful in the past several decades in trying to reform the NFIP and FEMA's actions and efforts to work with Congress have failed. Accordingly, support is needed to re-authorize the NFIP on a long-term basis and some thinking and analysis is necessary to propose a "gamechanger" similar to how the DRRRA was a "gamechanger" for mitigation.

Rep. Matt Lehman (IN), Acting Chair of the Committee and NCOIL Treasurer, stated that in meetings with members of Congress during NCOIL's D.C. fly-in this past June, the issue consistently brought up was that there has never been a true long-term plan with the NFIP and now that it has gone deeper into debt the extensions continue to get shorter and sometimes even bargains occur with the extension. One of the main issues discussed was that a 5-year extension and a plan to get the NFIP back on track is needed and that is something that NCOIL needs to continue to be engaged with. Rep. Lehman stated that the NFIP is broken and short-term extensions are not the answer. The program needs to be re-evaluated and perhaps the private market needs to be more involved because an affordability problem has been created. Rep. Lehman stated that one of his clients is refinancing his home and must obtain a flood insurance policy and his homeowners' policy is \$700 per year. The client is in a floodplain and his flood premium is \$2,700 per year and for him to try and understand why the disparity in cost between perils exists is very difficult.

Rep. Lehman then asked Dr. Kaniewski if there has ever been a discussion on where we build homes. If you look at certain beachfront areas, the expansion of multimillion-dollar homes and condominiums has increased dramatically over the years. Accordingly, one cannot be surprised to have billions of dollars in losses when you build where hurricanes are problematic. Dr. Kaniewski stated that FEMA welcomes the longest NFIP-extension that it can get and FEMA is ambitious in asking for 1 year, but FEMA believes that at least a 1 year extension is needed to come up with an appropriate strategy to fix the program. With regard to re-building in problematic areas, Dr. Kaniewski stated that is certainly a topic of discussion within FEMA and he is hopeful that local communities across the country are having that discussion. Unfortunately, FEMA has no ability to force those conversations, much less the ability to force homeowners to move out of

certain homes. Zoning is handled at the local level in addition building code standards. FEMA does have some tools available to incentivize homeowners from a flood insurance severe repetitive loss perspective. In those instances, FEMA has the ability to draw on additional funding from different programs through buyouts, re-locations, elevations, but the amount of funding in those programs is very small and there is no way FEMA by itself can solve the problem.

Rep. Keiser stated that Biggert-Waters was a clear demonstration that actuarially sound underwriting is not going to work for the NFIP. Rep. Keiser further stated that he hopes Dr. Kaniewski and FEMA understand that states and local communities have made tremendous programs in zoning and mitigation. Is there any discussion with Congress that would create a tax credit for personal property owner's mitigation actions similar to the green tax credit which had an amazing impact? Dr. Kaniewski stated that there are many discussions with Congress about how it can incentivize mitigation and right now, FEMA is focused on implementing the program just authorized, DRRRA, which is a gamechanger for mitigation.

#### DISCUSSION ON THE DEVELOPMENT OF MODEL LEGISLATION IN RESPONSE TO THE AMERICAN LAW INSTITUTE'S RESTATEMENT OF THE LAW OF LIABILITY INSURANCE

Rep. Lehman provided some background on NCOIL's involvement with the American Law Institute's (ALI) Liability Insurance Restatement (Restatement) and stated that NCOIL is at a time now where NCOIL must narrow its focus and decide how best to proceed.

Erin Collins, Asst. Vice President – State Affairs of the National Association of Mutual Insurance Companies (NAMIC) stated that the Restatement has been a topic of discussion within the industry for years as it pertains to the business of insurance. The ALI is an organization that has a long and storied history and part of their role is to issue Restatements of Law which is an academic undertaking of looking at the law in a particular area and then creating a Restatement of it for use by the courts. Restatements are supposed to a re-statement of what the law and public policy is on a particular issue. In the last few years, some of the ALI's Restatements have morphed to be somewhat of an aspirational document, moving more towards what the ALI believes the law should be. That transformation is reflected in this Restatement.

Ms. Collins stated that this Restatement has been a 5-year project for the ALI and interested parties, including NCOIL, have raised multiple concerns throughout the entire process, citing instances where the Restatement is not only aspirational, but in some instances completely inaccurate in certain areas and therefore constituted a usurpation of state legislative authority. As of May, the ALI adopted the Restatement with some changes but not all concerns have been addressed. The ALI is now in its "technical review period" whereby the Restatement has been adopted but certain editorial changes can occur, which the industry believes can be positive.

Ms. Collins stated that from NAMIC's perspective, after the Restatement is published there will still be areas of concern that will need to be addressed for years to come in different ways in different states. NAMIC does not believe that there is a "silver bullet" fix to the Restatement or a one-size-fits-all approach. If NCOIL has an appetite for a Model-law response to the Restatement after the Restatement is final, NAMIC believes

that such a response should be multi-faceted so that states can determine which approach is more appropriate for their state, whether it be a Resolution or a bill that disavows the Restatement in its entirety. NAMIC does not believe that there is a singular approach that would be appropriate in all 50 states.

Ron Jackson, Vice President – State Affairs Southeast Region of the American Insurance Association (AIA) echoed Ms. Collins' statements and thanked NCOIL for its involvement with the Restatement. Mr. Jackson also noted that the process surrounding the Restatement is odd in that the ALI has adopted it but still can make certain changes to it during the "technical review period." It would certainly be odd if a state legislature operated in that manner whereby it passed a law and then made changes to it after it was sent to the Governor's desk. Mr. Jackson noted that in 2018, two states enacted legislation in response to the Restatement that took different approaches. Tennessee passed a law that only dealt with stating what the "plain meaning" rule is under Tennessee law; Ohio passed a law that stated that the Restatement was not the public policy of Ohio.

Mr. Jackson stated that AIA looks forward to working with NCOIL on this issue in 2019 and that careful deliberations will be needed to decide the form and substance of what NCOIL's response will be, in addition to determining which states to take action in. As stated in prior meetings when responding to the ALI's assertion that the Restatement was necessary to respond to states that do not have settled law on a certain issue, a state legislature's decision to not pass a law on a certain topic is equally an exercise of the legislative prerogative as is passing a law. For that reason, Mr. Jackson stated that a legislative response may not be seen in all 50 states and it will be difficult to try and craft a response suited to all states.

Frank O'Brien, Vice President – State Gov't Relations of the Property & Casualty Insurance Ass'n of America (PCI), thanked NCOIL for its steady involvement with these issues and noted that NCOIL has had a direct and tangible impact on both the course of consideration of the Restatement as well as an impact on some of its provisions. That is an extraordinary accomplishment. The window for public comment on the Restatement is closing rapidly as the "technical review period" is almost finished and therefore the Restatement will soon be final and "out there." Mr. O'Brien requested that NCOIL continue to be engaged with the Restatement and continue to move forward with thoughtful debate and consideration.

Over the course of the next year, PCI is hopeful that the Restatement will continue to be an agenda topic for this Committee and that the Committee will consider a range of options as to what form its work will take to represent the state insurance legislator perspective. NCOIL has typically responded to issues like the Restatement with either a Model Law, Resolution, or series of Best Practices. In this particular instance, since this issue is national in scope and its impact on the legal community and insurance marketplace can only be surmised, PCI urges NCOIL to carefully consider a range of options as to how it should respond because its response will be more magnified due to the level of impact it already has had on the Restatement.

Rep. Lehman stated that part of the difficulty with a response from NCOIL in the form of a Model Law is that there is such a wide range of ways in which states might want to proceed with their response, as evidenced by the differences between the Tennessee and Ohio approach. Accordingly, a Resolution may be the better way to proceed and

Rep. Lehman asked if there are specific provisions of the Restatement that should be addressed in it. Ms. Collins replied yes and stated that there are multiple areas in which industry believes that the Restatement deviates from certain statutory law. It is hard to say at this point which provisions should be specifically addressed because the ALI's "technical review period" is still ongoing, but a couple of possibilities would be the plain-meaning rule and language permitting someone who is unhappy with their counsel to sue the insurance company for its selection of counsel. Another provision relates to interpretations of an insurance policy that involves principles of contract law. Ms. Collins stated that she believes at last count there were 8 remaining issues within the Restatement that were problematic, some of which may be difficult to address in a targeted fashion like Tennessee did with the plain-meaning rule.

Mr. Jackson noted that a document is in the midst of being prepared that pinpoints all of the remaining problematic provisions of the Restatement, one of which relates to rescission of an insurance policy in instances where the policyholder made a "substantial" misrepresentation; the use of the word "substantial" has been very controversial.

Rep. Lehman asked if there is a known date by which the ALI will be finished with its "technical review period." Mr. O'Brien stated no and that the entire process is very opaque. Mr. Jackson stated that industry has heard possible dates of "late 2018/early 2019" but no one is certain. Mr. O'Brien again noted that NCOIL should continue discussing the Restatement in 2019 due to the impact NCOIL has had on the Restatement and the credibility NCOIL has gained with the ALI.

Rep. Keiser stated that the Restatement represents a process that must be stopped and noted that just as the window is closing in on the ALI's "technical review period", the window is therefore closing on state legislatures and NCOIL to respond appropriately. Rep. Keiser stated that there should be some sort of language that can be introduced which states that the ALI cannot go beyond the intent or statement of law that the legislature has created. North Dakota already has a system in place to address that.

Rep. Joseph Fischer (KY) agreed with Rep. Keiser and stated that even if all of the remaining problematic provisions within the Restatement have not yet been finalized, a list of issues should be presented to Committee members so that when they start session in 2019 they can examine them further in their respective states. Rep. Fischer stated that he has discussed this with several Appellate judges who have stated that the ALI does not have as much credibility as it used to have. Rep. Fischer stated that in the age of Westlaw and other research tools, the Restatement is therefore not as important as it once was and seems to be more aspirational in nature.

Prof. Daniel Schwarcz of the University of Minnesota Law School, and an advisor on the Restatement, stated that some of the statements made to the committee are not accurate regarding the nature of a Restatement and some of the provisions of this Restatement. The first thing to recognize is that most of the rules in the Restatement do not deal with anything that is statutory; rather, they deal with issues from judge-made law that are not clear. In those contexts, courts find it sometimes useful to utilize a Restatement and sometimes don't. It is not accurate to say that Restatements have been summations of majority law. Historically, Restatements have looked at what trends are in certain areas. Also, no one has suggested that judges and courts are somehow bound by Restatements. The only place where a Restatement is likely to influence the

law is where no statute or binding court opinion exists on a certain issue. In those contexts, it can be difficult to only utilize Westlaw because courts often rule in ways that are opaque and distinguishable and therefore the Restatement can be a useful summation. Prof. Schwarcz stated that there is risk that NCOIL is actually impeding on judicial authority as it is not always appropriate to tell courts how to rule on common-law issues. Statutes don't exist on certain issues because they can be extremely complex and it is the appropriate prerogative of courts to decide them.

Rep. Lehman stated that some of the concern relates to the plain-meaning rule. As an example: birds poked holes in someone's house and birds are excluded under the policy but the adjuster said if rocks were thrown at the house, that would be covered. In the policyholder's world he thinks the bird damage should be covered because the bird damage envisioned by the policy exclusion related to long-term bird damage such as nesting. Can the court then rule in favor of the policyholder due to the vagueness of the Restatement's plain-meaning provisions? Prof. Schwarcz stated that it would be reversible error to follow a rule in the Restatement if there was already binding authority in a state on that rule that was different. The reason for the Restatement is to inform people of different approaches and trends. There are areas in which the Restatement can affect how the law on a certain issue may evolve but that is only going to happen if there is not binding precedent on an issue in a state. A court cannot adopt a Restatement-view if there is binding precedence to the contrary.

Rep. Fischer disagreed with Prof. Schwarcz in that any state Supreme Court can change the binding precedent that exists on an issue and the Restatement does have some aspirational impact on the Supreme Court of certain states with respect to interpretation of certain issues. In that respect, inaccurate Restatements can be dangerous and it is therefore important for NCOIL to stay involved with this issue. Additionally, the legislature is always free to challenge common-law rules through legislation however longstanding the rules may be. Rep. Lehman noted that in 49 states pollution-exclusion language was ok, but Indiana's language was ruled unconstitutional as vague, and agreed with Rep. Fischer's point that a state Supreme Court is powerful and can always change certain things.

Rep. Keiser also noted that rather than set policy, the ALI could have visited certain states and presented legislatures with certain issues that have not been addressed through statutes and recommended that they should be. Rep. Lehman closed by stating that he agreed with Rep. Keiser's earlier statement that the window is closing for state legislatures and NCOIL to act on the Restatement. It appears that one NCOIL Model Law may not be able to meet the needs of each state and NCOIL therefore must consider the best way to proceed as to how to offer states with an effective work product. This issue needs to be a priority and hopefully by the NCOIL Spring Meeting in March, a clear draft of a Resolution or other work product can be presented. Until then, if other states start to act and a certain approach begins to develop, a Model Law may then be a good approach.

#### DISCUSSION ON THE RISKS ASSOCIATED WITH AND INSURANCE ISSUES RELATED TO "LAST MILE" SCOOTERS

Ashley Scott, Policy Counsel for Lime, stated that Lime is approximately 1.5 years old, is supportive of free-movement, and focused on last and first-mile transportation solutions. That means if you are a commuter and get off a bus stop or train stop – how do you get

to your next location? Lime aims to fill that gap and provide additional technology to provide additional first and last-mile transportation solutions to cities. Ms. Scott stated that as urban centers grow more dense and there is more congestion, getting more cars off the road is important. Some statistics that drive Lime include: there is 333 million tons of carbon dioxide emitted from cars annually; 45% of Americans have no access to public transportation; and the average U.S. driver spends about 41 hours per year in their car in congestion.

In an effort to create new transportation frontiers and create more first and last-mile transportation options, Ms. Scott stated that Lime offers a fleet of multiple devices such as pedal bicycles, electrical assisted bicycles, as well as electric scooters. Most recently, Lime launched a free-floating car-sharing program, Lime Pod. Lime is the world's largest multi-model last-mile and micro-mobility transportation provider. Some sticking points for state legislators and municipal officials to consider are that unlike other industries such as docked bike-share providers, or traditional commuter transportation methods such as rail lines or bus stops, Lime does not require any initial public funding. Lime provides all of the product and places the product. There is some financial investment when it comes to administration of permits and enforcement of rules and regulatory frameworks but there is no initial investment for cities so it provides cities with a great opportunity to partner with operators in order to create and provide a new form of transportation for its citizens. Lime is an American-based company and was founded and funded in the Bay area and has a multi-model fleet. Lime also put a large emphasis on equity in terms of providing mobility options for low and moderate income people.

Ms. Scott stated that it can be recognized that in many municipalities and cities that are pockets and areas where there are transportation deserts in that hardly any train or bus stops exist. Lime has noticed from its data that people within those areas utilize Lime's transportation options the most to get into economic hubs and get into city centers. Lime also contributes to solving other issues that cities face such as low housing stock or access to jobs – transportation is key to financial freedom. Lime is proud to say that it contributes to free movement and moving the needle on those issues. Ms. Scott also noted that Lime is disbursed throughout the country.

Ms. Scott stated that what sets Lime apart from other operators is that Lime is fully committed to sustainability and Lime's entire foundation is based on providing options to create a more sustainable environment in all cities. Every ride is carbon-neutral and Lime has a goal to be completely carbon-free within its operations. Ms. Scott further stated that safety is a very important issue for Lime and is not an elephant in the room that it tries to divert its eyes from. Lime is tackling safety issues head-on and has launched a "Respect the Ride" PSA campaign that focuses on creating and educating rider behavior, and also educating car drivers to share the road with new technologies. Issues related to last-mile transportation are not going to go away so Lime is focused on efforts to change the culture of cities to allow all forms of transportation and movement.

Ms. Scott stated that Lime is dedicated to enhancing lives and communities and looks forward to partnering with state legislators and municipal officials to ensure that Lime is part of city and town sustainability plans moving forward. Lime is also focused on increasing transit access, reducing traffic congestion, and hiring locally to create localized economic opportunities for cities and towns and gain knowledge of the specific needs of certain cities and towns.

Ms. Scott stated that in San Francisco, Lime has had 300,000 total rides on their electronic scooters. 53% of riders said they might have used a car if they had not taken a Lime scooter. 39% of riders said that they used Lime to connect to or from public transit during their most recent trip. In Washington, D.C., Lime had 100,000 "unique" riders which means that they were not repeat-users. Lime is at a point now where it would like to start a dialogue with state legislators and municipal officials that centers on insurance issues. Transportation ridesharing is a relatively new industry and as such there is very limited actuarial data available for benchmarking. Scooter sharing is even more limited as there are very few companies that focus specifically on that type of shared economy so it becomes important to ask what is the "close cousin" of e-scooters? That speaks to many issues on the state level directly related to vehicle classification.

Accordingly, Ms. Scott discussed some important questions to ask when framing the discussion to create policy relating to Lime and other similar companies. What are comparable industries? Ms. Scott noted that Lime's position is that its scooters are not on the same level playing field as cars as they travel at a speed comparable to the top speed a bicycle can reach so the goal is to start the conversation of how best to create the standards that make sense for the industry. Ms. Scott stated that she has seen the full spectrum of ordinances and permit structures within municipal cities. In many instances, they have regulated Lime in terms of insurance more in-depth than they have with car-sharing services.

What are cities concerns? Lime understands that cities are concerned about the safety of its citizens and ensuring that companies can meet those safety concerns and have coverage to cover loss and damage that is a direct result of company business operations. How do we create a reasonable standard? Ms. Scott noted that the questions she laid out are all open-ended questions but the most important thing is to start the dialogue and engage organizations like NCOIL to answer the questions appropriately. In order to bring all the pertinent voices to the table, Lime is willing to engage with cities and states and attend conferences such as this one to answer the questions that are at the forefront of the minds of legislators and regulators.

Ms. Scott noted that Lime is currently primarily regulated at the municipal level so that means Lime is getting insurance requirements that run the gamut. One city only requires commercial general liability coverage. Another city asked for individual motor vehicle policies for each of the scooters. Cyber insurance, workers' compensation insurance, errors and omissions insurance, and personal advertising insurance have also been raised by other cities. Ms. Scott stated that all of those issues being brought forth creates a friction between cities that may even be bordering each other in terms of what Lime must do to meet certain policy requirements.

Ms. Scott stated that most of the regulatory structures that Lime encounters that pertain to insurance are housed in municipal permits or MOUs that Lime enters into with cities. Each municipality or municipal official has been outlining coverage requirements and they have not been able to point to anything at the state level that provides them with guidance in creating the requirements. Lime's biggest concern is a lack of uniformity and Lime would like to create some type of best practices that takes into account all of the pertinent opinions. Lime's goal is to provide insurance coverage that comprehensively covers its business operations and riders; create indemnification

provisions to protect municipal partners; serve as a partner to provide a global view of the insurance landscape for the industry; and starting a dialogue with state insurance legislators and regulators in order to communicate the nature of the industry to create smart, common sense policy. Lime will travel to wherever is needed to start those conversations.

Paul Martin, Regional Vice President – Southwestern Region, of NAMIC stated that NAMIC agrees with Lime’s goal of starting a dialogue on these issues because, oftentimes when new transportation technology such as last-mile scooters are introduced, the perception is that industry is opposed to it, but that is not the case. However, NAMIC believes that there are some issues that state insurance legislators and regulators need to be aware of going forward as they start making policy. Mr. Martin stated that he recently contacted his insurance agent to ask if, when on a last-mile scooter, he was covered by a homeowner’s policy, auto policy or umbrella policy; the agent replied “no” to all of those policies. Regardless of that unresolved issue, Mr. Martin stated that he believes the technology has several benefits and he enjoys it.

Mr. Martin noted that the initial tendency thus far has been to compare the last-mile scooters to transportation network companies (TNCs) such as Uber and Lyft but besides the scooters being app-based and related to transportation, there are not too many similarities. Unlike a TNC vehicle where a personal auto policy is in effect for most of the time it is on the road except when engaged in TNC operations, there is no equivalent for last-mile scooters. Mr. Martin then noted that there are some claim scenarios for the Committee to consider as the dialogue progresses: a.) liability issues when a scooter operator hits someone/something and does damage to them/the property; b.) how state comparative fault statutes come into play when a scooter operator is negligent and they cause an automobile driver to swerve and cause an accident; c.) damage to the scooter itself from riding into a pot-hole; d.) premises liability issues that can arise from re-charging a scooter in a home/apartment. If a fire were to start and cause damage, would that be covered under a homeowner’s/renters policy if the re-charging process is deemed to be a commercial activity?; e.) someone tripping over a scooter parked on a sidewalk; and f.) premises liability issues arising from when businesses allow scooters to be left there and someone trips over one outside the premises. The same issue arises for businesses who do not allow scooters to be left outside its premises.

Mr. Martin stated that those insurance issues don’t seem insurmountable, and legislation dealing with last-mile scooters is expected to be introduced in state legislatures in 2019, thereby creating preemption issues relating to states and municipalities.

Rep. Lehman closed by stating that the last-mile scooters are just the tip of the iceberg in the sense that the larger issue is the sharing economy. The beauty of America is that people can use things in ways that the insurance industry never thought of and therefore the industry is going to have to respond accordingly. Rep. Lehman stated that he is not sure if a legislative or insurance policy solution is needed. Using the TNC issue as an example, the TNC and taxi industries did not want to meet in the middle and he hopes that the issues surrounding last-mile scooters can be dealt with better. Rep. Lehman stated that he hopes NCOIL will continue to stay involved with these issues in 2019 and beyond.

## RE-ADOPTION OF STATE FLOOD DISASTER MITIGATION AND RELIEF MODEL ACT

Rep. Lehman noted that at the recent NCOIL Summer Meeting in Salt Lake City, the Committee had re-adopted the NCOIL State Flood Disaster Mitigation and Relief Model Act (Model) until this meeting in anticipation that Rep. David Santiago (FL), Vice Chair of the Committee, would be finished with proposed amendments to the Model. However, since he was not able to attend this meeting, the proposed amendments are not ready for consideration and the Model therefore needs to be re-adopted until the Spring Meeting in March so that Rep. Santiago and others can continue work on the amendments. Upon a Motion made by Rep. Keiser and seconded by Rep. Fischer, the Committee voted without objection by way of a voice vote to re-adopt the Model until the Spring Meeting

## INTRODUCTION OF PROPOSED INSURANCE MODERNIZATION CONCEPTS

Rep. Lehman stated that some members of the Committee and NCOIL staff had received some interest earlier in the year as to how the market is ripe for some “clean up” legislation in terms of getting the industry to move past some outdated ways of doing business. For instance, some states still don’t have legislation on the books that allow the option of getting electronic notices from insurers; they require paper.

Therefore, Rep. Lehman stated that for 2019 a good topic for this Committee, and NCOIL in general, is to discuss some type of an “Insurance Modernization” Model Law that could address issues similar to the “electronic notice option” issue in terms of cleaning up certain sections of state insurance codes that may have been left behind and forgotten as the insurance industry continues to rapidly innovate. Rep. Lehman encouraged Committee members and representatives from all lines of insurance to contact the NCOIL national office with ideas and recommendations as to what could be put in such a Model.

Similarly, Rep. Lehman noted that another issue that he hopes the Committee can consider going forward is rebating laws and how there are different standards in different states. Rep. Lehman stated that it is his understanding that the NAIC is open to having a dialogue on that issue and therefore challenged the Committee to start the process of a possible NCOIL Model Law to promote rebate law uniformity.

## ADJOURNMENT

There being no further business, the Committee adjourned at 10:30 a.m.