

NATIONAL CONFERENCE OF INSURANCE LEGISLATORS
PROPERTY-CASUALTY INSURANCE COMMITTEE
SAN ANTONIO, TEXAS
FEBRUARY 27, 2004
DRAFT MINUTES

The National Conference of Insurance Legislators (NCOIL) Property-Casualty Insurance Committee met at the Hyatt Regency on the Riverwalk in San Antonio, Texas, on Friday, February 27, 2004, at 8:00 a.m.

Rep. George Keiser of North Dakota, chair of the Committee, presided.

Other members of the Committee present were:

Sen. Steven Geller, FL
Rep. Shirley Bowler, LA
Rep. Joe Hune, MI
Rep. Larry Julian, MI
Rep. Mary Ann Middaugh, MI
Sen. Alan Sanborn, MI
Sen. Billy Hewes, MS
Sen. Dean Kirby, MS
Sen. Carroll Leavell, NM
Assem. Nancy Calhoun, NY
Sen. William Larkin, Jr., NY
Sen. James Seward, NY
Rep. Brian Kennedy, RI
Rep. Dan Tripp, SC
Rep. Craig Eiland, TX
Rep. Gene Seaman, TX

Other legislators present were:

Rep. Donald Brown, FL
Rep. James Tucker, LA
Rep. Jerry Klein, ND
Sen. Pam Redfield, NE
Rep. Robert Godshall, PA
Rep. Tony Melio, PA
Rep. Robert Dostis, VT
Rep. Gini Milkey, VT
Rep. Mark Young, VT

Also in attendance were:

Bob Mackin, Mackin & Company, NCOIL Executive Director
Susan Nolan, Mackin & Company, NCOIL Deputy Executive Director
Candace Frick, NCOIL Director of Legislative Affairs & Education
Timothy Tucker, NCOIL Director of State-Federal Relations

MINUTES

The Committee voted unanimously to approve the minutes of its November 21, 2003, meeting in Santa Fe, New Mexico.

ASBESTOS LIABILITY REFORM

Ray Farmer of the American Insurance Association (AIA) briefly reported that there was no real progress regarding federal efforts to enact a national asbestos trust fund to pay claims to functionally impaired asbestos victims. He said that Senate Majority Leader William Frist (R-TN) was committed to finding a compromise.

PROPOSED SMALL HOMEBUILDER LIABILITY MODEL ACT

Rep. Kennedy, sponsor of the proposed *Notice & Opportunity to Cure Model Act*, said he was disappointed that the National Association of Home Builders (NAHB) had not worked more closely with NCOIL legislators to propose amendments to the small homebuilder liability model. He moved that the Committee indefinitely postpone consideration of the proposed model act.

Upon a motion made and seconded, the Committee voted unanimously via voice vote to indefinitely postpone consideration of the model.

UPDATE ON STATE ACTIVITY REGARDING RATE MODERNIZATION

Ms. Frick reported that NCOIL was working with insurance industry representatives and others to educate legislators on the need to enact competitive rating laws, laws similar to the NCOIL *Property-Casualty Insurance Modernization Act* that the Committee amended in November. She said that NCOIL was particularly encouraged by activity in two states: in South Dakota legislators were considering a bill that would establish a true file-and-use rating system (that is, one without a waiting period) and, in South Carolina, the legislature was on its way to enacting a flex-band system for homeowners' insurance that would give way to a market-driven Illinois-style system in several years. She said the South Carolina bill followed the 1999 enactment in South Carolina of a similar system for auto insurance.

CONSIDERATION OF PROPOSED FLEX-RATING MODEL ACT

Rep. Kennedy said that he and Sen. David Bates (RI) were co-sponsoring a proposed *Property/Casualty Flex-Rating Regulatory Improvement Model Act*. Rep. Kennedy said the proposed model could be used in jurisdictions with more restrictive rate-filing and review systems than outlined in the bill and would establish a 12-percent flex-band, within which an insurer could file rate changes on an expedited basis during any 12-month period. He said the 12-percent band would apply to overall statewide rate

increases or decreases and not to individual risks. Rep. Kennedy encouraged the Committee to adopt the model, saying that it would build on prior NCOIL efforts to enact competitive rating laws across the country and would result in more open, affordable insurance markets. He said that he and Sen. Bates had introduced the legislation in Rhode Island.

Paula Davis of the Louisiana Insurance Department said her state still required prior approval of rate filings and noted that Louisiana is one of two states that still has a rating commission. She said two years ago the legislature moved to end the commission and move toward a more streamlined regulatory approach. That bill was vetoed, she said, but legislators last year did successfully pass a 10-percent flex-rating bill, modeled after South Carolina's recently established system for auto insurance. Ms. Davis said that since the flex-band legislation went into effect on January 1, 2004, insurers had made over 60 filings. She noted that anything above or below a 10-percent rate change still must go before the rating commission. She said that most of the rate filings submitted so far sought a six or seven-percent increase, rather than the maximum-allowed 10 percent.

Wes Bissett of the Independent Insurance Agents and Brokers of America (IIABA) reminded the Committee that during the November Annual Meeting legislators adopted a resolution that supports flex-rating as an interim step toward a system based more on open competition. He said the NCOIL resolution further committed legislators to investigate ways to help states transition from more restrictive rating systems to use-and-file. Mr. Bissett said that the proposed flex-rating model would do that. He noted that South Carolina's enactment of flex-rating in 1999 had resulted in a more competitive marketplace in that state.

Birny Birnbaum of the Center for Economic Justice (CEJ) said that, though he understood the model tried to "bridge the gap" between restrictive and open-competition systems, he did not support it. Mr. Birnbaum said the model does not recognize 1) the reality of the current insurance marketplace and 2) overall rate changes and risk-classification issues. He said that without even making a rate filing, an insurer could cause a consumer to receive a five-percent increase, for instance, just by changing the requirements for certain rating tiers. Mr. Birnbaum proposed the following: 1) prior approval for forms that would reduce coverage; 2) file-and-use for endorsements that would enhance coverage; 3) prior approval of the factors that insurers use to classify risks and to effect tier-placement; and 4) either file-and-use or use-and-file for rates, assuming that the above proposals were met.

Mr. Birnbaum said that in order for consumers to embrace the work of NCOIL on rate modernization, the organization needed to recognize that competition is not always good. He said he welcomed working with legislators regarding a regulatory framework that would address risk-classification concerns.

Neil Alldredge of the National Association of Mutual Insurance Companies (NAMIC) said the insurance industry supports the proposed flex-rating model, but that it

should not be viewed as the ultimate goal of rate modernization. Other industry representatives spoke in favor of both flex-rating and the proposed model.

Upon a motion made and seconded, the Committee voted to adopt the proposed flex-rating model act and refer it to the Executive Committee. Rep. Bowler's was the only vote in opposition.

CONSIDERATION OF PROPOSED RESOLUTION REGARDING MEDICAL MALPRACTICE REFORM

Rep. Keiser said the Committee would consider a proposed *Resolution Regarding Medical Malpractice Reform*, which he said acknowledges the impact that the medical liability system has had on premiums, capacity, and access to healthcare, as well as the recent efforts undertaken by Congress and the states. Rep. Keiser said the resolution supports state and federal initiatives to stabilize the medical liability market and urges consideration of the following reforms: 1) verification of medical mistreatment prior to proceeding with a claim; 2) reasonable caps on non-economic and punitive damages; 3) admission of collateral-source evidence; and 4) establishment of a statute of limitations following an injury, or following the time when an injury should have been discovered.

Mr. Birnbaum commented that he had concerns with provisions in the resolution regarding 1) increased medical-liability premiums leading to increased healthcare costs; 2) increased premiums leading to limited access to quality healthcare; 3) heightened claims costs leading to increased medical-liability premiums; and 4) support for caps on non-economic and punitive damages. He said that loss of investment income was a prime contributor to rising medical-malpractice premiums, and he commented that the proposed resolution should include language regarding reducing medical errors.

Kim Horvath of the American Medical Association (AMA) disputed Mr. Birnbaum's claims regarding, among other things, the importance of capping non-economic and punitive damages. In response to questions posed by Rep. Bowler, Ms. Horvath said that admitting collateral-source evidence helps stabilize premiums and that approximately 25 states have regulations to that effect, at least regarding medical liability. She noted that the proposed resolution only supports the admission of collateral-source evidence, rather than an automatic reduction in the amount of the award based on that evidence.

Rep. Eiland strongly urged, among other things, that the Committee reconsider provisions in the resolution that support medical-liability reforms at the federal level. He said that this was entirely a state issue and that NCOIL should be careful when asking the federal government to step in on insurance matters. Rep. Eiland suggested amending the resolution to strike language that supports federal intervention. He also, regarding collateral-source evidence, encouraged the Committee to reconsider the resolution's support for admitting evidence of other related payments.

Upon a motion made and seconded, the Committee voted by two-thirds to waive the 30-day deadline rule in order to consider an amendment that would 1) strike language urging Congress to enact reforms and 2) leave language regarding NCOIL's support for both state and federal efforts to stabilize the medical-liability market. The Committee then adopted the amendment. Rep. Eiland's was the only vote in opposition.

Rep. Bowler then moved that the Committee strike the resolution's two references to collateral-source evidence. Jay Martin of LeBoeuf, Lamb, Greene & MacRae, LLP, said that admitting collateral-source evidence was one of the most effective ways to lower costs associated with medical-liability coverage and, thereby, lower premiums. He said the purpose of collateral reform is to avoid "double dipping," by which a claimant receives money from both the defendant(s) and, for instance, health insurers. He urged the Committee not to amend the resolution.

The Committee held a vote to waive the 30-day deadline rule in order to consider Rep. Bowler's proposed amendment. The motion failed to secure two-thirds of the Committee's votes. Rep. Bowler, Sen. Geller, Rep. Tripp, and Rep. Eiland had voted in favor of waiving the 30-day deadline rule.

Sen. Geller expressed concern regarding the time the Committee had to discuss the proposed resolution. He said the resolution only addressed one element of the medical-liability crisis: tort reform. Other components, Sen. Geller said, included insurance-company reforms and doctor discipline. He suggested that the Committee defer its final consideration of the resolution until legislators had more time to discuss the matter and possibly hold a public hearing.

Upon a motion made and seconded, the Committee voted 11 to 4 to adopt the medical malpractice resolution and refer it to the Executive Committee. Those opposed were Rep. Seaman, Sen. Geller, Rep. Bowler, and Rep. Eiland.

DISCUSSION REGARDING NCOIL INSURANCE SCORING MODEL ACT

Rep. Keiser said the Committee had been asked by the National Association of Insurance Commissioners (NAIC) to clarify an issue regarding the "sole use" provisions in Section 5 of the NCOIL *Model Act Regarding Use of Credit Information in Personal Insurance*, adopted at the 2002 NCOIL Annual Meeting. He directed legislators to the correspondence in their meeting binders between himself, the NAIC, and Mr. Birnbaum regarding the meaning of "sole use." According to Rep. Keiser, the NCOIL model establishes a simple mandate—that credit information must not be the only underwriting factor considered.

Rep. Keiser then said that the NAIC had raised the issue of how the NCOIL model would treat insurers that use minimum insurance-scoring thresholds in underwriting. He said that such thresholds would result in an adverse action against a consumer, regardless of his/her driving record or other factors, should the consumer's insurance score fall below a certain minimum threshold.

Mr. Birnbaum said, among other things, that he understood there was strong consensus for the following: if credit is the primary determining factor in underwriting insurance coverage, then it is the “sole” factor and should be prohibited. He said there should be some other factor in addition to credit that determines a rate.

Oregon Administrator Joel Ario, secretary/treasurer of the NAIC and co-chair of the NAIC Credit Scoring Working Group, said regulators were struggling with whether using minimum thresholds would violate statutes prohibiting “sole use” of insurance scores. He said that he and most regulators thought that thresholds would violate “sole use” language, and he commented that insurers seemed split on the issue.

Administrator Ario suggested that NCOIL add the word “determining” to the “sole use” language in Section 5 of its model. He said that “sole determining factor” would make it clear that minimum thresholds would be disallowed.

During discussion, concerns were raised that Administrator Ario’s proposed change was not insignificant and would reopen the insurance-scoring debate. In response to a question posed by Ms. Frick, it was noted that the number of insurance companies that use minimum thresholds was uncertain.

Following legislative discussion, the Committee determined not to amend the model as suggested by Administrator Ario.

DISCUSSION REGARDING LOSS-HISTORY DATABASES

Rep. Keiser said the Committee would begin its investigation into reports generated from loss-history databases. He said that these databases record the prior claims activities of consumers, properties, and automobiles and noted that the Comprehensive Loss Underwriting Exchange (CLUE) and other reports drawn from these databases are used by insurers to underwrite risks.

Jeffrey Skelton of ChoicePoint said his company owns the CLUE database. He said, among other things, that the database is governed by federal law, that it has been in use for approximately 10 years, and that it is used only for new business, not upon renewal. Mr. Skelton said that a CLUE report goes back only five years, meaning that two-thirds of all consumers have no property claims—report to supply because they did not file claims within that window. He emphasized that CLUE has no connection to credit history, and he said that a CLUE report can only be accessed by an agent, insurer, or consumer. He said a consumer has access to his/her CLUE report through a variety of means and can verbally challenge information contained in his/her report. Mr. Skelton said a ChoicePoint representative would contact an insurer and advocate on behalf of the consumer within 30 calendar days; if the insurer could not supply proof of loss during that time, ChoicePoint would remove the disputed claim from the CLUE database.

Mr. Skelton said four things might trigger the recording of results to the CLUE database: 1) when a claims payment is made to a consumer; 2) when a claims payment is denied; 3) when a consumer initiates a claim and an insurer sends an adjuster to investigate; and 4) when a carrier sets aside loss reserves in anticipation of paying a claim. He said ChoicePoint does not try to record inquiries made by consumers regarding coverage limits and/or hypothetical claims.

Mr. Skelton said, however, that if a consumer calls an insurer regarding a loss but ultimately does not pursue the claim (and the insurer does not send an adjuster), that information might still be registered in CLUE as a loss. He said some insurers are more aggressive than others.

Phil Thompson of the San Antonio Board of Realtors said consumers regularly have difficulty accessing their claim records. He said homeowners, agents, and potential policyholders find themselves in difficult situations when a future homebuyer cannot secure homeowners' coverage as a result of a loss-history report. Texas real estate contracts, Mr. Thompson said, do not contain exit provisions should a homebuyer either be unable to secure coverage or should he/she find that coverage unaffordable. He said CLUE reports are widely misunderstood by insurance agents, which means the agents are unable to appropriately counsel consumers. He continued that insurers often outright refuse to give a consumer his/her CLUE report and provide no information regarding how the consumer can access that information on his/her own.

Following brief Committee discussion, Rep. Keiser said NCOIL would dedicate more time to investigating the issue at the Chicago Summer Meeting.

ADJOURNMENT

There being no further business, the meeting adjourned at 9:55 a.m.