

NATIONAL COUNCIL OF INSURANCE LEGISLATORS
EXECUTIVE COMMITTEE
INTERIM COMMITTEE CONFERENCE CALL
JANUARY 5, 2018
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Executive Committee held an interim meeting via conference call on Friday, January 5, 2018 at 2:00 P.M. (EST)

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

Members of the Committee present:

Rep. Sam Kito, AK	Sen. Neil Breslin, NY
Rep. Deborah Ferguson, AR	Asm. Andrew Garbarino, NY
Asm. Ken Cooley, CA	Sen. James Seward, NY
Rep. Matt Lehman, IN	Sen. Bob Hackett, OH
Rep. Steve Riggs, KY	Rep. Glen Mulready, OK
Rep. Greg Cromer, LA	Rep. Marguerite Quinn, PA
Rep. George Keiser, ND	Rep. Bill Botzow, VT
Sen. Jerry Klein, ND	

Also in attendance were:

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

DISCUSSION AND CONSIDERATION OF RESOLUTION ENCOURAGING THE ALI TO MATERIALLY CHANGE 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 American Law Institute's (ALI) Proposed Restatement of the Law of Liability Insurance (Proposed Restatement), NCOIL became heavily involved due to the concern that several of the Proposed Restatement's provisions go beyond established law and address matters properly within the legislative prerogative. Sen. Rapert stated that the purpose of this Committee's meeting is to consider the Resolution that was adopted by the NCOIL Property & Casualty Committee on November 16, 2017 at the NCOIL Annual Meeting in Phoenix, Arizona. That Resolution encourages the ALI to materially change the Proposed Restatement so that it accurately reflects current law and respects the legislative process. If the Proposed Restatement is not changed, the Resolution calls for certain action to be taken to ensure that the Proposed Restatement is not afforded recognition by courts as an authoritative reference regarding established rules and principles of insurance law, as Restatements traditionally have been afforded.

Commissioner Tom Considine, NCOIL CEO, then provided a timeline of NCOIL's interaction with the ALI regarding the Proposed Restatement. On May 5, 2017, NCOIL sent its first letter to ALI Director Richard Revesz and ALI Deputy Director Stephanie Middleton. The letter: a.) noted several provisions of the Proposed Restatement that

conflict with existing law; b.) asked the ALI to defer voting on final passage of the Proposed Restatement; c.) welcomed a dialogue between NCOIL and the ALI; d.) warned that if our request and invitation were not met, NCOIL would pass a Resolution opposing the proposed Restatement as a misrepresentation of the law of liability insurance, and as a usurpation of lawmaking authority from State insurance legislators. Later that month, the ALI postponed adoption of the Proposed Restatement. Despite the postponement, numerous judges cited the Proposed Restatement in their opinions.

NCOIL held a general session on the Proposed Restatement at its Annual Meeting in November, during which the Restatement's primary Reporter, Tom Baker, participated along with Laura Foggan, Victor Schwartz, and Peter Kochenburger. Later that day, having not been satisfied with the explanations provided regarding how the proposed Restatement reflects current law, the NCOIL Property & Casualty Committee voted without opposition to adopt the Resolution referenced earlier by Senator Rapert, sponsored by Senators Breslin and Seward.

On November 28, Cmsr. Considine sent a letter to ALI President David Levi and ALI Council Chair Roberta Ramo which: a.) again pointed out the provisions in the Proposed Restatement that conflict with existing law; b.) notified them of the Resolution adopted by the NCOIL P&C Committee; c.) requested that they reply to NCOIL on or before December 18, addressing whether the ALI will make the type of substantive changes NCOIL has requested. On December 6, ALI President David Levi sent a letter to Cmsr. Considine which stated that a new draft of the Proposed Restatement would be distributed that week and that the new draft "contains several substantive changes to the Proposed Restatement...on points on which you and others have expressed concerns." Unfortunately, upon review, it did not appear that the new draft addressed any of NCOIL's concerns. Accordingly, on December 7, Cmsr. Considine wrote back to ALI President Levi saying such and requesting a reply by December 19 as to how the new draft addressed NCOIL's concerns.

Cmsr. Considine stated that, as of today, NCOIL has not received a reply, and it therefore seems that the ALI is headed towards final adoption of the Proposed Restatement at its upcoming Council Meeting in Philadelphia (January 18-19). Cmsr. Considine further stated that the November 28, 2017 letter requested that it be shared with all members of the ALI Council. However, NCOIL heard from several ALI members that the letter was not distributed. Accordingly, another letter was sent to the ALI Council on January 3, 2018, sharing with them the letter and notifying them of the pending Resolution. Cmsr. Considine noted that if adopted, the Resolution calls for the following steps to be taken: a.) NCOIL will urge state legislators across the country to adopt resolutions declaring that this Restatement should not be afforded recognition by courts as an authoritative reference regarding established rules and principles of insurance law, as Restatements traditionally have been afforded; b.) NCOIL shall develop and promulgate, as appropriate, model legislation intended to maintain the viability, predictability and optimal functionality of the insurance market and its practices; c.) NCOIL shall send copy of this Resolution to ALI Leadership, the reporters of the Restatement of the Law of Liability Insurance, and further published in such a manner to reach and inform ALI members; and d.) NCOIL shall send the Resolution to State Chief Justices, State legislative leaders and members of the committees with jurisdiction over insurance public policy, as well as to all State insurance regulators.

Sen. Neil Breslin (NY) stated that the Proposed Restatement is problematic because it is aspirational and not representative of what a true restatement typically is – a restatement of what a specific topic of law is. Sen. Breslin stated that a strong response by NCOIL, such as this Resolution, is needed since the ALI has not made any changes to the Proposed Restatement to alleviate any of NCOIL's concerns. Sen. Breslin recommended that the Committee adopt the Resolution and take the steps that the Resolution calls for in distributing and notifying the appropriate parties. Sen. James Seward (NY) agreed with Sen. Breslin.

Sen. Bob Hackett (OH) stated that he has not heard from a lot of insurance companies about the Proposed Restatement and asked if they are aware of it. Cmsr. Considine stated that the NCOIL national office has been inundated with reactions from insurance companies saying that the Proposed Restatement is very problematic for them. Cmsr. Considine further stated that, most importantly, the NCOIL national office has heard from State legislators across the country about their problems with the Proposed Restatement, in addition to academics who have offered differing viewpoints.

Sen. Rapert stated that the main problem surrounding the Proposed Restatement is simple – legislators are elected to enact laws and that authority should not be usurped by the ALI.

NCOIL Secretary, Asm. Ken Cooley (CA), stated that the Proposed Restatement, if passed by the ALI, could have dramatic affects on the entire insurance industry. Asm. Cooley referenced § 24 of the Proposed Restatement, *The Insurer's Duty to Make Reasonable Settlement Decisions*, and noted that said section seeks to move the law from the well-settled "reasonableness" standard, to a standard that would make an insurer liable for not accepting a settlement offer so long as *any* reasonable insurer would accept the settlement, even if a reasonable insurer would have rejected a settlement offer. Such a standard does not recognize that different insurers have different ways of doing business/litigating and could therefore alter the entire insurance marketplace. Asm. Cooley noted that while not directly on point, in 1979, the California Supreme Court held (*Royal Globe Ins. Co. v. Superior Court*, 592 P.2d 329 (Cal. 1979)) that the California Unfair Trade Practices Act created a private cause of action directly against an insurance company by third party claimants, and held that a single violation of the Act was sufficient basis for a claim for punitive damages. As a result, an onslaught of litigation was unleashed in California courts which led to a dramatic increase in insurance costs for consumers. That case was overturned nine (9) years later (*Moradi-Shalal v. Fireman's Fund Ins. Co.*, 758 P.2d 58 (Cal. 1988)) but it is an example of when insurance liability rules are materially changed, the affects can be drastic, and consumers ultimately bear the burden through increased costs.

Professor Peter Kochenburger, Associate Clinical Professor of Law and Executive Director of the Insurance LLM Program and Deputy Director of the Insurance Law Center at the University of Connecticut School of Law, and an NAIC funded consumer representative, first stated he is not sure whether the ALI distributed NCOIL's letters to ALI's members, but said letters were posted on the ALI website. Prof. Kochenburger stated that the latest draft of the Proposed Restatement did make a few minor changes to address some concerns that NCOIL and others had voiced. Prof. Kochenburger further stated that a Proposed Restatement in the area of liability insurance is tricky because the majority rule on certain issues isn't always easily identified and sometimes terms are used differently among States/courts. Prof. Kochenburger disagreed with Asm.

Cooley's interpretation of § 24 of the Proposed Restatement and stated that the issue Asm. Cooley mentioned regarding third-party bad faith claims is not addressed in the Proposed Restatement. Prof. Kochenburger further stated that the Proposed Restatement does not represent a usurpation of legislative authority because State legislators can always intervene at any time and pass laws, particularly since Restatements are primarily common law.

Sonja Larkin-Thorne, an NAIC funded consumer representative, disagreed with Prof. Kocheburger and stated that as a consumer advocate, and as a former underwriter, she does not understand the need for the Proposed Restatement. Ms. Larkin-Thorne stated that the Proposed Restatement will ultimately increase costs for consumers, and there is no justification for the radical changes that the Proposed Restatement contains. Ms. Larkin-Thorne stated that she supports the Committee's adoption of the Resolution.

John Ashenfelter from State Farm thanked NCOIL for binging attention to the Proposed Restatement and agreed with Asm. Cooley's earlier statements. The Proposed Restatement does not represent the ALI's modus operandi and it represents a usurpation of legislative authority. Courts will be overwhelmed by the changes sought by the Proposed Restatement and consumers will ultimately bear the burden through increased insurance costs. Mr. Ashenfelter stated that he supports the Committee passing the Resolution.

Upon a Motion made by Sen. Breslin and seconded by Sen. Seward, the Committee voted without objection by way of a voice vote to adopt the Resolution.

Cmsr. Considine asked the Committee for a sense of how they would like to proceed with notifying the ALI and other interested parties since the ALI has not yet officially adopted the Proposed Restatement. Sen. Breslin stated that the ALI should be notified immediately and then afterwards, letters should be sent to those that the Resolution mentions, i.e. State Chief Justices, State legislative leaders, etc. Sen. Rapert agreed and suggested that an NCOIL representative be present at the ALI Council Meeting later this month. Asm. Cooley agreed with Sen. Breslin and Sen. Rapert. Cmsr. Considine acknowledged and agreed.

ADJOURNMENT

Upon a Motion made by Sen. Breslin and seconded by Sen. Seward, the Committee adjourned at 3:00 p.m.