

NATIONAL COUNCIL OF INSURANCE LEGISLATORS
PROPERTY & CASUALTY INSURANCE COMMITTEE
TAMPA, FLORIDA
DECEMBER 12, 2020
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Property & Casualty Insurance Committee met at the Tampa Marriott Water Street Hotel on Saturday, December 12, 2020 at 9:00 A.M. (EST)

Representative Bart Rowland of Kentucky, Chair of the Committee, presided.

Other members of the Committee present were (* indicates virtual attendance via Zoom):

Asm. Ken Cooley (CA)*	Sen. Neil Breslin (NY)*
Rep. Matt Lehman (IN)	Asm. Kevin Cahill (NY)*
Rep. Peggy Mayfield (IN)*	Asw. Pam Hunter (NY)*
Rep. Michael Webber (MI)	Sen. Jim Seward (NY)*
Sen. Paul Utke (MN)	Sen. Bob Hackett (OH)*
Rep. George Keiser (ND)*	Del. Steve Westfall (WV)*
Sen. Shawn Vedaa (ND)	

Other legislators present were:

Sen. Mike Gaskill (IN)
Rep. Jim Gooch (KY)*
Rep. Edmond Jordan (LA)*

Also in attendance were:

Commissioner Tom Considine, NCOIL CEO
Will Melofchik, NCOIL General Counsel
Tess Badenhausen, Assistant Director of Administration, NCOIL Support Services, LLC

QUORUM

Upon a motion made by Asm. Ken Cooley (CA) NCOIL Vice President, and seconded by Rep. Matt Lehman (IN), NCOIL President, the Committee waived the quorum requirement without objection by way of a voice vote.

MINUTES

Upon a motion made by Asw. Pam Hunter (NY), and seconded by Rep. George Keiser (ND), the Committee voted without objection by way of a voice vote to approve the minutes from the Committee's September 24, 2020 meeting.

CONTINUED DISCUSSION ON NCOIL DISTRACTED DRIVING MODEL ACT

Sen. Bob Hackett (OH), Co-sponsor of the NCOIL Distracted Driving Model Act (Model), stated that he would like to say a few words before the Committee begins and note the changes that he and his colleague and co-sponsor of the Model, Assemblyman Ken Cooley (CA), NCOIL

Vice President, have made to the Model since the Committee last met in Alexandria in September. The Model is in the legislative binders on page 231. A few housekeeping items were made in the form of adding a Table of Contents; a Title section; and an Effective Date section. A new Section 2 titled "Purpose" was added which most importantly makes clear that the Model is intended to allow for primary enforcement. Lastly, amendments were made throughout the Model to make clear that it targets handheld electronic devices and not in-vehicle technology systems. In Ohio, total claims are down since the pandemic but serious accidents are up and everyone agrees it is due to distracted driving. Sen. Hackett stated that good progress is being made on the Model and he looks forward to the discussion today and hopefully having the Model ready for a vote by the next meeting or the Summer meeting at the latest.

Asm. Cooley thanked Sen. Hackett for describing the changes that have been made to the Model and stressed the importance of the change that now allows for primary enforcement. When discussing this issue he always recalls early in his career in California when everyone was anxious about a mandatory seatbelt law. There was a time when that seemed like a big hill to climb – enacting a mandatory seatbelt law. It started with secondary enforcement but it was then realized that the law saves lives and provides immediate practical value so the jump to primary enforcement was made. Now, such seatbelt laws are ubiquitous. You can see the parallels here with distracted driving laws. Asm. Cooley also noted the importance of the change to the Model noted by Sen. Hackett regarding distinguishing handheld electronic devices from in-vehicle technology systems. Asm. Cooley thanked everyone who has worked on the Model thus far and stated that he looks forward to shepherding it across the finish line to adoption.

Andrew Kirkner, Regional VP – Ohio/Mid-Atlantic Valley at the National Association of Mutual Insurance Companies (NAMIC), stated that NAMIC urges the Committee to adopt the Model. The Model presents the Committee with an opportunity to send a message to those states that are considering distracted driving legislation and that message is that NCOIL which is truly the country's leading insurance legislative organization is truly committed to ending distracted driving and saving lives. NAMIC spoke in support of the Model at the Committee's last meeting so there is no need to duplicate remarks but it is important to recognize the importance of the amendment made to the Model regarding primary enforcement. The Model also contains prohibitions on watching media or broadcasting media from a car/vehicle while operating it and those are very positive developments and for some of the states that adopted early distracted driving legislation – so called texting and driving bills – those provisions were not included so that is an improvement and an opportunity for those states to revisit that legislation. NAMIC would like to thank Sen. Hackett and Asm. Cooley for their work and encourages the Committee to adopt the Model.

Wayne Weikel, Senior Director at the Alliance for Automotive Innovation (Alliance), stated that the Alliance is a D.C. based trade association formed earlier this year representing the manufacturers who produce 99% of all light duty vehicles on the road each year as well as tier 1 suppliers and autonomous vehicle technology companies. Members have spent billions of dollars to make safer automobiles and the Alliance and its former iterations have supported bills like the Model in states when they have come up. As noted, when the Model was introduced the Alliance had concerns that it would unintentionally capture in-vehicle electronic systems within its scope. That is important because in-vehicle systems have been designed with engineering specs to increase roadway safety. We want people to pair their phones with their in-vehicle systems – it makes roadways safer. Things like voice to text or how you can call up a recent address but can't type in a new address from scratch while driving are things that make

roadways safer. They are also things that make drivers keep their hands on the wheel and eyes on the road which is the most important thing to avoiding unnecessary crashes. The Alliance is supportive of the sponsor's and NCOIL staff's work on the Model thus far to see the Alliance's concerns addressed and as such the Alliance strongly supports the Model as reflected in the 30 day materials and urges its adoption.

Rep. Matt Lehman (IN), NCOIL President, stated that whenever we have had the discussion about distracted driving we narrowly focus it to the handheld devices used while driving. Where does this lead us in terms of there is an aide in the car, kids in the car, and a lot of things that will distract me beyond hand-held devices? When we go down the path of narrowing it to handheld devices where will this end up long term as it relates to other things that cause distracted driving?

Rep. Edmond Jordan (LA), stated that in Section 4(D)(4), when talking about any form of electronic data retrieval of communication he wonders if we are using Waze or Google maps or Apple maps if that falls under data retrieval. The bigger issue is switching to primary enforcement. The Louisiana Black Caucus had a bill like the Model that came up the past several years and that has been a major impediment because of the impact it could have on communities of color and policing. In light of the fact that we just had a meeting dealing with race in underwriting, although this doesn't deal with underwriting, this may be something to consider moving forward. In response to Rep. Lehman's point, Sen. Hackett pointed to Section 4(C) which says "A driver shall exercise due care in operating a motor vehicle on the highways of this state and shall not engage in any actions which shall distract such driver from the safe operation of such vehicle" and stated that may address his concern. Rep. Lehman stated it does in a way but that also goes to Rep. Jordan's point about primary enforcement so under this law would a police officer be able to stop someone who was distracted by how they are drinking their coffee? This just goes to the issue of where does this have a parameter of I can do this but I cant do that.

Asm. Cooley stated that the state of the law in most jurisdictions is that if a police officer sees someone operating a vehicle in an impaired or unsafe manner they can stop you anyway so the Model doesn't change that. He would expect that if an officer sees a driver who has a car full of kids and is turning and looking and talking to them and creating an unsafe condition the officer would feel compelled to pull the driver over and have a conversation to avoid a tragedy occurring. Asm. Cooley stated that accordingly he does not believe the Model is changing the general law of operating a motor vehicle under due care but is just going into a specific area of a new type of peril that gets introduced into the general operation of operating of a motor vehicle. Asm. Cooley noted that he thinks we can work with staff on making clear that we are not really trying to create a class of re-stating the law of due diligence of driving a vehicle that extends to all other conduct – we're just saying that is the yardstick currently and we are just writing specialized rules with respect to the use of technology.

Asm. Cooley stated that he is mindful of the concerns expressed by Rep. Jordan. Secondary enforcement is not a perfect solution to that either because then what happens if an officer thinks they have an issue then they are looking for some other reason to conduct a traffic stop in order to address the issue of electronics. There is a long history of problems with that alleging that a taillight has an issue or suspecting issues for pulling someone over. The stats on distracted driving are awfully darn good and if we haven't adequately established that as part of the record then we can do that. This is a Model that can be well-served by clear legislative findings concerning distracted driving and we can readily partner with the automotive innovators and automotive companies themselves and incorporate that.

Asm. Cooley again spoke of his experience with seatbelt laws in CA in the 1980s. People were very nervous about them but in fact it is such palpable common sense that it became widely embraced and that is similar to the type of issue we are dealing with here and this is a significant class of behavior that builds upon the basics law of tort and the application of everyone's duty not to cause harm to others and it writes the rules of this area of technology that is helpful. Sen. Hackett stated that it is helpful if you look at the number of people now that text and drive and use their phones when they drive. If you use your phone when you are in your car you have to look down at it and when you are doing that you are almost driving blind and the numbers have increased so much of that occurrence and people don't realize the huge increase of that.

Asw. Pam Hunter (NY) stated that she would like to associate her comments with Rep. Jordan. Asw. Hunter definitely thinks that there can be instances where models can create unintended consequences and especially negatively impact communities of color and that should be something the Committee should always be careful of and looking at when creating Models. Asw. Hunter asked Mr. Wiekel when is it a manufacture's responsibility, and the line is narrow, that the new vehicles have so many gadgets and technology that while luxurious and convenient, she cant imagine a convenience where somebody is not touching a screen. She stated that she doesn't know where that line is when we are having convos with manufactures relative to responsibility. This is all great and luxurious but it takes away from the fact that you are supposed to be concentrating on driving and when you can watch TV in your car Asw. Hunter thinks the line has been surpassed in over-creating too much of a distraction in the vehicle.

Mr. Wiekel stated that while new automobiles may have video screens available to passengers there is not a car on the road today that is produced that has a TV screen that is capable of displaying entertainment within the eyesight of the driver. While there may be a video screen of some sort it is displaying other info relative to driving. With regard to the line of responsibility, the way auto makers look at this is the billions of dollars that have been pushed into developing autonomous vehicles and according to the National Highway Traffic Safety Administration (NHTSA), 94% of auto accidents are caused by human error. The pathway that auto makers see is that there will be less and less involvement of the human driver in regular roadway situations. The path forward ultimately leads to somewhere in that area.

Part of the reason for pushing this legislation is we want to people to pair their phones with their car because it does create some control and in the absence of that someone could be driving down the road watching YouTube on their phone surreptitiously that they are sitting on their lap or something of that sort. We want consumers to link their phones to the vehicle so that we can block out those sort of things. As for distractions, everything something does that is not the driving task in the vehicle could be distraction. The hope with an automobile centers on repetition. Mr. Wiekel stated that when he got a new automobile recently the first week or so it took him a little bit to answer a phone but now having it awhile his eyes don't leave the road to do that or answer a call or setup voice to text so there is a learning curve but on balance we keep coming back to that its better to have vehicle systems that are designed with international engineering standards better than the wild west of someone is trying to do things on their phone when there are no controls.

Asm. Kevin Cahill (NY), NCOIL Treasurer, echoed the comments from his colleagues regarding the danger of using any kind of enforcement for racial profiling. It is not something that is a matter of opinion as study after study has indicated that law enforcement against drivers who are people of color is substantially higher than law enforcement against drivers who are white.

That is a statistic that has been proven over and over again and with specifically distracted driving laws a study of one police department showed that there were 4 times as many black people pulled over for distracted driving than white people in a community that only had 20% black people in it. Asm. Cahill stated that he doubts very much that people are using devices more because of their race. It probably speaks to the nature of enforcement and that brings us back to the beginning of the conference earlier this week of the very benign and sometimes passive means by which race impacts insurance. If someone gets arrested or is charged with a traffic motor vehicle violation that puts them in a higher risk category and results in their insurance going up. The points are well taken and we should continue to consider those aspects when considering all Models.

That being said, staying with statistics, distracted driving is more dangerous than drunk driving and is killing and causing more accidents than drink driving. If you are one of the many legislators who had the benefit of going to the Griffith Institutes session several years ago on distracted driving where everyone participated with a screen in front of them and participants missed pedestrians because they were intentionally made to distract ourselves you would understand that this is a serious road hazard that has to be addressed. There is no evidence, maybe it hasn't been studied, that drinking coffee while driving or shaving while driving would cause any kind of accident. It is the distraction of your concentration that is at stake here and when you are using a device that causes you to be hung up on or dial a wrong number you lose your focus and you forget momentarily that you are driving.

It is important to step as close as we can to a uniform standard across the country because without laws people make their own judgments as if it's a matter of opinion. When we make these laws we do it to encourage behavior and it certainly has worked as Asm. Cooley pointed out looking at seatbelts. We all wear them now. Look at smoking indoors. There was a time when we didn't do that. Behaviors change because we as legislators make rules and this is an opportunity to makes rules that make the roads safer. That said, Asm. Cahill would like to go back and revisit the topics that Sen. Breslin led earlier in the week and we should be cognizant of those facts going forward and Asm. Cahill supports this Model and the direction of it.

In response to Rep. Jordan, Asw. Hunter, and Asm. Cahill's comments, Mr. Kirkner stated that they all raise an important topic and it was one seen played out at the state level and that is the effectiveness of primary enforcement as weighed against its potential impacts on minority groups. As it relates to the Model before the Committee, the purpose statement puts forth into the Model a pretty cut and dry statement which is that primary enforcement of laws is an important part of the strategy to reduce traffic deaths and life altering crashes. That statement taken alone is true and is certainly something NCOIL should pursue in NAMIC's opinion. That conversation will not happen in a vacuum and there is ample opportunity at the state level after passage of the Model for states to balance other concerns with that primary enforcement mechanism.

This is a conversation similar to what happened in Virginia that is going to come down to the legislative bodies in individual states. If we look to seatbelts for example the CDC cites an age study that with states that have primary enforcement of seatbelt laws have something like 9% higher use of seatbelt. It is not a 1:1 corollary but we know that primary enforcement is helpful and that distracted driving is dangerous. That is not the entire equation and states should look at priorities in enforcement but the Model would still leave ample flexibility for that process to occur. Lastly, there are states that have considered distracted driving legislation that have included as part of the package instructions for the study of enforcement against certain

demographic groups. That may be something that is appropriate if not for this Model then for NCOIL to consider.

Rep. Rowland echoed Mr. Kirkner's statement regarding the distracted driving demographic and asked if it would please the Committee if language was inserted in the Model requiring such a study. Sen. Breslin stated that it is a great idea. Sen. Hackett stated that is had no problem with that. Asm. Cooley stated that it is an outstanding idea. The philosophy of the Model is that everyone owes a duty to exercise due care so as to not subject anyone to unreasonable risks of harm. That is the law and the study aligns with that. To put a spotlight on the concern for its equitable enforcement and application and to setup a reporting system on the use of the statute in a given state is a good idea. Rep. Rowland said NCOIL staff can distribute language before the next meeting. Rep. Rowland stated that there is more work to do on the Model but today has been a healthy and productive discussion and he appreciates everyone's involvement.

INTRODUCTION OF NCOIL CORONAVIRUS LIMITED IMMUNITY MODEL ACT (Model)

Rep. Rowland stated that he is proud to sponsor the Model as it deals with such an important and timely issue. The Model is in the legislator binders on page 237 and is very straightforward. It is primarily based on what was enacted in Idaho this past Summer although several states have passed similar laws. The Model essentially protects businesses by providing them a certain level of immunity from lawsuits relating to COVID-19. Of course, if a business acts in a reckless or willful manner, liability can attach, but the businesses who want to re-open in a safe manner should be provided a certain level of immunity from COVID-related lawsuits. Rep. Rowland noted that Congress is considering enacting similar legislation and if it is indeed enacted this model legislation may become moot, but nonetheless we have to be proactive and be prepared.

Rep. Lehman stated that none of us expected to be dealing with the issues we are dealing with today. When it comes to COVID and business immunity this is timely and we may have issues from a processing standpoint in terms of adopting the Model so we will probably have to hold today. When approaching this issue when you look at our communities right now every business is looking to us for help and one of the things they are looking for help with is that they want to re-open their business and open their doors but they don't want to have to keep looking over their shoulder as to who is on their doorstep looking to put them out of business with a lawsuit. This is very important. From a process standpoint, Rep. Lehman stated that this is either in or already making its way through many general assembly's. It's a top priority in IN and will probably move out the first week there.

For the states that have already pushed the legislation, NCOIL is a great organization to gather data so perhaps we should gather that data and say what are best practices that we have seen with these types of laws. This can become a Model that may not address the issue immediately but we can get out in March to say this is what we have found to be best the practices. Every state is going to deal with and consider this and NCOIL has always been an organization that says we build the foundation and you put up the drapes but that foundation is going to have some structure to it and giving some time to see what states do on this enables NCOIL to create a really solid foundation. Rep. Lehman stated that we have to do something and continue to move forward. Rep. Lehman stated that he looks forward to working with Chair Rowland on where we go and with this and also hearing the engagement of the Committee and states. This is a situation where we need all hands on deck from all states to hear everything. Rep. Lehman stated that he looks forward to the discussion today of all perspectives.

Mr. Kirkner stated that if we boil this Model down to its simplest form, it is attempting to accomplish something that is really important. Businesses and individuals alike need to be protected from frivolous lawsuits stemming from the global pandemic currently facing the country and world. While the outbreak and more recent spikes in cases are troubling, for the first time in several months there is a light at the end of the tunnel regarding vaccine distribution and the business world reopening in large part. Whether that is the spring or fall of next year, we do sort of have a perspective on when will things will open back up. That said, when things open back up and consumers return to stores NAMIC thinks its more important than ever to make sure these businesses aren't faced with rising litigation costs relating to frivolous lawsuits.

One of the ways to do that as Rep. Lehman pointed out regarding what states are already doing is limited immunity. We have seen bills in OH, MI, and a number of other states such as IN, WV and other sates considering such legislation as we head into spring sessions. NAMIC thinks the Model is a really good start and step in the right direction and has a few specific comments. In terms of improvement or suggested modifications, NAMIC and its members believe a few things are important. From a threshold standpoint, one of the hot topics in the immunity space right now is the idea of take home liability. The Model specifically exempts work comp law and the impact on it and in the take home liability space one of the concerns raised by NAMIC members is that there will be individuals who contract COVID from individuals who bring it home from work.

The bill extends immunity to persons from liability for exposure but it may not go far enough in extending that immunity to businesses and other persons for exposure to third parties – take home liability. There can be improvements made and NAMIC will certainly offer language to do that. The Model also contains a broad grant of immunity except where there are intentional acts. Many states across the country would require a higher threshold of evidence when referencing an intentional act i.e. clear and convincing standard. It may not be appropriate for NCOIL to list what each state's standard of evidence of intentional acts is but a drafting note on that point cold be important to note the instance that there are differences among the states regarding evidentiary standards for intentional acts.

Finally, NAMIC believes that there can be a broadening of the exposure language in the Model. At present, Section 3 provides immunity for the exposure to COVID but we think that the language can be expanded to contemplate direct or indirect exposure. That speaks to the issue of take home liability referenced earlier. Globally speaking the Model is a great start and one of the comments received by NAMIC is that a Model that is concise and clean like the Model has the best chance of success. NAMIC agrees with that principle and believes some small tweaks can improve the Model and allow NCOIL to be a leader on the issue. NAMIC will most likely supplement these comments with written comments and thanks NCOIL for being a leader on this issue.

Wes Bissett, Senior Counsel, Gov't Affairs at the Independent Insurance Agents & Brokers of American (Big I) stated that the Big I supports the efforts of the sponsors to take this issue on and the Model is a narrow and short one that merely creates a higher culpability standard for a plaintiff bringing a COVID exposure lawsuit. We have seen numerous states adopt similar legislation this year and as noted Congress is considering similar legislation but the Big I believes the states are the appropriate forum for action like this as it is states that typically address the assignment of liability so it is very appropriate for state legislators to be considering this issue. Given the interest in this issue in many states we think a Model is very appropriate. There may be legislators on the Committee who feel that it is not appropriate or warranted for their particular state and it may not be universally adopted but there is certainly sufficient

interest in this to warrant Model law. It would be an understatement to say that we live in stressful and traumatic and overwhelming times as we are in a global pandemic after all. The pandemic is especially challenging if you are in a business or employer and whether you run a non profit organization, a hospital, a school, a university, or a small business you are struggling today to make it through this storm and you are not only worried about your personal situation and the long term viability of your enterprise but you have the extra burden and pressure of knowing that you have employees and patrons relying on you. That is a special burden that the owners and operators of businesses and other orgs have and they take it very seriously.

Profit and non profit orgs are facing more challenges than we can cite as a result of the virus and what this Model would do would be to eliminate one small and unnecessary source of concern. It is no secret that we live in a litigious society and businesses are worried about litigation as a result of COVID. It can be an existential threat for businesses that are already on the brink. Many businesses are on the tipping point and the threat of litigation can be the one thing that forces them to close altogether. Businesses are very vulnerable right now. Some might think that the safest course of action and the path of least resistance and the most reasonable thing to do in this situation is to shutdown altogether but that would put patrons and employees in an even more vulnerable position than they are today.

The threat of litigation in this environment is very real. A business can take every conceivable action possible to prevent the spread of the virus but it is everywhere. We face community spread and it is not going to be a challenge for a plaintiff to make an allegation against a business or non profit company that they will then have to defend against. That claim may not be successful ultimately but you do have to defend against it in courts without much direction and they will be deciding what constitutes reasonable care in this uncertain environment. The Model encourages business in a manner that is consistent with the guidance and directives of state officials to remain open and to operate in a constructive and safe and responsible good faith way. But it does give some degree of confidence to businesses and precludes the ability of courts to frankly engage in de facto COVID related policy making.

The Model though is not limitless and is not an absolute shield against accountability and liability. It doesn't shield bad or improper acts. It doesn't allow bad actors to operate. It doesn't authorize or permit reckless or willful misconduct and some might suggest if you were to pass this that we are going to see a parade of horribles and bad behavior that will emerge as a result of a state passing this Model. The Big I thinks such concerns are completely misplaced for several reasons. We don't think a business once a bill like this is passed is going to choose to become a bad actor and engage in bad faith action. It flies in the face of a businesses own self interest and reputational concerns and the fact that it is trying to remain open safely and keep its employees employed and its patrons served and perhaps most notably the Model itself would still permit plaintiffs to bring lawsuits in those situations and we have not seen in states that passed laws like the Model the types of horrible behavior breakout that some have suggested might.

The witness list today is insurance heavy and that makes sense at an NCOIL meeting but it does underrepresent the very widespread and significant support from just about every segment of the economy: non profit, for profit, public, private sectors. These bills have broad support from just about every conceivable business or employer you can imagine. As we begin to emerge from this crisis and get back on our feet in a collective sense and hopefully get our economy going again, businesses and employers are going to need all of the support and encouragement and certainty they can find and this Model provides that in this limited and

narrow context. Mr. Bissett thanked the Chair and sponsors and commended NCOIL for a successful set of meetings this week under difficult circumstances.

Lauren Pachman, Counsel and Director of Regulatory Affairs at the National Association of Professional Insurance Agents (PIA), stated that PIA represents independent insurance agents in all 50 states Puerto Rico and Guam. Many of the agents are small business owners and many of them serve a clientele of small business owners so we have a vested interest in making sure that small businesses are protected during this difficult economic time. As Mr. Bissett mentioned, small businesses could be easily bankrupted by a single lawsuit even if it's a frivolous one and many small businesses are just getting by if that in our current climate. They also need predictability and are trying to operate in accordance with everchanging federal, state and local guidelines regarding COVID such as openings, closings, curfews, time limitations on when they can be open, etc.

The Model reflects the movement around the country towards protecting small businesses with similar legislative efforts and the Model sends a message to states that haven't enacted anything yet that it is a tool in the toolkit they can use to protect small businesses in their state. As mentioned by Mr. Bissett, Section 3 of the Model provides businesses that are in compliance with those everchanging guidelines to be confident that they can open and they will not be the subject of frivolous lawsuits. They of course could be still subject to a frivolous lawsuit but it would be much easier to dispense with a lawsuit in a more cost effective manner with legislation like this on the books. Many of the businesses that we are talking about are already on the brink and they need all the predictability they can get in the current economic climate. This additional predictability provided by the Model will be the difference for some businesses between solvency and collapse. Ms. Pachman thanked the sponsors for developing the Model and is happy to work with other organizations and NCOIL staff about adding any essential provisions that might be of value including what NAMIC mentioned regarding evidentiary standards and also provisions regarding statute of limitations (SOL).

Prof. David Vladeck, A.B. Chettle Jr. Professor of Law at the Georgetown University Law Center, stated that he is going to be the fly on the ointment because he thinks the Committee is embarking on a misadventure that will not help small businesses and people who are harmed. Starting with facts, we have had 16 million cases of COVID reported, nearly 300,000 deaths and there has nearly been no litigation. The Chamber of Commerce has been tracking this from the beginning. The cases that have been brought are cases that ought to be brought like people injured in meat packing plants because their employer failed to take necessary precautions, some cases involving nursing homes which were very slow to protect the people who were living there – that's about it. When looking at the number of small businesses that have been sued over this, its almost zero.

So, first of all, what is the basis for this legislation – why do you think you need it? The tort system in his view has worked very well. There have been so few cases because causation would be extremely hard to prove in these matters. In order to sue somebody you have to be able to show and you have to plead there is a reasonable connection between somebody's COVID and their injury. Causation here is extraordinarily difficult to prove and lawyers are not stupid – they are not going to bring a case that they don't have a substantial chance in winning because they are fronting the money. You might ask – ok so what does it matter if we have this legislation? The legislation is incredibly overinclusive just the way the federal legislation is. The breadth of immunity here is extraordinarily large and undefined. Like the federal statute which might have all sorts of unintended consequences the breadth of the Model doesn't solve for that.

Further, there is an issue of moral hazard. This is classic moral hazard. Prof. Vladeck stated he understands why the insurance industry wants the Model since it will save them money if there are cases but think about moral hazard. The question here is what can we do to reopen our economy – what are we going to do to get people back to work. Is it really sensible to tell the public you are on your own unless somebody engages in an intentional tort which is essentially a crime in every state. Businesses that act responsibly are already protected from liability. Reasonableness is the cornerstone of our tort system so we don't need legislation to protect the responsible. Immunizing companies from liability when they act unreasonably or irresponsibly would be utterly counterproductive and would impede the ability of states to re-open their economies.

Telling people they are on their own and there are no real requirements that your drug store or other place of business is taking sensible precautions – that is not the right signal to send. The right signal to send is that if people act unreasonably they will pay for it because that is the way the system has always worked. There are two disciplines on our marketplace - regulation and tort law. There has so far been no effective regulation and that is where the federal government has really failed terribly. There is no effective regulation but there are guidelines and if a company follows those guidelines that company has essentially an airtight regulatory compliance defense. That is the way it works with the law – if there is a regulation and you adhere to it and bad things happen that is not your fault; it is the regulator's fault.

We either need regulation through law or we don't have a marketplace. Every time you go to the grocery store and buy a pound of flour you know you are getting a pound because the initial regulatory system had to do with weight and measures. Now we have public health measures. There are all sorts of problems with the Model that the Committee has not even begun to think about. What about cases that have arisen prior to the passage of the Model? There would be a huge constitutional issue if you tried to wipe away those claims. Do you have the constitutional authority to wipe away the property interest someone has in a legal claim retrospectively? A lot of the discussion so far has been on frivolous cases. The courts know how to prevent frivolous cases. If you file a frivolous case as a lawyer you pay a price. The Model has nothing to do with frivolous lawsuits. Another justification is there is a reasonable measure in bounds here because it only involves essentially intentional torts or gross negligence. Well, intentional torts are crimes in every state as is what is called gross negligence so what you're really talking about is the only cases that can move forward on the Model is if somebody goes out and intentionally tries to harm someone or engages in an act that is so reckless it meets a gross negligence standard. So, think about someone firing a gun towards a crowd or driving quickly through a pedestrian area – that is what gross negligence is. If you have any doubts about it, Prof. Vladeck stated that testified before the Senate Judiciary Committee and you can look at his testimony on their website as he talks about state law throughout the country.

With regard to take home liability, it exists in very narrow cases. The only cases so far that have been brought on that grounds are in the meatpacking industry in Green Bay and Iowa. Workers got sick and there were huge outbreaks in facilities and they went home and their spouse and children got sick. Should they bear the liability for that? That's what the Model would say – tough noogies for them. Even though they didn't have any fault. If you want to just protect criminals, that's what this Model does. The Model is only talking about gross negligence and willful conduct. Go look at the laws of more states and you will find that all of those things overlap with criminal law. The liability issue here is much more important in terms of signaling than it is with the actual case law that will follow. We dealt with this for almost a year and there have been almost no cases that the industry is fearful of. Law signals a lot and law that

basically says that you are on your own in this marketplace – if someone hurts you but didn't do it intentionally or willfully then tough noogies – that doesn't send the right signal. That is the perfect illustration of the Model and Prof. Vladeck urged the Committee to step back and take a look at the data of cases so far and then move forward.

Rebecca Dixon, Executive Director at the National Employment Law Center (NELP), stated that she is here to provide the worker perspective on this issue. Worker health is really public health and workers' rights to a healthy and safe workplace must come before profits. We simply aren't able to reopen businesses and public institutions if workers and consumers aren't safe and don't have confidence in their safety. Granting employers the immunity that some have long sought would create disincentives for even law abiding employers to protect their workers, produce a race to the bottom for workplace standards and would cause a health and safety disaster with new hot spots across sectors and spread across communities. Ms. Dixon stated that she want to leave the Committee with three points. First, when employers across the country fail to adequately protect their workers, they contribute to the spread of COVID into communities and due to historic inequities, this impact is uneven. Where employers are actually located in the labor market determines who is not able to work safely from home, who is out of work, and who is reporting to work and taking a daily risk. The concentration of women and people of color in low paying occupations ensures that they are the workers who are disproportionately in jobs on the front lines of COVID and they often work in industries that don't have health benefits or sick leave and have few workplace protections already.

Ms. Dixon encouraged the Committee to consider the impact of policymaking. What does the data tell us about this recommendation and who is advantaged most by it and who is disadvantaged by it? Who benefits and who is burdened? History shows us that it is important to consider unequal impacts. For example, without ever considering or mentioning race in this historical record the way people were stratified into the labor market enabled the exclusion of millions of workers from the New Deal programs excluded 90% of black women because they were concentrated in agricultural domestic work. There are many examples of how employers have been slow to follow the basic CDC recommendations. As COVID ripped through a pork processing plant in Waterloo, Iowa in April, Tyson's food supervisors not only kept the facility open but they placed bets on how many workers would catch the virus. One plant manager allegedly organized a cash buy in winner take all betting pool for supervisors and managers to wager on how many employees would get sick and test positive for COVID. Let me be clear, workers are getting sick and dying and these are tragedies that are preventable.

Second, the rule of law versus the honor system. Right now, employers operate on the honor system unless their state has issued enforceable guidance. The CDC guidelines are advisory and not enforceable. The Occupational Safety and Health Administration (OSHA) has failed to protect the health and safety of workers during this pandemic. Workers are already really challenged to enforce any of their rights and get access to the courts because of things like forced arbitration and collective action waivers that they sign when they take their jobs. This is also true for health and safety. OSHA has utterly failed to protect workers as its standards are voluntary and not enforceable and it's not enforcing any of the CDC voluntary guidance either. Unlike other statutes, workers have no private right of action to sue if an employer is violating OSHA including when their employer retaliates against them for raising safety concerns. They only have an administrative remedy to file a complaint and request an OSHA safety inspection. Workers have filed thousands of complaints but OSHA has conducted few if any on site inspections and issued no citations protecting workers from COVID exposure at work. Workers who speak up are facing retaliations and according to a recent survey black workers are twice as likely to face retaliation.

With regard to work comp, for workers injured on the job work comp is no fault coverage but you give up the right to sue for negligence. It is not really clear how much coverage work comp is going to have for COVID since work comp generally does not cover communicable community spread illnesses like cold or flu.

Lastly, immunity is really a solution in search of a problem. There is simply no flood of litigation. According to various COVID lawsuit trackers, somewhere between 116 and 234 lawsuits over issues like lack of PPE, exposure or infections at work or death have been filed to date. That's about 2 or 4 lawsuits per state. That is a trickle, not a flood. Also, it is important to know that while supporters of immunity may claim that they are primarily focused on preventing workers and consumers who may get sick from suing them, we need to be clear that the trade associations who lobby for employers including the Chamber of Commerce, Restaurant Association of America, National Association of Manufacturers and National Association of Independent Business to name a few are pushing for legal immunity from a wide range of core worker protections. The immunity sought by these associations and employers side attorneys would extend to violations of a worker's right to minimum wage, overtime, right to not work when you are off the clock protections and disability discrimination including the right to paid sick leave and paid sick time under the Families First Coronavirus Response Act. Throughout history and moments like these when we face both a pandemic and a public health crisis our challenges are also opportunities. How employers and policymakers respond during this moment could improve work in the U.S. for the long term or make the existing problems worse.

Frank O'Brien, VP of State Gov't Relations at the American Property Casualty Insurance Association (APCIA) stated that Prof. Vladeck and other opponents of this particular proposal would suggest that what it basically says to workers is tough noogies and you are out of luck because of these particular provisions. Mr. O'Brien stated that he would suggest that Prof. Vladeck and others would equally say to business communities and Main Street America tough noogies to you because you followed the rules and now there is the potential to you that you could face some additional liability coming your way. In that regard, this is the quintessential public policy question and state legislators and orgs like NCOIL are well positioned to determine whose noogies are going to be tougher.

This particular type of issue is a classic public policy question and it is something that a number of legislators in several states have wrestled with. As Rep. Lehman noted, it is also something that more states are going to wrestle with coming on down the pike. One of the points that opponents of this type of proposal would make, will make, and have made this morning is that there are not a lot of lawsuits out there at the present time. Taking them at their word and assuming that stats are correct and there is no reason to doubt otherwise, that is today – what about tomorrow and next week and what happens when main street America begins to reopen and begins to move into an area where we are in regular order and the doors to the court houses are open and trials are beginning to be scheduled and things like that.

Plaintiffs lawyers and their supporters will say see, there are no cases, but with courts shuttered and the SOL on their side, folks are not under any immediate need to file the cases. There may be practical issues, there may be SOL issues, pre judgment interest issues and concerns, tactical and strategic questions, individual lawyers in their offices may be weighing whether or not to take a case and file a case – there are lots of reasons tight now why there may not be an immediate tsunami of cases but there could be. For main street America who has been worried about their survival the potential for litigation coming on down the road is another concern.

Imagine yourself as doing everything you can possibly think of and followed the rules of your state and community and all of a sudden you have a suit filed against you. Well, it is true that as we go through the litigation process you may do well on that suit from your perspective and defeat it but sometimes the mere filing of litigation is as damaging as going through the litigation itself. There is a cost perspective, there is an emotional perspective, etc. That is not to say that there will be instances where litigation is warranted – there may very well be and in the Model it is crafted such that if a defendant acted intentionally, willfully or recklessly a claimant could pursue damages. It is not a complete bar and it is going to be up to state legislatures across the country to determine what the bar should be. If there are situations where a business has acted recklessly and has put their workers, customers and general public in danger and not followed the rules and has done so intentionally or recklessly then they should suffer the consequences and that is something that should play out as issues such as this are debated within the state legislatures.

Finally, several states around the country have developed legislation on this and it is a developing area and it is an area that is ripe for NCOIL to consider and is directly in NCOIL's wheelhouse and APCIA would support NCOIL continuing to look at discuss, debate and consider this very important public policy issue.

Rep. Chad McCoy (KY), who is currently working on similar legislation in Kentucky, stated that he is a Republican plaintiff's lawyer but he has been a defense lawyer for a lot of his career and that this issue presents a big balancing act. He has traveled around Kentucky to hear from businesses and this is a very real fear but as noted by Prof. Vladeck the data is just not there right now and in this organization what we have to do is an important balancing act. Frivolous lawsuits need to be stopped immediately and people need to be punished for that but at the same time we can't allow bad actors to get away.

What's very important for the business community is that we give them something that is real but also constitutional and one of the fears in Kentucky with the Model is that they want to be sure that retroactivity is not allowed. We have to keep in mind that there is a vaccine coming so we are looking at a short window of cases and Rep. McCoy would like to throw out something to chew on that has been done in the medical malpractice area which is the concept of a certificate of merit. A requirement that as a part of filing a lawsuit, the plaintiff and plaintiff's attorney have to file a certificate that they already have an expert that will testify as an expert not only as to a breach of the standard but also to causation and causation is probably the real hiccup in these cases as it will be almost impossible to prove. With the certificate of merit you would immediately cut away any of the frivolous lawsuits and what you would be left with are those that you would have an arguable (doesn't mean win or loss) breach of standard and causation. Kentucky has signaled to the business community that they are behind them but at the same time a balance needs to be struck and you can't throw the baby out with the bath water so to speak.

Rep. George Keiser (ND) stated that he is from ND which is a super red state and has a lot of people who are strong supporters of the President and not only politically supportive but supportive behaviorally and frequently don't wear masks and don't social distance as a source of freedom. ND has a lot of business owners like that. His question is that it seems to be if that if this was passed in ND it would eliminate any requirement to follow science for any employer in terms of social distancing and masks and tracing because there just isn't a requirement since they are exempt from that as this is not part of that – there is no requirement to follow science or to use reasonably objective responses. Rep. Keiser stated that he is curious from a legal standpoint if that would be true.

Prof. Vladeck stated that is a really good question but he is not sure if he has a really good answer because community standards matter in tort law and if the community standard is that you don't need to wear a mask, a jury of someone's peers is unlikely to ding a small business owner for not requiring masks. His understanding is that the ND Governor doesn't allow mask requirements in the state and if that is true that would complicate tremendously any effort to bring a tort case. Prof. Vladeck haven't looked state by state in a while but when he last looked there was no tort case involving COVID in ND and maybe that's the reason why.

Prof. Vladeck then responded to Mr. O'Brien's point regarding timing. If you want whatever cases to be filed now rather than later just go to the legislature with this kind of bill because retroactivity is not on the table – whatever you do is perspective only. So, if you want people to file cases then move this bill through a state legislature and whatever cases there are will be filed. The threat of legislation has been minimal ever since Leader McConnel drew a line in the sand about this so Prof. Vladeck thinks the speculation that people are waiting to bring these cases probably is unfounded largely because of the risk that if you wait too long and there is a liability bill then you may be stuck. But, none of this legislation can be retroactive.

Sen. Hackett stated that OH has law on this issue and the question that came up was how can we ask businesses to be open and stay open if we don't provide protections? Sen. Hackett stated that OH is different than the Dakotas as it is often a red state but the cities are blue and when you look at the situation it is such that the Governor and legislature don't get along and the Governor has to work with the legislature better and is not issuing laws that mandate things but rather issuing guidelines so the scenario is how do you operate in situations like that? When the pandemic first started, it was the city areas that were getting hammered and the rural areas were not so the question is how does this operate in a state like that.

Sen. Hackett stated that he got a bunch of calls saying you cant take away the right to sue and there is no way this business should open but the business had the right to open. So how do you operate in a state where you have political difference of opinion and area differences. Prof. Vladeck stated that this is really the same problem that ND has. The less people who are willing to wear masks and social distance, the more difficult it is to prove causation. One of the reasons there has been so few cases filed is because the causation problem for the plaintiff is almost impossible. In ND where people are not wearing masks or rural areas in OH where not wearing masks, proving causation is essentially impossible. Causation is the foundation of tort law and the plaintiff bears the burden on that and they cant sue unless they can show that it's the defendant that actually caused the injury they are complaining of. That is a practical answer but not a legal answer.

Sen. Hackett asked if that is the case then why is OH Bureau of Work Comp (BWC) paying a high number of claims that are filed by essential workers – are they doing it out of the goodness of their heart or because there is causation? Prof. Vladeck stated that he is not sure and is not aware of what is considered a high claims rate. A lot of the essential workers in the U.S. were exposed because they didn't have adequate PPE and no social distancing. You see the outbreaks in prisons and packing plants and nursing homes and that is where the cases are so far.

Prof. Adam Scales of Rutgers Law School stated the causation and fault standards applicable in a work comp context are completely different as the whole point of work comp was to reduce the burden on injured workers in establishing fault. Prof. Vladeck wisely focused on causation as a huge issue here and it often intertwined with the questions of fault. If an employee catches

COVID and files a claim Prof. Scales personally thinks that there are quite interesting questions about whether causation can be established there. CA went pretty far and articulated an irrebuttable presumption of causation and that is probably a mistake but almost under any work comp plan the burden is simply going to be lesser for an employee compared to a hypothetical tort claimant who would face substantial hurdles in bringing a claim.

Mr. Kirkner stated that part of the discussion here is work comp but the Model specifically exempts work comp. In response to Prof. Vladeck's comments, Mr. Kirkner noted that he stated that this has been a largely fact free discussion and then proceeded to make a statement that all of the cases that have been filed so far ought to have been filed. It is very difficult to operate in a framework where every case filed is valid. It would be an interesting conversation to do a deep dive on the number of tort cases filed that actually go to a verdict to a jury or from the bench. In fact, most of these cases settle.

The fact that there is not a massive amount of cases in the pipeline right now is the result of a number of things not the least of which being that courts have been closed and there is often a 2 year SOL on many of these claims and that SOL varies across the country. The point is that just because the cases don't exist today and the volume that would in Prof. Vladeck's mind lend credence to a bill like this doesn't necessarily mean that they aren't coming. Insurers see frivolous lawsuits every day and it is certainly reasonable to expect that those lawsuits whether causation is an issue or not would occur here and the bottom line is that litigation drives up the cost of insurance and really this is a time where small businesses and large businesses alike can least afford it.

INTRODUCTION OF AMENDMENTS TO NCOIL POST ASSESSMENT PROPERTY AND LIABILITY INSURANCE GUARANTY ASSOCIATION MODEL ACT

Asm. Cooley stated that this Model was actually readopted by this Committee at its last meeting in September but at the time he felt that there were some loose ends to address. Within the realm of insurance where people are buying a promise of future performance, the first line of defense for all customers is the rating system which is how rates are set for insurance. That's what protects the public to have adequate funds to pay claims. The second line of defense is guaranty funds so somehow if an insurance company runs aground there is an alternative to just a customer bearing that loss and the loss is then distributed through the guaranty system. That raises the issue on insurance division acts to make sure that in transferring a book of business, there are not any unintended consequences with respect to when the business is transferred people are fully protected with the guaranty funds. To ensure that, it is very important to listen to what the guaranty funds have to say about their technical rules of coverage and how it gets funded and that brings us to the proposed amendments to the Model.

The first proposed amendment is on page 244 of the legislative binders and would adjust the Model to address insurance business that has been "restructured" under recently enacted laws which permit insurance business transfers (IBTs) or divisions to ensure that it remains appropriately covered under the guaranty fund. There are concerns many current guaranty fund laws may not protect claimants on policies that are transferred pursuant to these transactions. The language suggested would reflect the policy position that claims that would have been covered before the transaction would retain coverage after; however such a transaction should not create guaranty fund coverage that was not available before the transaction.

The second amendment is on page 248. Guaranty funds all have assessment provisions and they all have caps on those assessments. The proposed amendment would expressly permit

assessments to insurance company guaranty association members to fund various expenses that maintain the guaranty funds in an “always ready” posture even when claims activity is low. This is meant to plan in advance for insurance liquidations. It should be noted that the administrative assessment authority sought with this language, combined with any other assessments made to member insurers, would not exceed the two percent threshold already in place in most states. These are highly technical amendments to reconcile the Model with guaranty associations to make sure that they operate without any unintended consequences and shocking occurrences of having people who thought they were covered having no coverage. Asm. Cooley stated that he looks forward to working on these amendments with the Committee.

On behalf of the National Conference of Insurance Guaranty Funds (NCIGF), Barbara Cox stated that Asm. Cooley did an excellent job of explaining the amendments. The NCIGF takes no position for or against restructuring transactions. We do believe that if there was coverage before the transaction there should be coverage after the transaction. Conversely, there should not be such coverage created by the transaction. The first amendment clarifies that as there is some concern that in many if not most states under current law there is a real question as to whether transferred plans would be covered by the guaranty associations so this amendment was developed by NCIGF’s legal committee and it has been well vetted and it is recommended that it be adopted by NCOIL and included in the Model.

The second amendment concerns special assessments to essentially keep the doors open on guaranty funds. NCIGF had a year long study that included board managers, guaranty fund managers and several industry representatives and the concern was that under current practices, funding of the guaranty funds is very much tied to claims volume and that means that a fund could be sitting in a small state with 10 claims and not really have the wherewithal to assess the industry to keep the doors open. Conversely, they could make a claim against the estate and sometimes that can be objectionable because the claims cost per claim could be so high if that were done. This is an optional provision and states may have many other tools within their plan of operation their law or in their practice to make sure that their doors remain open. The other question is why do we have to keep those doors open. Ms. Cox stated that she has been involved with guaranty fund association systems for 25 years and she can tell you that a fund can go to 3 claims to 3,000 or 30,000 overnight. NCIGF encourages pre-planning for liquidations and it doesn’t always happen that way. Hence, we want to make sure that to the realest extent possible that claims against a guaranty fund get coverage. That is not always possible but to the greatest extent possible coverage should not be disrupted due to the liquidation of an insurance company.

Rep. Rowland thanked Asm. Cooley for introducing the amendments and stated the Committee will discuss this further in March.

UPDATE ON NO-PAY NO-PLAY LAWS

Prof. Scales stated that when first approached with this topic he had never heard of it and that was rather embarrassing as he is been teaching insurance law for 23 years. For those who also may be unfamiliar with these types of laws, no pay no play laws substantially restrict or eliminate the ability of auto accident injury victims to sue for negligence where the injured person was uninsured. There are several variations you can find sprinkled across the dozen states that have enacted such legislation. Sometimes, the disability is only up to a threshold amount so if your claim falls below that amount you cant sue but if it goes above that amount you could sue. A common restriction is that the disability applies to non-economic harms of

pain and suffering and emotional distress. Not infrequently, the legislation is also written such that it allows for no cause of action at all for the injured but uninsured person. The wording of at least some of the legislation is at least open to the interpretation that the disability might extend to non-motorist defendants as well but that needs to be studied further. There is a frequent carveout in most of these statutes – if the defendant motorist is guilty of DUI or a felony or something similar then the disability on the injured but uninsured motorist suing does not apply.

This type of legislation has been enacted by about a dozen states since 1996 and there are several justifications offered for the laws which can be reflected in the NCOIL Resolution. Some of them are somewhat interlocking but they also contain some contradiction. One idea is that the legislation will reduce premiums and another is that it will reduce fraud. It is hoped that such laws will reduce uninsured driving by making uninsured driving relatively more expensive for individuals. Also, there is the overarching appeal to fairness. There is some limited evidence to the effectiveness of these measures. RAND and others use models to estimate the impacts and the last round found dates back to around 2012 and the estimates pointed to about a 3% reduction in premium cost per insured driver which is about \$5 a month at the time in Texas. That may be a bit optimistic but lower payouts should show up as lower premiums at some point so let's assume that the projection is accurate. 3% isn't zero and I suppose if one had the opportunity to select multiple low value interventions, they might indeed add up to real money in a family budget. That said, it is important to keep this relatively modest benefit in mind when assessing these proposals. On the issue of reducing uninsured driving that is extremely unlikely that the legislation has an effect on that as it does not meaningfully change the incentives for the types of people who are likely to be currently uninsured. If the average non-consumer, the uninsured driver, is ignorant the incentive potential might be needed even further.

The reduced fraud rationale is also a bit tenuous. This is an extraordinary blunt instrument one that punishes fraudster and legitimate victims alike. Fraud and low value PIP claims is a real problem for the insurance industry but basically this is a concession of failure. Unable to detect fraud when it counts, insurance asks to wipe out legitimate claims that share exactly one indicium of potential fraud – the lack of insurance. This brings us to the fairness rationale. It turns out that there is a long history of interest to shutting the courthouse door to morally questionable plaintiffs and illegitimate claims. This has been known as the outlaw doctrine and at times in our history the law has disabled those who are injured while committing crimes or other bad acts like driving on a Sunday from suing in tort. By definition, this eliminates claims without regard to validity. For most of the past century, such defenses were rejected by American law. By the 1950s two legal scholars disposed of the outlaw doctrine as “a barbarous relic of the worst there was in puritanism.” The more things change, the more they stay the same. In some other work Prof. Scales has done he has had occasion to observe that every age fits the practices of the past into the felt necessities of the present – only the rationales change as each successive age discards earlier old fashioned reasoning in favor of enlightened modern reasoning that rather amazingly ends up sounding a lot like the olden days. This is no different.

With that in mind Prof. Scales talked about the fairness aspects of this type of legislation. In his view, it inappropriately conflates the source of the right to injury compensation with the likely source of the funding of that compensation. Simply put, the moral and legal basis of an injury victims claim stems simply from the commission of a wrong from the defendant against the plaintiff. That's it. We don't ask whether either party is rich or poor. We don't make inquiries into religious habits and we have even discarded by overwhelming consensus the concept that directly relevant negligent behaviors should entirely eliminate his right to recovery. The conflation at work here is to elevate plaintiff's non-compliance with mandatory insurance

requirements beyond any considerations of defendant or plaintiff fault. This appeal is easily seen in the catchy title: no pay no play. But the point of rights including those secured by federal and state constitutions and the common law is that you don't have to pay to enjoy them that is why they care caused rights. Prof. Scales pointed out that the carveouts, while politically understandable, contribute to the conceptual confusion here. Drunken driving is bad but it is difficult to understand why an uninsured claimant with a relatively modest injury claim against a driver is free to sue while someone with a catastrophic injury occasioned by a sober driver is cast out of the law's protection. In a weird way, these carve outs for defendants recreate the all or nothing rule that the law long ago discarded for plaintiffs

Moreover, the carve out has literally nothing to do with the alleged rationale for no pay no play laws. The frequency restriction of the disability to non economic harm is also disingenuous. If someone has failed to pay by contributing to the insurance system why should his right to recover turn on the particular pathway his injuries take? Two claims with identical injuries for similar accidents might be differently situated as to their ratio of economic to non economic loss. Nothing is perfect in public policy but the policy of treating non-economic injuries as second tier harms susceptible to waiver by non-payment is one congenial to liability insurers which apparently was enough in 12 states but Prof. Scales doesn't think its really persuasive to anyone else. Prof. Scales closed by saying something nice about no pay no play. We don't have true fault and truth in this country. Low injury thresholds mean that in virtually any case with meaningful injury a plaintiff can resort to the tort system. In theory, one might imagine a no fault system that can truly be thought of as creating a broadly applicable threshold on injury suits as a matter of protection for citizen motorists. We have homestead exemptions and other exemptions across tort law and with some work he could see fitting an auto no fault system into the framework. In this framework motorists would have a legal, not merely practical immunity, from suit below a certain threshold in exchange for participation in the system.

Some of the no pay no play laws seem to work kind of like this such as what is in Louisiana and Prof. Scales argued that this limited disability, threshold disability, might be the basis of a conceptual and coherent public policy. Unfortunately, that is not what we have at present.

Mr. Kirkner thanked the Committee for addressing this important topic which really speaks to the role of affordability of auto insurance and public policy. Mr. Kirkner appreciated Prof. Scales presentation but would dispute a few points in it. Without getting too bogged down in the specifics of the legislation, NAMIC believes there is a more appropriate way to refer to these laws. The phrase no pay no play really puts the wrong context on this discussion. The more appropriate title is something like the Missouri legislation that was tilted fairness for responsible drivers. It may seem like a semantic difference but its not because what we are taking about at the end of the day is insurance and insurance is a system of pooled and shared risk in which individuals participate.

The complicated factor to that system is that at least in this country the vast majority of states with just 1 exception have mandated participation in that system. In 2014, NCOIL took a look at this issue and adopted the Resolution which did 2 things. First, it limited the ability of illegally uninsured drivers to collect non economic damages and second it did maintain rights for those illegally uninsured drivers to recover even those non economic damages in a very limited set of circumstances including when that person was a pedestrian or was an occupant in a car or where they were injured by an at fault drink driver or fleeing felon. That is an important distinction to be aware of.

What the Resolution mainly did and what NAMIC supports is situations that would prohibit illegally uninsured drivers from collecting the benefits of a system in which they do not participate. The Resolution does not bar the illegally uninsured driver from collecting non economic damages. There is a distinction between economic and non economic damages and it is important to not leave the discussion with the impression that fairness for responsible driver laws prohibit collection of economic damages. In fact, by and large the bills are limited to those non economic damages. That is an important distinction. NAMIC would support NCOIL returning to the discussion around these laws and would support model legislation that closely tracks with the Resolution which would in fact bar recovery of non economic damages while maintaining the rights of those same uninsured drivers to collect non economic damages in certain capacities.

Lastly, it is important to note, outside of fairness, what the point of these laws is. One of the rationales is an attempt is to reduce the number of uninsured persons in a state. Many are well aware of the impact of uninsured drivers on the impact of the overall insurance climate. A 2012 study submitted to the Nevada legislature indicated that there could be and likely was some tie in between these laws and a decreased number of uninsured drivers in a given state. Its very fair to say from an intellectual honesty perspective that the study could be updated and use some additional development which NAMIC would support. That is outside of the fairness rationale but in closing it is important to return to that point. Individuals that do not participate in the system should not be able to use the benefits of that system. This is a fairness perspective and NAMIC encourages to continue the discussion and perhaps works toward model legislation in this space.

ADJOURNMENT

Upon a Motion made by Asm. Cooley and seconded by Rep. Michael Webber (MI), the Committee adjourned at 10:45 a.m.