

NCOIL Considers Regulating Litigation Financing, Debates Consumer Protection Model

NCOIL legislators, responding to calls for greater consumer safeguards, are moving forward with possible regulation of controversial financing arrangements between third-party lenders and plaintiffs engaged in long-duration lawsuits. Members of the Property-Casualty Insurance Committee have suggested that an NCOIL model—such as a draft *Consumer Legal Funding Model Act* featured at the July Summer Meeting—could be critical as third-party funders, insurers, consumer groups, and the legal community battle over how to regulate in the dozens of states that do not.

The draft model, sponsored by NCOIL President-Elect Rep. Charlie Curtiss (TN), is based on Tennessee legislation and, while not opposing third-party litigation financing, mandates (cont. on page 2)



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NCOIL SUMMER MEETING
Burlington, VT
July 12 — 15
www.ncoil.org



NCOIL MOVES TOWARD CONCLUSION OF ITS UNCLAIMED BENEFIT, CERTIFICATE OF INSURANCE DEBATES

After more than a year of conference calls, meetings, and special sessions, NCOIL is moving toward conclusion of its work on unclaimed life insurance benefits and on certificates of insurance and binders. The NCOIL Summer Meeting in Burlington, Vermont—with two additional working sessions dedicated to each issue—may be the forum in which legislators vote up or down on amendments to an NCOIL *Unclaimed Life Insurance Benefits Model Act*, adopted in November 2011, that urges fair treatment for beneficiaries. And with agents, insurers, lenders, and others weighing in, NCOIL could act decisively on bills to reform how policy-

holders prove insurance to third parties and how lenders prove coverage for commercial loans.

The Life Insurance & Financial Planning Committee will consider amendments jointly proposed by the American Council of Life Insurers (ACLI) and the National Association of Unclaimed Property Administrators (NAUPA). The amendments—offered by Rep. Robert Damron (KY), sponsor of the underlying model—would revise the “Death Master File (DMF)” definition to specify the version available to insurers and agents.

The revisions also would establish (cont. on p. 2)

NCOIL TO ADVANCE DEBATE ON CRITICAL WORKERS’ COMP ISSUES

In what promises to be a springboard for debate later this year, the NCOIL Workers’ Compensation Insurance Committee at the July Summer Meeting will investigate the controversial practice of physician-dispensed repackaged drugs and coverage options for volunteer firefighters. The Committee is launching these explorations in response to concerns that repackaged drugs are raising workers’ comp costs and that escalating premiums are making it difficult for communities to cover volunteer firefighters.

On July 12, NCOIL legislators will kick off their examinations by analyzing two different state approaches to reduce the costs associated with physician-dispensed repackaged drugs. One approach, utilized in Montana, expressly prohibits medical practitioners from dispensing drugs, with limited exceptions (e.g., in an emergency or if no local pharmacy is available). A second approach, derived from Florida Senate Bill No. 668, provides that the price of a repackaged (cont. on p. 4)

NCOIL Moves...

(cont. from page 1)

that insurers must check for matches quarterly using either the annual DMF or its updates and would clarify when an **insurer must check for DMF matches** with respect to group life insurance. The model would ban service providers from charging fees to insureds for DMF searches/verifications.

A second set of amendments, sponsored for discussion by Rep. George Keiser (ND), would require semi-annual DMF searches, rather than quarterly, and would add a drafting note suggesting that states consider a **one-year delayed effective date**.

Overall, the unclaimed benefits model requires insurers to compare a U.S. Social Security Death Master File with holders of in-force life insurance policies and retained asset accounts quarterly. The model calls for **timely insurer efforts** to confirm an insured or account holder's death and locate beneficiaries. The bill also establishes a process for escheating unclaimed funds to state treasury departments. Special Life Committee meetings will take place on July 13 and 14, in addition to discussion at the regular Committee session on July 12.

The Property-Casualty Insurance Committee (cont. on p. 3)

NCOIL Considers Regulating...

(cont. from p. 1)

certain contract disclosures; aims to prohibit referral fees and conflicts of interest; outlines a process for distributing proceeds; and says that lenders cannot assess fees more than three (3) years after the plaintiff receives his/her money from the lender, among other provisions. The model, which insurers oppose, does not cap how much lenders can charge in fees and interest.

Third-party litigation financing, also known as non-recourse financing, often takes place when a lending company gives money to a plaintiff in return for receiving money from any settlement or award. The

third-party lender receives nothing—including the amount of the original loan—if the plaintiff loses. According to both lending companies and insurers, the funding is often used to pay daily expenses while a lawsuit works its way through the courts.

Opponents of the practice say that it interferes with proper functioning of the judicial system, requires consumers to pay excessive fees and rates, and raises attorney conflict-of-interest concerns. Supporters say that third-party financing does not encourage frivolous litigation because lenders have a vested

interest in giving money only to plaintiffs likely to succeed. Supporters also say that the fees and interest associated with litigation loans—which are higher than for typical bank loans—are justified because third-party lenders have no guaranty of repayment.

Before considering the draft model, the P-C Committee at the 2012 Spring Meeting defeated a proposed resolution urging a ban on third-party legal financing. Certain legislators said there are benefits to third-party lending that NCOIL should not ignore.

The Summer Meeting runs from July 12 through 15 in Burlington, Vermont. The Annual Meeting takes place November 15 through 18 in Point Clear, Alabama. ■

“The model does not cap how much third-party lenders can charge in fees & interest.”

In Brief: Proposed *Consumer Legal Funding Model Act*



The controversial model, slated for July 13 debate at the NCOIL Summer Meeting, would, in part:

- mandate various contract disclosures, including of rescission rights
- limit how long lenders can charge fees to consumers (no more than 3 years)
- outline a process for distributing proceeds to lenders, including lienholders' role
- ban lender referral fees to attorneys/others and address conflict-of-interest concerns



NCOIL SUMMER MEETING

July 12 – 15, 2012
Burlington, Vermont

Tentative Agenda
Available at
WWW.NCOIL.ORG

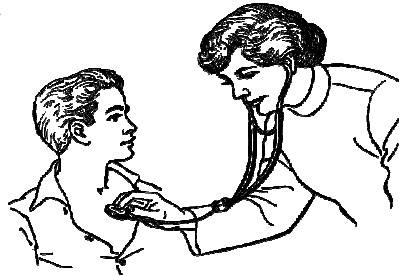
U.S. Supreme Court and Healthcare Reform: What Justices Said

On June 28, the Court handed down its historic ruling on Affordable Care Act constitutionality, keeping in play the individual mandate and Medicaid expansion requirements. Below are excerpts from the majority and minority opinions.

Majority Opinion (written by Chief Justice John Roberts)

“The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress’s power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress’s power to tax.”

“Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”



Dissenting Opinion (written by Justice Anthony Kennedy)

“What is absolutely clear, affirmed by the text of the Constitution, by the Tenth Amendment and by innumerable cases is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be, such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs.”

“The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court’s ruling undermines those values at every turn. In the name of restraint, it overreaches. In the name of constitutional avoidance, it creates new constitutional questions. In the name of cooperative federalism, it undermines state sovereignty.” ■

NCOIL Recognizes Senator Vi Simpson, Leadership Changes

With regret, NCOIL announces that Sen. Vi Simpson (IN) has formally resigned her office as NCOIL President-Elect due to her nomination as a candidate for

Indiana Lieutenant Governor in the fall election and the upcoming expiration of her Senate term.

Sen. Simpson will be greatly missed. Active since 2007, she served as vice chair of the International Insurance Issues Committee and played a role in many others. In Indiana,

she ascended to Minority Leader in 2008, capping a 24-year Senate career.



Due to Sen. Simpson’s resignation, and in line with NCOIL by-laws and standard procedures, NCOIL officers (cont. on p. 4)

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|------------------|---------------------------|
| President: | Sen. Carroll Leavell (NM) |
| President-Elect: | Rep. Charles Curtiss (TN) |
| Vice President: | Rep. Greg Wren (AL) |
| Secretary: | Sen. Neil Breslin (NY) |
| Treasurer: | Vacant |

will extend its year-long work on certificates of insurance and binders during July 14 and 15 working sessions, as well as at the Committee’s July 13 meeting. Attention will focus first on a draft model—an outgrowth of Committee discussion over certificates of insurance—to establish that **insurance binders do not expire** until a policy is issued and to require that lenders accept binders as evidence of insurance, subject to certain conditions.

Legislators drafted the binder model because they believe lenders have valid concerns with proposed certificates of insurance legislation that would **deem all certificates to be “information only.”** Lenders have argued strenuously that an “info only” certificate is insufficient proof of coverage for them and that they need more official documentation—particularly since it may take many months to receive the policy itself.

Time permitting, the Committee will consider a draft p-c industry certificates of insurance model. The bill—a substitute for an original model set aside by the Committee on May 11 in anticipation of an industry compromise—looks to **stem certificate fraud and misuse**, as well as to clarify what the documents can and cannot do. ■



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NCOIL to Advance Debate...

(cont. from p. 1)

drug cannot be greater than the price of that same drug in its original packaging.

NCOIL is working closely with the National Council on Compensation Insurance (NCCI) on this issue, as well as to address coverage issues for volunteer firefighters. NCOIL and NCCI are looking into ways to control and minimize costs in this area, such as fire department roster reporting

requirements, defining when a volunteer is "working," and reforming minimum payroll calculations as potential NCOIL-endorsed solutions.

Additionally, the Committee is launching an examination into the impact of opioid abuse on workers' comp costs and allegedly inadequate coverage (as a result of statutory exclusions) of agriculture and migrant farm workers. ■

NCOIL Recognizes...

(cont. from p. 3)

have advanced in succession (*see box on p. 3*).

Sen. Leavell has appointed an interim Nominating Committee to propose a new candidate for Treasurer at the Summer Meeting. Upon Rep. Curtiss' ascendance to NCOIL president at the Annual Meeting, the Executive Committee must reapprove current officers and approve a new 2013 Treasurer.

Sen. Simpson, in resigning her position, spoke fondly of her time at NCOIL. "I have truly enjoyed my term of service," she wrote, "and it has been a pleasure working with you, the other members of the Executive Committee and our excellent staff. I wish NCOIL much continued success and want to thank you for allowing me to be a part." ■