NATIONAL COUNCIL OF INSURANCE LEGISLATORS
JOINT STATE-FEDERAL RELATIONS & INTERNATIONAL INSURANCE ISSUES COMMITTEE
LAS VEGAS, NEVADA
MARCH 4, 2022
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Joint State-Federal Relations & International Insurance Issues Committee met at Harrah's Las Vegas in Las Vegas, Nevada on Friday, March 4, 2022 at 10:00 a.m.

Minnesota Senator Paul Utke, Chair of the Committee, presided.

Other members of the Committee present were:

Rep. Deborah Ferguson, DDS (AR)
Sen. Keith Ingram (AR)
Asm. Ken Cooley (CA)
Rep. Matt Lehman (IN)
Rep. Brenda Carter (MI)
Sen. Jerry Klein (ND)
Sen. Bob Hackett (OH)
Rep. Tom Oliverson, M.D. (TX)

Other legislators present were:

Asm. Timothy Grayson (CA)
Rep. Kerry Wood (CT)
Rep. Roy Takumi (HI)
Rep. Martin Carbaugh (IN)
Rep. Deanna Frazier Gordon (KY)
Rep. Kelly Breen (MI)
Rep. Kevin Coleman (MI)
Rep. Jim Lilly (MI)
Rep. Richard West (MO)
Sen. Paul Lowe (NC)
Sen. Randy Burckhard (ND)
Rep. Emily O'Brien (ND)
Sen. Shawn Vedaa (ND)
Asw. Maggie Carlton (NV)
Asw. Michelle Gorelow (NV)
Sen. Jay Hottinger (OH)
Rep. Brian Lampton (OH)
Rep. Wendi Thomas (PA)
Rep. Carl Anderson (SC)
Rep. Lacey Hull (TX)
Sen. Mary Felzkowski (WI)
Sen. Janis Ringhand (WI)

Also in attendance were:

Commissioner Tom Considine, NCOIL CEO
Will Melofchik, NCOIL General Counsel

QUORUM

Upon a Motion made by Rep. Matt Lehman, NCOIL Immediate Past President, and seconded by Sen. Jerry Klein (ND), the Committee voted without objection by way of a voice vote to waive the quorum requirement.

MINUTES

Upon a Motion made by Rep. Tom Oliverson, M.D. (TX), NCOIL Treasurer, and seconded by Sen. Bob Hackett (OH), the Committee voted without objection by way of a voice vote to adopt the minutes of the Committee's November 20, 2021 meeting in Scottsdale, AZ.

UPDATE AND DISCUSSION ON IMPLEMENTATION OF NEW FEDERAL BALANCE BILLING LAW -THE NO SURPRISES ACT

Loran Adler, Associate Director at the USC-Brookings Schaeffer Initiative for Health Policy thanked the Committee for the opportunity to speak and stated that he has done a lot of research on the surprise billing issue and a host of other issues. And obviously, with the passage of the No Surprises Act (NSA) last year, there's a lot of interest with the number of states who already had balance billing laws and sort of aligning and figuring out the regulatory and enforcement schemes of the law. To start with a quick level setting on the issues, surprise billing has been a problem for decades. And primarily we're talking about either emergency care, cases where the patient does not have a choice over their provider, so we're talking about emergency situations where you show up at the ER or the ambulance takes you to the ER. Or in situations where you make the conscious choice to choose an in-network hospital, you choose an in-network surgeon, but it turns out the anesthesiologist or the radiologist that you had no choice over was not in your insurer's network. And if that happens, you the patient are stuck in a predicament where the insurer will pay something, but the doctor can then balance bill you for the difference between their charge, sort of just a list price, like the manufacturer's suggested retail price (MSRP) on a car and whatever the insurer paid.

That obviously can cause financial hardship. These are often thousand-dollar bills or so and it is quite common. I think there was a lot of news coverage bringing up anecdotes, but it really is more than a series of anecdotes, it's something like one in five times that a patient ends up at an ER, they would have been at risk of one of these surprise bills. And it's not at every hospital - most hospitals actually make sure that the anesthesiologist or the ER doctors who work at their facility also contract with the same insurance companies. So, at most hospitals you're not going to get balanced billed but for a not too small minority group of hospitals, basically everyone who walks through the door is at risk of getting balanced billed, or was. I should use the past tense now.

There's a lot of private equity activity in the emergency medicine and anesthesia specialties. And it was quite clear that this was a business strategy. I think they were quite clear in their communications to Congress as well that this was being used to leverage negotiations with insurers to try to get paid more money eventually. And the idea wasn't to balance bill patients but to try to make more money and this really represents a market failure. The problem here is that it is very hard for the insurance company to steer patients to in-network providers when the patient doesn't get to choose who their doctor is.

This isn't a problem for your primary care doctor, or your cardiologist or name a specialty that the patient is choosing. This is only a problem where it is the doctors that patients don't choose. When my wife gave birth, I actually tried to call the hospital and find out if the anesthesia group accepted my insurance and I got the run around ten times and never even got an answer and I just sort of winged it. So that's sort of where this comes from. And I think we knew that this leverage basically allowed these specialties and particularly a subset of those specialties to garner higher payments. And those prices are reflected back in the premiums that we all pay. I think premiums for insurance, commercial insurance we're talking about, is more than 1% higher than they otherwise would have been. And that is where the NSA comes in. A number of states over the last decade in particular have started passing legislation on this issue. But the states are restricted in how broad their protections can be. The NSA is federal legislation that took effect at the beginning of this year. And this applies to almost all kinds of surprise out of network bills. It's not every surprise bill. A lot of people just didn't know their deductible was high - it's not that sort of bill. But when we're talking about these surprise out of network bills, and it is

literally any emergency out of network bill, it is sort of post stabilization care. So, once you are stabilized at an out of network hospital you have to be able to be safely moved to an in-network hospital before your protection expires.

And this also applies to air ambulance transports and then to the case of anesthesia and radiology that I was talking about before where you're at an in-network hospital, but some of the doctors that practice there are not in-network. The notable exception is ground ambulances and that is sort of an issue that sort of still stays out there. A few states have laws regulating ground ambulances and a lot of states and localities have some sort of price regulation on their ground ambulance companies but I'll leave that aside for now. The core of the NSA is rights - there's the consumer protection angle here where patients cannot be balanced billed anymore, and the insurer has to treat this care as if it is in network for purposes of patient cost sharing. And then on top of that, it sets up this process to basically determine how much the insurer owes to the out of network doctor, or the out of network hospital.

That is where all the contentiousness has come up. They set up this independent dispute resolution (IDR) process - sort of an arbitration. It gets likened a lot to the baseball arbitration system where each party, the provider and the doctor, and the insurer make a final offer and this neutral arbitrator must choose one or the other and that becomes the final payment. The law itself instructs them to consider whatever the median in network price would have been for that service so try to think of what was the market price for this issue. And then it lists a host of what they call additional circumstances and additional information like the severity of the case, how good the doctor is, and that sort of thing. That is where this big dispute is right now. There are several lawsuits very focused on this arbitration process. Almost all of the lawsuits are pretty narrowly focused on that, and the Administration came in and basically wrote guidance that took the factors enumerated in the law and said the arbitrator's supposed to choose whoever is closer to this median in network price unless there is credible evidence that they should deviate.

That garnered a lot of contention and there were lawsuits. Several provider groups sued. And most recently last week, the Texas Medical Association won their lawsuit at the District Court level in Texas and there are I think five other suits that are effectively the same exact case elsewhere in the country right now. But the upshot of that is that temporarily that guidance is stricken. So, the arbitrators still look to the law itself. The law itself still enumerates factors here. So, what's next here - I think there's a lot of confusion on exactly what this means. There's a temporary stay against this one piece of the law, but the rest of the law's consumer protections are still holding the enforcement and everything like that is still holding. There are similar cases being held on St. Patrick's Day in D.C. that are going to be heard including one from the air ambulance group. These cases can be appealed. Actually, the Administration has said that they are planning to issue a final rule which is very technical but basically it will actually reset the process. So, the Administration is releasing this new rule by May of this year. The first rule is what's called an interim final rule, and this is now the actual final rule.

So, that basically resets everything, and we'll have to go through the course again unless they change it in a way that provider groups are satisfied with. And if not, you'll go through Appeal Courts as after the District Court you end up with the Circuits and you could end up at the Supreme Court. There is one pending case in New York that is challenging the entire law. There's not been much movement on that yet so far but that is the one case that is challenging this on a constitutional basis. And then to get to the interaction with state laws here. A lot of states have laws that regulate surprise billing. The problem is they generally only apply to folks in what are called fully insured health plans and do not apply to the folks who are in self-insured

or generally large employer plans where it is technically the employer who is sort of footing the bill at the end of the day.

So, the federal law will often supersede state law so for the self-insured employers, the federal law holds. And then in any case where the existing state law does not apply, the federal law sort of wraps around that for the fully insured population and sometimes this is happening. States can also have more protective laws so to the extent that the state law is more protective than the federal law, that will hold and then the payment policy between the insurer and provider would be governed by those state laws for the folks in fully insured plans. I think that raises one big question - I talked to a number of folks at the state level who are considering this as it's a little bit cumbersome to run two parallel surprise billing processes at the state level. There is a question of how do you align them? Especially if you're running two different arbitration processes and things like that. I think several states have said let's just sunset our own law and just have everyone under the federal law. I think there's several considerations to talk through there.

Now getting into enforcement because I know that's probably of interest to some folks here. The states have primary enforcement over a bit of this law. So, over basically any of the provider billing practices the states are the first line of enforcement. And then for all of the fully insured health plans that's something that states are more used to. The departments of insurance are used to regulating those plans. And there is an option for what's called a collaborative enforcement agreement where the state is sort of making sure that providers and folks are complying with the law. But the federal government would be the one administering penalties if they couldn't get to voluntary compliance. The federal government maintains their authority over the employers and the self-insured plans and then they also have the fall back enforcement. So, if a state refuses or doesn't want to take up the enforcement angle here the federal government will step in. It's not like the law doesn't apply if the state chooses not to enforce.

Sen. Hackett stated with regard to ground ambulances, they are excluded from the NSA but at the same time they put in there that task force to study the issue. We've been working with them in Ohio. Do you think the federal government will be able to eventually bring ground ambulances in? What's the latest you hear? Has that task force been formed and done any work? Mr. Adler stated that I have heard absolutely nothing on whether the task force is formed or when it will be formed despite the fact that I'm somewhat involved in the process. So, I feel like I would have heard if it was. The thing to consider is that will still have no force of law or anything along those lines. I am not too optimistic, but I try and maintain optimism that in the next few years the federal government may come back. But the federal government has a thing where they tend to get a little bit tired of it and they get a little exhaustion from the issue. So, I feel like there's probably a few years delay before they come back. So, some states like Connecticut I think just has a regulation on the ambulance companies themselves. So, you can have a way of doing the protection for the entire state if you regulate the prices that the ambulances charge, and a few states have taken that approach.

Rep. Deborah Ferguson, DDS (AR), NCOIL Secretary, stated with this qualifying payment amount (QPA) in limbo, what do you suspect will be the outcome of the IDR? Mr. Adler stated that's a lot more uncertain. Part of this law was to also unwind some of this leverage and the higher premiums that had resulted from this market failure. That was the idea. If the payments ended up near what sort of the median in network prices are which basically don't account for sort of the outlier high prices of the few groups who are kind of really leaning into this issue, then you would see lower premiums. If that doesn't happen, that's sort of interesting, and I think the Trump Administration was very much on the same page as the Biden Administration on this front. I still think the odds are that most cases tend to get decided based on the QPA. It is still

the only concrete number that they are given in the law. They're still told to consider that. It is still the first factor that is listed for them to consider.

My general experience having studied state arbitration systems is that arbitrators tend to just choose whatever the concrete metric is and by and large, there are obviously exceptions, they'll stick with whatever that metric is. In New Hampshire that metric is something like the QPA and that seems to hold the day. But in New York and New Jersey they start with a much higher payment level as the concrete metric. My guess is that it still ends up in a similar place but with more exceptions to that and probably a higher average outcome. But really one of the things is it's just a lot more uncertain. And I unfortunately can't give a great prediction on this. I don't know what's going to happen as the final rule may have another way to get at that same thing. It's possible they do the exact same thing and guarantee the exact same rule. And the District Court ruling can always be appealed. I'm not a legal expert but eventually the Supreme Court would rule on that.

Rep. Oliverson stated that he heard the magic word which is QPA and he wanted to probe that a little bit. So, you're aware no doubt and I want to make sure everyone in the room is aware that there was a bipartisan letter signed by 150 Members of Congress that felt like the agency's rule making and their over reliance on QPA and arbitration was completely inconsistent with the legislative intent. There's nothing that frustrates me more as a lawmaker than when an agency gets cute and decides to listen to somebody other than the duly elected members of the legislature in terms of how they're going to actually implement law. So, where do you think that idea came from in terms of the QPA? Because obviously you got a lot of Members of Congress that feel like they're not being listened to and that was not what was agreed to in the language. There are seven factors that are supposed to be given equal weight in arbitration. That was the law that was passed.

Mr. Adler stated that I think one of the things is right. The whole debate around surprise billing at the federal level is every single bill was very essentially focused on this QPA. So, in Congress you have this Congressional Budget Office (CBO) who estimates the effects on the deficit and on premiums of various laws. So, every single bill including the final one they estimated would reduce premiums and that is explicitly because they thought Congress meant for arbitration decisions to largely be close to the QPA. If the arbitration decisions aren't close to the QPA you don't get those premium savings. You don't get those deficit savings. And that law was used to pay for other programs.

Rep. Oliverson stated so did they just lie to the other Members of Congress? Because it seems to me like you have a lot of Members of Congress that feel very strongly that that was not the conversation that was had. Mr. Adler stated that it's interesting. It's hard to know congressional intent. All the committees of jurisdiction said this was our intent, so you had the Energy and Commerce and Committee on Health, Education, Labor and Pensions (HELP) who are the two actual committees of jurisdiction here that said this is our intent. But there's no one intent. When a bunch of people vote for the one bill, I don't know that there is one intent. That's sort of the idea. I think the idea would be that this sort of rulemaking ensures the law works the way it was intended. I think when the Trump Administration was pushing this, it was very clear that they wanted this to reduce premiums as well as stop the surprise billing themselves. But it's unclear. The Courts are going to rule, and I don't get to make that decision.

Rep. Oliverson stated that when you pass legislation based on a certain set of assumptions that people vote for, whether it's in the state house or the federal house, the completion of that legislative process is predicated on a deal that was made and a correct understanding. So,

obviously if there was misinformation that was being circulated and that was never the intent to begin with, it almost seems to me like we're back to benchmarking 2.0 here with the rules that have been promulgated which if that were the case, then why bother to put all of those other criteria into the arbitration process to begin with? That's certainly not the direction we went in Texas and our system is actually working quite well. Mr. Adler stated that I think odds are that decisions end up near the QPA or in Texas my guess is they probably end up near the median in network price most of the time anyway because that's a concrete factor that folks are given. And it is reflective of some level of a market price. People can quibble over that, but it is some level of a market price.

Rep. Oliverson asked why is not the previous contracted rate the more important number if you're looking for a number - why not focus on prior contracting history? Mr. Adler stated I think that's sort of where the large body of research on surprise billing comes in. I think to me the body of evidence is quite clear that the previously contracted rates were buoyed upward by the sort of leverage that was brought about by this market failure. Without this market failure and particularly for the sort of large, very high market power groups here, those rates were higher than they otherwise would have been in a fair market. So, that's really the idea that the prior contracted rates are almost always going to be higher than a fair market rate and the median is the idea is you're kind of not because by a median by its nature it's not higher so it is just the middle contract.

Rep. Oliverson stated that so, you're saying that a provider group has more negotiating leverage than an insurance company that's on the fortune 100 - that doesn't make sense to me and certainly not by my experience. Mr. Adler stated that in these specialties this is KKR and Blackstone and Welsh, Anderson, Carson and Stowe, these are very large private equity companies. So, KKR and United aren't exactly that different in that sense. Rep. Oliverson stated that the driving force behind those things was market consolidation within the insurance sector and the inability of small groups to be able to effectively contract. Mr. Adler stated that the nice thing about this law is that it should help the small groups because it's a median. So, if you didn't have that market power before you actually now get a benefit because of the law and the median should be higher than if you weren't one of these private equity big anesthesia or emergency doctor practices. The law actually has a good chance to actually help you.

Sen. Hackett stated that I agree with Rep. Oliverson and in Ohio we were successful with getting the bill passed. But one of the reasons we were successful was the emergency room physicians came in and when it goes to arbitration it is the previous contracts that are brought into the thing because the emergency room physicians will tell you that they didn't really have any negotiating power. And then what would happen is, they'd get something, they'd live with it. And then the next contract, they were just told it's going to a lower price. So, in the arbitration system, that is brought in. Sen. Hackett stated that he totally agrees with Rep. Oliverson and he is not sure where leverage comes in because they can't really collude together because that's antitrust. They can't unionize. That's what really put it over the top in Ohio is the emergency room physicians came in and said ok, but if you put this thing in the arbitration they came in and lowered the price on the next contract. Mr. Adler stated that I think we'll have to agree to disagree. Envision is 10% of all the ER doctors in the country. It's not exactly a ramshackle organization.

PRESENTATION ON STATUS AND FUTURE OF SOCIAL SECURITY SYSTEM

Andrew Biggs, Ph.D., Senior Fellow at the American Enterprise Institute (AEI) thanked the Committee for the opportunity to speak and stated that I think I face a little bit of a bigger

challenge than Mr. Adler did in the sense that he's talking about something that's very cutting edge, and just been passed and being implemented and being litigated. Social security has not had any substantial changes to it since 1984. So, for me to keep your interest is going to be a challenge. You could literally pick up a New York Times article on social security today and compare it to a similar article say from 1990 and they're going to read very similarly. You'll read about the retirement of the baby boomers, 10,000 per day. People are living longer, increasing life spans, rising numbers of disabled workers. All that means more beneficiaries pulling money out of the social security program.

At the same time declines in birth rates means fewer workers paying money into the system. The ratio of workers to beneficiaries which I'll explain later is really the key factor of social security. That was about five workers per beneficiary in 1960. It's about three to one today. And by the mid-2030s it'll be about two workers per beneficiary. I'm going to give you a little simple math that explains to you how those demographics drive the cost of the program. The average social security benefit today is equal to about 40% of the average wage of workers in the economy. And the social security benefit formula keeps that ratio pretty similar over time. So, the benefits equaled about 40% of the average wage. Which means if you divide that 40% number by the ratio of workers per beneficiary, you'll find sort of the implicit tax rate needed to fund the system. So, if we're back in 1960 and the average benefits equaled to 40% of the average wage, divide that by five workers per beneficiary and you get a tax rate of around 8%, which is about what it was. Divide 40% by three workers per beneficiary, which we have today, you get a cost rate of around 13% of wages, which is where we are today. And divide 40% by two workers per beneficiary which is what we'll have in the future, you get sort of an implicit cost rate of the program of about 20% of workers' wages just for social security.

Now, social security's already the biggest tax that most people pay. Most people pay more in social security payroll taxes than they do in income taxes. And so there's a lot of political resistance to raising that tax rate. President Biden has promised not to raise taxes on low and middle income workers but congressional democrats have almost unanimously co-sponsored a social security reform bill, which relies on raising the payroll taxes on low and middle income workers to make the math work. So, this is a challenge for them. At the same time, social security's also the biggest source of income for most retirees. And so, there's also political resistance to cutting benefits. And that's true even if we just cut them for rich people, it's even true if we cut them well in the future. I worked in the Bush White House in 2005 when President George W. Bush put a lot of political capital on the line to enact social security reform. Republicans controlled both the House and the Senate, and still we did not come close to passing that. So, it's a very difficult thing. It's difficult to raise taxes and difficult to cut benefits which helps explain why more than 30 years have passed since we had the last reform. And more than 30 years since we knew we needed another reform literally nothing has happened. But then there's this third factor, social security is also the biggest line item in the federal budget - it's bigger than the military, bigger than Medicare, bigger than Medicaid. And if you don't do one of the above two things, cut benefits or raise taxes, then you've got a problem for the budget.

Now, one way we think about this is what's called the social security trust fund. And from the 1980's through about 2009 Americans were paying more into social security than the system paid out in benefits. That surplus was "invested" in the special issue, non-tradable government bonds that are stored in a three-ring binder in a filing cabinet in West Virginia. During the time I was in the Bush White House, the President pointed out that you know, these bonds are just in this three-ring binder, so they switched it to a locked filing cabinet. This is the general view of the social security trust fund is that it's an accounting mechanism. It's like your credit card statement

says here's how much we borrowed from social security. But it's not a store of income that we can use to pay social security benefits in the future. So, the trust fund surplus is the economic interaction when in the years that those happened, those allowed the government to either tax less or spend more than it otherwise could have. Of course, when we got to 2009 afterwards with the great recession, we had to start repaying the trust fund. And what that means is we repay that using what are called general tax revenues, that's essentially income tax money. And to repay it we either have to raise taxes, we have to cut other programs, or we have to borrow the money. And those are the same three choices you face if you didn't have a trust fund at all.

So, the trust fund commits the government to paying benefits, it's not like a fund for state government pension, we have actual private stocks and bonds that you can cash in to pay it. The trust fund doesn't make it easier to pay those benefits. And under current projections from social security the trust fund will run out around 2034 give or take a year based on how the economy works. Under strict interpretation of the law when the trust fund runs out of money, benefits would have to be cut by around 22%. Because of the way the law works, the social security system legally cannot pay or cannot issue checks unless it has the money in the trust fund to pay them. So, that's a 22% cut for not just new retirees, but for old retirees, for disabled, survivors, across the board. And it would continue essentially into the future. So, that's something that a lot of people focus on. A lot of people in their personal lives will say, "Look, that trust fund's running out, I'm not going to get any social security, I'm not counting on anything." But there is kind of a hope or a saving grace. This relies on the fact that the trust fund is essentially not real. And the way I look at this is to say if having a trust fund doesn't make it easier to pay social security benefits, not having a trust fund doesn't in fact make it harder.

I'll explain it a little bit. By the early 2030s the federal government's going to be repaying about $400 billion per year to the social security trust funds. And to do that, they'll use $400 billion of general tax revenues which means essentially again income taxes. That's about 11% of all income tax revenues in those years is actually going to be diverted to go pay social security to repay those trust fund bonds. Put it another way, about 20% of social security's revenues are going to come from those transfers. Now, when the trust fund runs out, social security no longer has a legal right to demand that money. They don't have bonds in hand to say you have to repay me. But that doesn't mean Congress can't or won't continue to make those general revenue transfers in order to keep benefits flowing. Congress can simply continue paying that $400 billion a year. If we do cut benefits 22%, we're going to have an extra $400 billion per year sitting around that the government doesn't know what to do with. They could give you a $400 billion tax cut or they can continue paying social security benefits with it.

They'll probably dress it up somehow, they might raise social security payroll taxes but then reduce income taxes to the same people. So, social security continues to look the same and it looks like it's been reformed. But the reality is if you're paying social security benefits in the year the trust fund runs out likely you can continue or you will continue paying them in the future. Now, I'm not saying that is good policy. I've argued most of my professional career that we should reduce social security benefits going forward for middle and upper income people. Because they can afford to save more on their own. They will save more on their own. Back in the 1930's that's not how our financial markets were set up, it's not how our economy worked. But today, it's a much, much different story. If you compare our private retirement system today in the 1970's when traditional pensions were at their peak, we have more people participating in retirement plans, they're contributing a bigger share of their incomes to these plans. The total retirement plan assets in private sector plans are seven times higher than they were in the 1970's. More people are getting benefits from these private plans in retirement.

So, we clearly have a system that can help substitute for social security benefits as we go forward. So, I think the best policy is something similar to what you see in countries like Australia, or the United Kingdom, or New Zealand where the government really focuses on providing a strong safety net against poverty in old age while we put more of the burden for providing income replacement on people saving more on their own. Just as an example, Australia has one of the highest rated retirement systems in the world. Their government cost for their social security program is about half what the U.S. pays. And the reason it's half is that they enroll every worker in an employer sponsored retirement plan similar to a 401K and the government simply picks up the slack with a means tested anti-poverty benefit. So, going into the future their costs are projected to decline, our costs are projected to increase. We're paying more through the government, we're not necessarily getting better results. I cannot given Congress' inability to handle social security over the past 30 years promise the best policy's going to happen but what I think I can tell you is that you shouldn't fear that your benefits are suddenly going to be cut. I will turn 65 sometime in the mid-2030s and I am not in great fear that that's going to happen to me. So, we won't have the best policy I think, but the likelihood of a retirement crisis triggered by social security's insolvency is pretty small.

Sen. Utke thanked Dr. Biggs and stated that as you talked about good policy, or best policy, or whatever we want to call it, we know something's going to happen because in the game of being an elected official, there's no one that's going to go home and tell their constituents that we ended social security and expect to go back to office. So, we're going to see some really creative ways coming forth here as we get into the early 2030s and move forward.

Sen. Randy Burckhard (ND) stated that I have three adult kids in their 40s, and I always assure them that there will be social security. And I want you to give me a yes or no on that. But you're suggesting they might have reduced benefits if they're middle income or higher - is that what I thought I heard?

Dr. Biggs stated that it's possible. I can tell you two things. First, the deal has been promised under social security. You pay this payroll tax rate, 12% and then you are going to get this benefit from this benefit formula. That deal cannot be kept because a change in demographics make that unaffordable. Either the tax rate has to go up and/or the benefits have to come down. At the same time though, social security is a pay as you go program. The money that you and I pay into the system today does not go to some account to be saved for us, it goes right out the door to pay benefits. What that means though is as long as we are paying taxes into the system there's going to be money to pay benefits coming out of the system. It may not be the full promised benefit but it is something. So, the idea that we're going to get nothing from social security, that it'll be broke and with zero from it, that's completely false. At the same time though, the idea that we can get the same deal that we had before is also false. Social security becomes a worse deal in the future. We're going to pay more and get less. It's just how the math works. But the program itself almost certainly will continue in the future.

Sen. Klein stated that many years ago when North Dakota's own U.S. Senator Kent Conrad was chairing the appropriations section, I saw him on 60 Minutes and the question was, what are we going to do and how are you going to fix social security? And he said, no one in Washington has the political will to address it. Have we got the political will now? We keep talking about it, I mean the can is about as far down the road as we can kick it. I don't have to wait 12 years to be collecting, I'm there. We just keep talking about it, and we keep talking about it and we've got some great ideas. Is there just any movement at all and are there any people at all talking about, "hey, this is how we're going to fix it?"

Dr. Biggs stated that he thinks Sen. Klein is right. If we were to sit down here and design a social security reform plan, we could do it in an hour. The math is not difficult. We all know what the options are. We're going to raise the payroll tax rate. We can raise the retirement age. Cut cost of living adjustments. These are not exotic sorts of policy reforms. It's all a matter of political will. And we know that fixing social security earlier rather than later is the better way to do it. In general, the sooner you get on it, you spread the cost, you spread the pain over more generations of people, that makes the whole problem easier. The difficulty for an elected official is, kicking the can down the road makes their lives easier. They say, I can make a difficult political choice today, maybe lose my job or I can kick the can down the road and whoever holds this same office 10 or 15 years from now, it's their difficult decision to make. It really comes down to people just not wanting to tell Americans the bad news. That you're going to have to pay more and get less. And you know I don't blame this all on politicians because the problem is that Americans themselves don't want to hear it. They often say they want to kick the can down the road, they want to procrastinate. You know everybody says I care about my kids and my grandkids but if you think about our entitlement program, social security, Medicare, you add the national debt, what we are cumulatively doing is putting more and more debt on our kids and our grandkids.

So, it comes down to just human nature. That people want to procrastinate, people are selfish, they don't want to make difficult decisions. That's why I think you need real leadership on it. President Clinton tried to do it, President Bush tried to do it and neither of them succeeded. It cannot be done on a partisan basis. Right now, Democrats control Washington D.C. and they all have this social security plan they want to pass. They will never pass it. The same as when President Bush had his social security plan, he was not able to pass it. You really do need leadership to bring both sides together and say we're going to tell America some difficult truths. And if we do it together, we can survive. But if you do it on a partisan basis, it just won't work.

Sen. Burckhard asked if there is a statute that guarantees that social security will always be in existence. Dr. Biggs replied no and stated social security is a law passed by Congress. They could pass a different law tomorrow and change your benefits. This is not like a private pension where you have some vested right, or fiduciary duties and things like that. It's a tax levied by Congress on wages. It is a benefit paid to you by Congress based on your wages. There's no legal link between the taxes and the benefits. This was a constitutional thing going back to the Roosevelt Administration that they thought if there was a link it would be unconstitutional. So, you just have these two different things going on, they can change either of them whenever they want. Sen. Burckhard stated that this is a political dope slap for Congress, because they are kicking the can down the road for the next guy, or the next person to address which seems like a "shame on you" kind of deal. No offense to you sir - thank you for the information.

Rep. Wendi Thomas (PA) stated that you mentioned that the system for saving for retirement is much different now. So, I'm just wondering if you have any stats on that. Rep. Thomas further stated that in response to Sen. Klein's comment about collecting social security, she is going to be collecting sooner than him and her father told her it won't be there for her. And it's still here, and here for the foreseeable future. I've told my kids the same thing, don't depend on it. You're twenty-some years old, start saving now. From my prospective young people have started saving by greater numbers at this point. If you have any stats on that, I'd be interested.

Dr. Biggs stated that with the private retirement side in America you're not going to hear when you open the newspaper, or look on a website where they say, "Oh Americans don't save for retirement." If you go back to the 1970's when traditional pensions were at their peak, less than 40% of private sector workers participated in one. And due to vesting requirements most of

those people who formally participated never actually collected a benefit. There's a study done by a labor committee in Congress and in the 1970s they have something like nine out of ten people who were in one of these traditional pensions never got a benefit. Today, around 60% of private sector workers are participating in a 401K. If you pay money in, you're almost certain to get money out. We're contributing more to those plans than we did in the past because traditional pensions it was only the employer paid in. Now, we have the employer and the employee paying into retirement accounts. So, we have more people saving more amounts than ever before. If you can look in federal reserve data on the total amount of assets held in private retirement plans there is a clear inflection point in the 1980's when 401K's started taking over from traditional pensions. Prior to that you had sort of a slow and steady increase in assets. Then things really shifted up.

So, pension assets, even controlling for inflation and the growth of the economy, private plan assets today are seven times higher than what they were in the 1970's. Retirement incomes for all you here are at record highs across the income distribution. Poverty and old age is at record lows. Most retirees in surveys say, "Hey, we're doing okay" and yet if you read in the news media they refuse to believe them. And so, this is a system that's messy. We don't have a single system, we have all these different IRA's, 401K's, pensions, 403B's - it's a mess and yet it kind of works because we're giving a lot of people different options and we need to fill in the gaps in that. But we have a system that is getting us in the right direction, and I think it's trying to fine tune it rather than tear it apart.

Sen. Paul Lowe (NC) stated that I was just listening to this and trying to understand what I thought I heard. And what I came up with is lower benefits or pay more taxes and I don't know a legislator that would send this forward. Dr. Biggs said that's why they haven't. Sen. Lowe stated that I thought I had stumbled on the right answer. I wanted to check. Dr. Biggs stated that we need to elect to you to Congress and you can do it in your single term in office.

Sen. Mary Felzkowski (WI) stated that the Social Security Act was passed and then over the years we've kind of diluted it and given benefits out for more areas. Had we kept social security for retirement benefits, would we still be in the same position? Dr. Biggs stated that if I had a spreadsheet I could give you a better answer. Beginning in 1950, we started paying out disability benefits. That's become a bigger and bigger part of the program. Sen. Felzkowski asked if Dr. Biggs knew the percentage. Dr. Biggs stated that I would say about 20-25% of benefits are for the disabled. The growth of the disabled roles has been a matter of a lot of policy interest because, I'll be frank, in my opinion, American's health is in fact improving. Jobs are less physically arduous. So, you would think under those conditions the number of disabled would go down. But in the 1980's Congress loosened up eligibility requirements and I think that's kind of what drove it. If you did not have the increase in the disability roles, the retirement part may be solvent another 10 to 20 years but I think eventually it would go under and we'd be in the same position but that's something I can check on because it's a very interesting question.

Asw. Maggie Carlton (NV) stated that the one thing that hasn't been discussed is the maximum taxable earnings. It has increased incrementally - where would we need to be with that earnings to be able to help us balance it out? Because if I'm looking at this, salaries now are much higher than when I believe people were looking at social security at the beginning and the fact that it maxes out at $147,000 and we know that there are folks with a lot more income than that - I'm not saying go all the way to the last dollar but I'm saying as we move forward, if I'm going to be paying that tax on my earnings, in no other way do I have a hard stop on anything. I pay it all the way through like Medicare. So, as the taxable earnings go up, where would we need to be to get closer to balancing this?

Dr. Biggs stated that right now social security taxes are applied in the first $147,000 of your wages. Your benefits are calculated based on that same amount. If you eliminated that maximum taxable wage ceiling, at one point it would have made the system solvent for 75 years. Now, it would probably cover about three quarters of it. The reason you don't though is that very few countries around the world have an uncapped social security tax the way some people are proposing here. If you go to Canada, their version of the social security payroll tax stops at around $60,000, same in the UK. So, people have talked about raising it. But the social security payroll tax is 12.4% of your earnings between you and your employer. If you were to just eliminate that, that's the same as raising your top income tax rate by twelve percentage points which would be a big deal to do. It could be done but sometimes it's proposed as a simple fix. It would be a pretty dramatic change in the US tax code to do that.

Asw. Carlton stated that I'm always wary when I ask a question that I'm not sure of the answer, but I want to make sure I really understand this, because it's complicated. So, we're taxed at 12% but the maximum we go to would be the $147,000 that's listed for this year. Dr. Biggs replied yes. Asw. Carlton stated that I'm talking about that 12% in the small portions of it going up to let's say $200,000 or $225,000 is there a number there that gets us where we want to be going? I'm not talking about just totally eliminating it, I'm talking about different thresholds and how close do we get with those thresholds. Dr. Biggs stated that if we want to pick a given threshold, say $250,000 and say how much would that get you - I do know eliminating the cap entirely would not get you to full solvency. So, something below that is obviously going to get you to less. The issue when we think about the political resistance is that if you have somebody's who's making $150,000 per year, and you're going to raise their marginal tax rate by 12%, this is not the private jet crowd. And so, there's a lot of money there to be had, because this is your vast upper middle class. But they're also people that don't see themselves as incredibly rich. And so, it can be done. I'm just taking that $147,000 cap and raising it to $225,000 or $250,000 but for people in that range, they are definitely going to feel it and it just gets to why it's a difficult nut to crack. It would get you a bit and if I had to bet on what will happen, some increase in that cap is likely.

INTRODUCTION AND DISCUSSION OF RESOLUTION SUPPORTING INDEPENDENT CONTRACTOR STATUS FOR INSURANCE AGENTS AND OTHER LICENSED FINANCIAL PROFESSIONALS

Asm. Cooley stated that he is very proud to sponsor the Resolution and stated that this is an issue that's been brewing around the country - the status of whether gig workers are independent contractors. It arises out of looking at gig workers and trying to ascertain how do they access benefits in employment or not. Traditionally there is a three factor test which is influential in determining whether or not you have someone who is an independent contractor or not. You also have a court decision in the Borello case which has 11 related factors they use to kind of classify an individual. In California we had a court decision in Dynamex which was very stringent in the rules it applied and the thrust of which was that many traditional independent contractors would be regarded as employees.

We had legislation in California that tried to codify the Dynamex decision - a very major bill back in 2019 would have greatly expanded the role of employment and undermined in many professions the role of being an independent contractor. As that discussion proceeded in California the bill, AB5 of 2019, was eventually adopted but it included a great many exemptions, the very first of which was that of an insurance agent. So, insurance agents have a relationship with a carrier but they organize their own business. The insurance agency business is actually

recognized in the California State Constitution of all things. But, in California with this debate brewing about gig workers and what's an independent contractor, and how you should rewrite the rules, even in liberal California we came down on the side of exempting independent insurance agents from this change of law to ensure the status quo with respect to insurance agents. And that is the thrust of the proposed Resolution here. The aim is to have NCOIL speaking on behalf of the insurance business and independent insurance agents that any such rules should exempt insurance agents and other financial professionals from worker classification tests such as the "ABC" test, so they can continue going on being correctly categorized as independent contractors. A number of states have implemented this including my own state of California. And I just think it's the sort of thing that NCOIL should speak on and just say that this is the right rule, that independent insurance agents are indeed independent. They shouldn't be classed as employees and that is the thrust of this Resolution.

Maeghan Gale, Policy Director, Gov't Relations at the National Association of Insurance & Financial Advisors (NAIFA), thanked the Committee for the opportunity to speak and thanked Asm. Cooley for sponsoring the Resolution. If you recall, this committee heard several presentations, including one from me, on worker classification in the federal legislation the Protecting the Right to Organize Act (PRO) Act at the recent Summer meeting in Boston. Since then, the independent contractor models continue to come up for debate on both federal and state levels. And our industry while it's not the primary target of these efforts it's more of a bystander of the attention focused on the gig economy which almost of course exclusively uses independent contractors. This is particularly relevant around the "ABC" test, because we do feel often that insurance producers, since their primary course of business is to sell insurance for insurance carriers, would trigger this "ABC" test and be considered employees.

The independent insurance business model reflects the reality that producers are primarily engaged in sales activities. They often sell products from multiple different insurance companies and are not subject to the traditional employer, employee control characteristics. And so, NAIFA conducted a survey last year of over 1,000 of its members across the country. And 90% reported 1099 income indicative of independent contractor status on some level. And 95% of those who operate as an independent contractor wished to do so. There's just no appetite amongst the industry to be caught in this larger debate and be classified as employees. As many of you know, a career in insurance and financial services is maybe not what a lot of people graduate from college expecting. I know that it wasn't for me when I started as an insurance agent - it was a second career and this is the same for many. They're drawn to become an agent for the entrepreneurial nature and the opportunity to build their own small business and being forcefully reclassified as an employee significantly undermines this. So, we've worked with several states including California and Alabama on these issues and feel that the exemptions are appropriate. So, we ask for your support in recognizing that insurance and financial service professionals have a long history of appropriate classification as independent contractors and are not involved in the worker classification problems found in other industries and they should remain under that status if they so choose.

Hearing no questions or comments, upon a motion made by Rep. Lehman and seconded Rep. Oliverson, the Committed voted without objection by way of a voice vote to adopt the Resolution.

ANY OTHER BUSINESS

Asm. Cooley stated that he would now like to formally introduce the Resolution that he referenced during the Welcome Breakfast – Resolution in Support of the People and

Government of Ukraine. The purpose of this Resolution is to put our organization on record with this operative language: “NCOIL urges Members of Congress to condemn the Russian attack on Ukraine and stand with the United States and its allies, President Joseph Biden, the people of Ukraine, and Ukrainian President Volodymyr Zelenskyy in opposition to this war.” Copies of the Resolution should then go to U.S. House Financial Services Committee members, members of the U.S. Senate Banking Committees, the National Association of Insurance Commissioners (NAIC), and the Chair of all state committees that have jurisdiction over insurance matters.

So, obviously this Resolution relates to the contemporary circumstances and on February 24th Russia invaded its neighbor Ukraine, threatened their democratically elected government in an attack violating the rule of law, national sovereignty, and free democracy. And as a freely elected democracy Ukraine and it’s President share many of the same democratic principles that we adhere to in our respective states, and they are fighting to defend and preserve of course these ideals. But as I shared, the first line of their national anthem is dignity and freedom of Ukraine has not yet perished. So, they are actually trying to preserve their national dignity and their freedom in the face of this onslaught. And I do think that coming out of World War II there’s that famous quote that “they came for the trade unions, I didn’t speak as I wasn't a trade union; they came for the Jew, and I didn’t speak up because I wasn’t Jewish; then they came for me, and no one was left to speak up.” It’s just a moment where very dramatic things were afoot. All of our work, our lives, are invested in democracy and democratic principles and a way of going about resolving differences short of the gun. And so, I bring this Resolution forward which passed yesterday unanimously in my state among a group of bipartisan colleagues on both sides of the aisle which were very eloquent on behalf of this. I am honored to bring the Resolution to this group as appropriate for our body.

Hearing no questions or comments, upon a Motion made by Sen. Hackett and seconded by Rep. Brenda Carter (MI), Vice Chair of the Committee, the Committee voted without objection by way of a voice vote to adopt the Resolution.

ADJOURNMENT

Hearing no further business, upon a motion made by Rep. Ferguson and seconded by Rep. Oliverson, the Committee adjourned at 11:15 a.m.