NATIONAL COUNCIL OF INSURANCE LEGISLATORS
FINANCIAL SERVICES & MULTI-LINES ISSUES COMMITTEE
INTERIM COMMITTEE MEETING – SEPTEMBER 20, 2024
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Financial Services & Multi-Lines Issues Committee held an interim meeting via Zoom on Friday, September 20, 2024 at 12:00 P.M. (EST)

Senator Mary Felzkowski of Wisconsin, Chair of the Committee, presided.

Other members of the Committee present were:

Rep. Tammy Nuccio (CT)
Rep. Matt Lehman (IN)
Rep. Mike Meredith (KY)
Rep. Edmond Jordan (LA)
Rep. Brenda Carter (MI)
Sen. Paul Utke (MN)
Rep. Nelly Nicol (MT)
Asm. Jarett Gandolfo (NY)
Asw. Pam Hunter (NY)
Asw. David Weprin (NY)
Sen. Bob Hackett (OH)
Sen. George Lang (OH)
Rep. Forrest Bennett (OK)
Rep. Ellyn Hefner (OK)
Del. David Green (WV)
Del. Walter Hall (WV)
Del. Steve Westfall (WV)

Other legislators present were:

Rep. Jim Gooch (KY)
Sen. Lana Theis (MI)
Sen. Hillman Frazier (MS)

Also in attendance were:

Commissioner Tom Considine, NCOIL CEO
Will Melofchik, NCOIL General Counsel
Pat Gilbert, Manager, Administration & Member Services, NCOIL Support Services, LLC

QUORUM

Upon a Motion made by Rep. Matt Lehman (IN) and seconded by Asw. Pam Hunter (NY), NCOIL Vice President, the Committee voted without objection by way of a voice vote to waive the quorum requirement.

INTRODUCTORY REMARKS: CHAIR FELZKOWSKI

Sen. Felzkowski thanked everyone for joining the meeting and stated that the purpose of our meeting today is to continue discussion on two model laws, both of which we would like to try and have a vote on during our Annual Meeting in November. Updated versions of both of those models were distributed and posted on the website in advance of this meeting.

CONTINUED DISCUSSION ON NCOIL TRANSPARENCY IN THIRD PARTY LITIGATION FINANCING MODEL ACT

Sen. Felzkowski stated that we'll start with a continued discussion on the NCOIL Transparency in Third-party Litigation Financing Model Act. We've had some really good discussion on this and will be continuing that discussion today. We've been making progress on the Model and before we go through some of the discussions on it, we'll start off by turning it over to the sponsor of this Model, Rep. Matt Lehman (IN).

Rep. Lehman thanked everybody that's participated in this discussion. There's been a lot of feedback on this and there's still some moving parts of this we want to talk about. As you can see in the latest version of the model, there are two things I'm going to deal with. The first one being disclosure and changes in Sections 7 and 16. Those govern how and when to disclose the litigation funding agreement. I still think they need to have a little more conversation. When we began this discussion, I know one of the most contentious issues was disclosure - the existence of versus the contents of. In Indiana, we passed it out with the existence of it but we have language that has it subject to discovery which is also in this model. The West Virginia language requires the contents be disclosed and at our last meeting I believe we had a long discussion on that. We had added in the West Virginia language in our model because I wanted to start that conversation here in terms of seeing what people had to say in terms of whether that was too broad or not broad enough. The automatic disclosure requirement should or shouldn't be in the model? So, after listening to testimony there, I was having conversations with several attorneys outside of the interested parties or even NCOIL and I do think there's possibly a need for some further discussion. The concern that the legal people had was that we were going maybe too far into the litigation lane into the judicial path. And so, if you had a state that has very strict and very good judicial rules or procedures, then they don't really need this and discovery is the path. If your state does not have that then maybe the West Virginia language should be your path. So, I guess that's why I want to kind of flesh out a little more.

I also heard from many about what's driving this. I was just at a conference yesterday on where the market is today and inflation was discussed. What's driving insurance rates up to where they're 40% higher? A lot of its inflation. But they said one big factor was third-party funding litigation. And the gentleman that's bringing this up had no idea I was even there and doesn't know who I am. And so afterwards I said something to him and he said "I think it really is more in the class action in that space." So, the question was, should this be somewhat limited to those commercial type risks versus the consumer type risk. So again, that's something I want to hear from those that are here today. With that, I'm going to go walk through another couple things here. First, let me step back. From a philosophy standpoint, I've been around NCOIL a long time and my philosophy has been pretty consistent and I think we need to make sure we're building frameworks for states, not to build the final product to get to your states. So, in this discussion, some of that hinges on what's best for your state and maybe we put in drafting notes and put in language that would say your state should do this, this or this. But I think again the model is to serve as a policy guidance for the space to use in your legislature. So, you'll see a note at the top of the model that I wanted to discuss today a little bit of the definition of "charges" in Section 3. I included that note because I do feel that a lot of discussions so far around this has centered on the disclosure but I want to make sure that we talk about the full dialogue and the charges as well. I know some folks have reached out saying there shouldn't be a specific rate in the model and it should be left up to the states. I'm interested in hearing thoughts on that.

Additionally, I know in our state, we shy away from referencing federal law because we have laws within the state to deal with these types of products. So again, maybe this gets down to more of a drafting note, citing what your state would use. I don't want anything to be construed as "NCOIL didn't care about it, why should you?" So, does not having a rate in the model set the table up for that? We all have a concern on the high interest rates on consumer debt. So I want to hear everybody's comments on that. Obviously, the goal is to have all this ready so that we can have a final vote in San Antonio. There are other issues as well in terms of tightening up definitions of a not-for-profit and making sure this applies not just maybe to attorneys, but also to law firms and affiliates, and tightening up the environmental exemption. There's a few other small changes as well but if people have comments on any of those provisions, please share those as well. The last thing I'll say is that I think it's important for us to come to an agreement at some point here by November and not wait as I believe this is continuing to be a bigger problem. It's growing momentum around the country and it's important we provide guidance. People are looking to us for that guidance and I think we need to find a way to go here. And therefore, I'm looking forward to that discussion about the two major issues and other issues you might want to weigh in on.

Del. Steve Westfall (WV), co-sponsor of the Model, thanked Rep. Lehman for all his work and stated that I spoke to Rep. Lehman recently about how I think there needs to be full transparency and the West Virginia language is the way to proceed but if we can get some kind of compromise to say something like if your state allows it, this is the way to go, that might be best. I know during one of the Zoom meetings we had, one person was saying that they don't do any of this business in West Virginia or Indiana so that it didn't matter what the laws were in the state. I kind of took offense to that and I think Rep. Lehman did too. But we're growing and I think this is causing rates to go up. Our rates went up about 20% this year. I'm still 100% behind full transparency and we'll see what happens but hopefully we can get to a compromise somewhere that really works in other states.

Brent Walker, Director of Government Relations at The Coalition Against Insurance Fraud, thanked Rep. Lehman, Del. Westfall, and the Committee for all of their work on this. The Coalition is unique in that we have over 300 member organizations from consumer groups, government entities and insurers, and we're dedicated to fighting insurance fraud. I did look at this model from that anti-fraud perspective and I just want to stay in my own lane there around the fraud aspect. And if you've been following recent stories in the New York Post you see some examples of where insurance fraud can creep in and involve litigation financiers. We do support this effort and I think it's an important one. I do want to make some comments on our review of the draft and I did note how consumer funding companies and commercial funding companies were handled separately or differently in the model. And I just want to remind everyone, fraudsters are creative and if there are loopholes or ways to exploit a statute they will find it. And so, I hope that our comments are helpful in preventing some of those areas where maybe fraudsters can seek to exploit maybe some of the differences. And we suggest maybe a universal approach to some of these suggestions or prohibitions.

Primarily, the model addresses foreign entities of concern, countries and individuals for the commercial side but it doesn't have that same restriction on the consumer side. I think that's a fair suggestion that both types of funding companies should not receive financing from a foreign entity, company, or individual of concern. I also think that would apply to the sharing of information under court order or seal. I did note and I appreciate

that both types of funding companies should not have any influence or decision making, that's handled separately in each of the sections and I appreciate that. But I also think that the registration and annual reporting with the state should apply to both if we're really going to achieve full transparency. I think that's something that is important. And I think to that end, sufficiently spelling out how you're going to disclose a corporate financer's corporate identity, their investors, their principals, that seems to go with other existing sections in the draft around the reporting and registration. And then finally, I do think it's fair to ask that investors, funding companies and their principals if they do register and report with the state, they should be prohibited from having crimes of fraud or moral turpitude and there should be some diligence around that. And as Rep. Lehman said, perhaps whether it's language or drafting notes, I would ask you to strongly consider some of these suggestions. I do think this is an important effort. I also understand that litigation financing helps the consumer with access to justice and access to the court system. We just want to make sure that we prevent any loopholes for fraudsters to exploit.

Eric Schuller, President of the Alliance for Responsible Consumer Legal Funding (ARC), thanked the Committee for their work and thanked Rep. Lehman for having some discussions in between the last call and this call. Just a couple of things that we'd like to address, one is on the charges section. Our recommendation has always been to remove the reference to specific charges. I think making sure that the states have the individual right and ability to make that determination on their own is important. And our concern was referencing the Military Lending Act rate itself. I sent this to about a dozen lawyers and I got five or six different responses to what exactly that language means. And so our concern is that it could be interpreted in multiple different ways as to what exactly that rate is. By leaving it up to the individual states it then would be clear like it is in Indiana, like it is in several other states. On the section on disclosure, we like where it has evolved to but I would just like to add one more caveat to that in that it would be upon request rather than automatic. Our concern is that if you have it to where it is an automatic like it is here now, not everybody's going to know about this. Not everybody follows the statutes as close. And you could have people and attorneys and consumers involuntarily or unknowingly violate the statute. If you have it upon request then there is no ifs, ands or buts about it as to whether or not there is some disclosure of the existence of the contract. We're not opposed to that. But I think it should be upon request. This way there is an affirmative request to make sure that that document was produced and not inadvertently left off.

Jack Kelly of the American Legal Finance Association (ALFA) thanked the Committee for its work and stated that the disclosure language is very good. We might just want to go a little more generic in the reference to civil procedure. That sort of conforms to either West Virginia's term of civil procedures or Indiana's. So, we might just want to say "according to the civil procedures of the state." I think the model uses the word "trial procedures" or something like that but perhaps we just make it generic as I think that's pretty standard.

Daniel Hinkle, Senior Counsel for Policy and State Affairs at the American Association for Justice (AAJ), thanked the Committee for the opportunity to speak and stated that AAJ is the trial lawyer organization. I just wanted to point out a couple of things that have been raised repeatedly throughout the year. By my count, there have been 18 states that have already passed some form of legislation regulating litigation finance. And the vast majority of those states have left the disclosure question to existing rules of

civil procedure, meaning that if there is any model regarding the disclosure requirements in this it should be left to existing rules of civil procedures. That's how most states out there have addressed it. This issue has come up repeatedly in those states, and it has gone to that position in those places. And so I just want to flag that as the vast majority of states that have dealt with this. The other thing I wanted to just raise with everyone again is that Professor Ken Klein pointed out during his presentation at the summer meeting that disclosure does not advance justice. It does not benefit anyone except by giving the defendant in litigation a competitive advantage in the way they handle their cases. And so, those are just two major issues that I wanted to remind everybody of.

Mark Behrens, co-chair of the Public Policy Practice Group at Shook, Hardy and Bacon, thanked the Committee for the opportunity to speak and stated that I represent a number of defendants in mass tort cases as well as an insurer. I have a few reactions. One is the disclosure does need to follow the West Virginia approach and needs to be more robust than what's in the draft model right now for a few reasons. One is one of the key issues in these cases goes to the funder's element of control over the case because that can compromise the attorney's ethics. And I know that there's a provision in the model that says the funder's can't control but without production of the agreement, we can't tell whether there is actual control. We can't tell whether the statute would be violated without seeing the agreement itself to see what it says about that. The other thing too is the agreement can say who is providing the funding. So, a key part of this model is no funding by foreign entities of concern. Just having written notice that there's funding doesn't tell you who the funder is. Again, you need the contract, the agreement, to know whether the statute is being violated. The other reasons why you need to know what's in the agreement is the level of funding because that can go to the element of control. Somebody that has only put a penny into a case may not have control. Somebody that's put a pound into the case may exercise significant control over the case. They may be deciding whether the case is brought, how it's litigated, when it settles, and how much it settles. Those are things that go right to the ethics of this practice and the influence on the judiciary.

And the other reason why the level of funding is significant is that it can go to potential cost shifting. Right now in discovery, for example, we have a system in the United States where the producer pays, where the plaintiff can ask the defendant for every document. And in some of these mass tort cases, it could be 20 million pages of documents. Typically, we don't require the individual plaintiff to contribute to the cost of that discovery. We put it all on the defendant. Because we typically view an individual plaintiff as somebody that's unable to pay for that kind of discovery. Well, that changes when there's a funder involved. Now, it's not David versus Goliath. It's Goliath versus Goliath when we're talking about commercial litigation funding. And again, courts need to know when those things are going on. They need to know the terms of the agreement because it can affect those types of decisions. So, I think it's very important to move towards the West Virginia approach. And it's not true that at least when you're dealing with commercial litigation funding that we leave this up to state civil procedure. Indiana did this, but it's not what West Virginia did. It's not what Wisconsin did. I don't believe that it's what Montana did. So, what we're seeing in other states more reflects the West Virginia approach. If there is a concern about how it impacts the courts, I think that the way you could thread that needle is to have the courts decide the admissibility of these agreements. So, it's important for the courts and the litigants to have the agreement. But whether the jury could ever hear it, that I think would be appropriate to leave to the courts according to the rules of evidence.

And then just very briefly, a couple of other things because these can be dealt with later. But I do think some of the definitions need to be tightened up. For example, I highlight two in particular, the definition of “commercial litigation financier” says it's a funder who enters into an agreement with a plaintiff. Well, plaintiffs don't enter into commercial litigation funding agreements. So, the way the model is written now it wouldn't even apply in commercial litigation. I know that's not the intent but that is what the model says. And the same thing with the disclosure language that's in there now dealing with commercial litigation financiers. It's talking about when a plaintiff enters into an agreement. On the commercial side the plaintiffs are not entering into these agreements and I think it's very important that the definitions reflect the actual practice. And the only other one I'd mention is on “foreign entity of concern” where there's a reference here to an individual but when you look at what the definition is it's, an individual can't meet any of those criteria. So, I think you either need to change the definition to include something like a Russian Oligarch as an individual of concern, but it doesn't fit under the definition right now.

Jon Schnautz, Vice President at the National Association of Mutual Insurance Companies (NAMIC), thanked the Committee for the opportunity to speak in strong support of the concept of disclosure and transparency in this model. And we think the language that was circulated last week needs some work to get back to what it needs to be on that concept. I'll just briefly say we support the goal of transparency that's in the title of the model. It's been the goal from the beginning. We think the best way to achieve that is to do something analogous to what's been done in every state here as to insurance policies and that is make the actual agreement disclosed to the other party automatically. I think Mr. Behrens covered that point pretty well so I want to focus on something a little bit different which is, listening to conversations so far, it seems like the discussion at this point is a little less about whether disclosure is appropriate and a little more about who should be requiring it. So, I want to focus on that because from our perspective we think it is entirely within the province of the legislature to act on this issue if it so chooses and I just think there's a lot of points there but I want to highlight a few.

First, there's about 15 states that already require pre suit disclosure of insurance policies by statute. Now, I want to be very clear, we don't support those bills but they do exist. There are statutes out there on that and to my knowledge we have never argued when we argue against them that the legislature lacks authority to pass those statutes. Instead, we argue they're bad policy. So, I think that's one bit of evidence to say that the legislature can act here if it chooses and that the model can go there. In addition, state statutes, both past and proposed, specifically on the topic of third-party litigation funding have included language that is substantively identical to what was in the model back in July. The most obvious example is West Virginia. That's what the language is based on. But looking around the country there are bills proposed, some still under consideration, in Ohio, North Carolina, Minnesota, Florida, Georgia, Iowa, and Arizona. This is not a comprehensive list but again, each of these bills include a disclosure requirement that is substantively identical to what was in the July version. We think that proves that a state legislature can go there if it so chooses. Finally, and I think most critically, NCOIL itself has a precedent here. There is an Asbestos Bankruptcy Trust Claims Model Act NCOIL adopted in 2017 and re-adopted two years ago. It was sponsored by Sen. Jerry Klein (ND) and Sen. Bob Hackett (OH). I think both are on this committee. That model includes very specific disclosure requirements for plaintiffs in asbestos suits and includes the content of the disclosure, the timing of the disclosure, the requirements to supplement the disclosure, and speaks to the relevance and

admissibility. In other words, it is much more prescriptive than what this model included back in July. And so we think the precedent is there for NCOIL speaking to a very similar issue regarding disclosure in another context.

So, in conclusion, NAMIC supports the July disclosure language. We look forward to further discussion on the model. I will briefly touch on just a couple of points that have been raised so far. The first one is on the charges definition issue. I think if I'm hearing right that there is some room for compromise here. Speaking for us, we would be willing to support the removal of a specific cap in the model. What we would like to see though, is an appropriate drafting note that clearly leaves that issue up to the states. In other words, we would not support removal of the cap. We think that would be used to carry the implication that NCOIL considered the issue and decided a cap was inappropriate. Leaving it to the states is contextually very different than that. And then I guess the final point is we do think the model should continue to apply to all types of funding. We think that's important. There have been some comments here that could have been taken otherwise and so I wanted to make that point clear.

Wes Bissett, Senior Counsel at the Independent Insurance Agents and Brokers of America (IIABA), thanked the Committee for the opportunity to speak and stated that to begin, I'll say that addressing this issue and addressing the abuse of the legal system in general is our most significant public policy priority today. There's nothing that outweighs it. And so, we'll be working on this issue as we have in the last couple of years. We'll be working on this in many states in 2025 and beyond and we think it's critical to have a meaningful starting point for state legislators to look to. So, we strongly appreciate and thank NCOIL and Rep. Lehman and Del. Westfall for their leadership on this. Some of the speakers have stole my thunder a little bit in their remarks so I would say we urge you not to water this proposal down and agree that with the disclosure language, to the extent that you can keep it as is and not water it down. That that would be ideal. I especially wanted to comment on the rate provision and we really agree with NAMIC's suggestion on that. We think the removal of a reference to a rate cap would be troubling because of the implication that some might take from that and try to suggest to policymakers. So, even if there were a reference to a rate cap provision with almost a fill in the blank element to that we think that would be helpful. There could even be a drafting note associated with that that outlines the caps that are in place in places like Tennessee and Arkansas and Montana. So, we urge you to continue your good work on this and not to water it down. It's not just the insurance industry that's focused on this. There are many policyholder organizations that we're engaging with at a state level that strongly support this effort and we urge you to adopt it in November. It's critically important to have a meaningful guide for state policymakers in place going into 2025.

Mike Lane, Associate General Counsel at State Farm Insurance, thanked the Committee for its work and stated that I want to echo some of the comments that were just made. We obviously do have concerns with the slide back with regard to the disclosure language from the July version. We think this is going to be a bigger problem. It's not just an insurance issue problem. And NCOIL will be a standard. And so, if we end up with just disclosure of the existence of the contract that will be viewed in the other states as a standard. And so, we really do think that the actual contract, in order to address any abuses that could come from this, has to be disclosed. So we would support changing the language to what it was in July.

Hilary Segura, Vice President of State Government Relations with the American Property Casualty Insurance Association (APCIA) thanked the Committee for the opportunity to speak and stated that APCIA very much appreciates the efforts of Rep. Lehman and Del. Westfall and the entire committee tackling this very important issue. I would echo a lot of the comments that have been made earlier so I will be very brief in my comments. I would just say that there are core parts of the litigation financing legislation that are crucial to our insurance membership, that being the disclosure requirements and the model already is including language regarding the foreign entities of concern. And also language to make the non-party funder's role clear. For that, we are appreciative of it but we do believe that the model itself needs to have language regarding the disclosure of the agreement itself. As has been noted previously, legislation in West Virginia and Wisconsin and Montana have already included the disclosure of the contents of the agreement and we think that is a very important component. As NCOIL is a national standard bearing across the country, we think that is important to be included in the final model.

Eric DeCampos, Senior Director of Strategy, Policy & Government Affairs with the National Insurance Crime Bureau (NICB), thanked the Committee for the opportunity to speak and stated that I just wanted to echo some of the other comments regarding concerns around any rollbacks and any sliding on the disclosure piece. We certainly want to avoid taking away that transparency which can certainly help illuminate bad actors, fraudulent activities or criminal enterprises that may seek to use this type of legal avenue to carry out their unscrupulous activities. So I just wanted to make that mention as well and we certainly hope to see this model move forward with disclosure language that can address our concerns.

Asw. Pam Hunter (NY), NCOIL Vice President, stated that I want to commend Rep. Lehman on this model. It is a strong model that does protect consumers by making sure the contracts are easy to read, that no kickbacks are paid, that allows funding transparency to all parties and that has a cap on charges. From the beginning you had the language addressing maximum charges, which is critical to protecting our constituents. And I do Chair the Banking Committee in New York and you know how important it is to make sure consumers aren't abused and overcharged. And I think we should keep the rate cap language in to show that this legislation protects consumers from abusive charges.

Rep. Edmond Jordan (LA), NCOIL Secretary, thanked Rep. Lehman and everyone who's worked on this model. I want to echo some of the sentiments of Asw. Hunter in that I do think we do need to keep the rate cap in. However, I struggle a little bit with the disclosure because really, I think as it relates to the commercial side I tend to agree with some of the comments that were made and saying that we maybe need to have some regulations on them and deal with those issues. Because I think class actions are a totally different animal and I've been involved in some of those so I understand some of that. But as it relates to the consumer section of it, I really don't know if this is needed at all and I do believe that it gives the defense a strategic advantage. It puts the plaintiffs at a disadvantage by having it disclosed but certainly, I would vehemently disagree with those that say that the contents of the contract should be disclosed. I think one of the distinctions that we're missing is as it relates to an insurance contract, the insurance company is a party to the lawsuit. In these cases, these third-party litigation finances are not a party to the lawsuit, especially on the consumer side. And so I think it puts the plaintiffs, especially those that lack funding and lots of people that are involved in some

of this litigation are not high wage earners, at a distinct disadvantage by not only disclosing the contract but also disclosing the contents of the contract. So I would suggest that neither one of those things be disclosed as it relates to the consumer side. But if we're going to do something on the consumer side maybe go as far as disclosing the existence, although again I'm against that, but certainly not releasing the contents of it. I don't see the benefit of that even to the defense, other than to give them an advantage of knowing that the plaintiff may be in some financial troubles. And again that leads to them maybe lowballing an offer and doing some other things that are just not in the interest of justice.

Sen. Paul Utke (MN), NCOIL Treasurer, stated that we've been hearing a lot about some potential changes to the model as we've been leading up to this meeting and one of them centers on the rate cap language and my only question is about whether there is a clearer way to word the rate, if it's going to have a ceiling, then referencing the federal law currently cited. And I think it was mentioned earlier that there is some confusion to it. And I don't know what's right or what's wrong but if there's a way to clarify that, if there's going to be a rate in the system, that could work. And I've had people both ways talk about let the states just do it but then again the state still can modify it down the road if they so desire but having it in there is to kind of keep some control or at least set a bar. We all know when you set a bar that's where everybody targets, whether it's a high bar or low bar, that's where they're going to end up. And so I understand the reason people say leave it out and just let the free market run with it but in some of these things with consumers involved and in some cases they are into things that they're not very familiar with when they get to the legal system, then some direction is probably good. So as we move forward with this I guess my questions would be, is there more clarity to how that rate is worded? Or is this the best way? I don't know. And I will look at it some more too as we go forward because in the end we want protections and we want clarity to make sure that this is something that is a useful tool for the states as take this up and run it through their legislature and debate it. So we still have more work and more educating to do at least in my case as I want to get some additional information.

Asm. Jarett Gandolfo (NY) stated that I first want to commend Rep. Lehman on crafting a very solid model. I think it really will do a great job to promote transparency and fair contracts and prevent fraud and protect consumers. But I do think keeping a maximum rate for charges is a crucial piece of this for preventing abuse and protecting consumers. It gives it a little more teeth. I would like to see the maximum rate language stay in as others have mentioned. NCOIL is just setting a framework in other state legislatures that can be negotiated up or down or eliminated entirely. But by keeping the rate in, it's going to show that NCOIL has considered this and that we are recommending a certain rate and don't want it to appear like an afterthought. So I think leaving it in is the best course of action.

Sen. Felzkowski stated that I do like the previous disclosure language and it was based a little bit on Wisconsin's strong disclosure language. I think Mr. Behrens made some real good comments which I agree with and I would just say we have strong disclosure language in Wisconsin and I think if you look at settlements that have happened since that strong disclosure language has been there, they don't think in any way, shape or form it has hurt our plaintiffs. Nor has it hurt their settlements at all. So, as we talked about, NCOIL is a model and I think when we go lighter on some of these disclosures or lighter on language, other states will look at it and say, "well, if it wasn't important to NCOIL to put it in, why should we even take a look at doing something stronger? Or

maybe if disclosure wasn't important to NCOIL why should we look at it that way?" So I think that's something that when we're looking at model legislation we have to be very cognizant of.

Rep. Lehman thanked everyone for their comments. I think what I'm hearing is we want to make sure that we have maybe some more clarity around strong consumer protections on that rate language. But I think I heard overwhelmingly we want to make sure we are making the statement that we're very strong on consumer protections. As far as the disclosure goes, I'm sensing a lot prefer the way it was previously. I think what I'm hearing is that the problem seems to be more around the commercial side of things so maybe we need to have a broader discussion of do we squeeze tighter on the commercial side? But I do appreciate everybody's comments and we'll continue to work on some language so when we get to San Antonio, we'll hopefully have a good product.

CONTINUED DISCUSSION ON NCOIL EARNED WAGE ACCESS MODEL ACT

Sen. Felzkowski stated that next on our agenda is a continued discussion on the NCOIL Earned Wage Access Model Act. Similar to the model we just discussed, we've been discussing this issue since last November and now we've been making progress on the Model before you which has also gone through several discussions and markups. I'll turn things over to the sponsor of the model, Asw. Hunter.

Asw. Hunter thanked everyone that has participated in the discussions on this issue since we first introduced it in November last year. As you can see, I have made some changes to the model and that version has been distributed and is on the website. Those changes are based on the proposed amendments submitted by both consumer advocates and industry representatives so I've tried to maintain a balanced approach here. I think it's worth repeating that is this is a great opportunity for NCOIL to provide guidance to states on this issue. Some states have taken action on this but they have taken different approaches and recently at the federal level, the Consumer Financial Protection Bureau (CFPB) has announced its intent to issue a rule declaring that these types of products are credit and subject to federal Truth in Lending law. And that proposed rule really just muddies the waters further on this issue as both consumer advocates and industry representatives have widely different opinions on the rule and it's almost certain that this rule is going to be subject to years of litigation. So, it's clear that state legislators and by extension us, NCOIL, are going to have to provide guidance here. I look forward to the discussion today and I'm confident that we can reach a consensus by our meeting in November to vote on something.

John Barnes, Vice President of Government Relations at Catalis, thanked the Committee for the opportunity to speak and for its work to develop a model that regulates this emerging industry and in doing so provides important safeguards for both consumers and for providers. Our company does business in many states that are represented here today and by helping our state regulators our goal is to protect consumers and promote healthy marketplaces. Concerns we've heard from legislators directly when talking about this model is that there's a clear gap that is missing from consumer protections and specifically putting a limit on the number of advances that a consumer can take out at once. Without such a limit there's significant risk that consumers can overextend themselves financially. The most effective way to regulate this product is in real time and the only way to do that in real time is through a centralized database which would track these advances and prevent consumers from

taking out multiple advances simultaneously. This is the same approach that's already in place for small dollar non-bank consumer credit products in 14 states around the country from Washington on the West Coast to Oklahoma, North Dakota, Illinois, Florida, Alabama, Wisconsin, Michigan and many other states. There's a reason that legislators have come together and said this is an important consumer protection and we believe it's important that it applies here since these products are not underwritten and there's no credit check involved so without this centralized system providers just have no way of knowing in real time who is lending to who and how much has been lent. The risk is clear. Without safeguards, consumers can easily take out multiple advances across different apps, across different providers, and it's a clear way to get into a cycle of debt in an unhealthy reliance over time. I know all of you know this, but research from Harvard and the California Department of Finance Protection Innovation has shown that on average, consumers take out 26 earned wage advances per year and that most consumers have more than two of these apps downloaded on their phones. So, without proper safeguards, we can quickly get into an overextension and financial strain.

Finally, if the committee agrees it wants to do something to ensure this consumer protection it's critical to include the database in the model because without it being written into statute, regulators simply don't believe they have the authority to implement the database. As said earlier, it's critical to include language like this because many legislators will say “if it wasn’t important to NCOIL why should we consider that?” So that's what we're asking the committee to do today is to take a closer look and ensure there are consumer protections that keep consumers safe from getting overextended. By doing so, we can ensure that when this goes out to the states there'll be no question that consumers are protected and the industry will benefit from the transparency as well.

Ben LaRocco, Senior Director of Government Relations at EarnIn, thanked the Committee for the opportunity to speak and stated that I want to address a few issues that are in the model. First, I want to address the comments just made. I've been working on this issue for many years in every state and never once have I heard a legislator say that the government should have a full database of every earned wage access user and every transaction. It seems like a lot of very sensitive data that need not be in the government's hands. So we can talk more about that if there's interest but I do want to discuss some issues in the model. I think a lot of work has gone into this and I definitely appreciate a lot of the work that Asw. Hunter and others have done. I do want to flag a couple of issues that I think probably need a little bit more work. First, I think the first one is disclosure. We’ve been talking a lot about disclosures in the states. This will be the third model bill that will be passed by various organizations on this issue. We've been spending years debating disclosures on the federal level even beyond the CFPB rule which was mentioned. And getting disclosures right is very important. And there's various points when you want disclosure. You want disclosures when the person first downloads the app. You want disclosures when they're at the point of sale. And then you want disclosures as follow-ups too. So, I think we need to do a little bit more work on that in this model and the specifics of that. Section 8(b)(9) specifically I think needs some more work.

Also section 8(b)(8) regarding the receipt of funds. We don't control when people receive funds, we control when we send funds and I think there's one provision where they have to receive the funds the day before they're paid. And that’s a problem because what happens if they get paid at night and they need $50 in the morning and then want to go get the app? Should we say “no, you're prohibited from taking out this

money because it's your payday?" I think that was an addition that I think needs to be reworked a little bit. And then section 8(c) where there is an exemption from the usury laws, we had suggested an exemption from lending and money transmission laws. We think there needs to be some clarification that if you get an earned wage access license you would not also need any other license to do earned wage access. If you also lend or if you also transit money you would need those, but by the fact that you get the earned wage access license you don't need to also get those things because that could be very burdensome if we would have to comply with all of the lending laws and all of the money transmission laws and the earned wage access laws. So we think there needs to be some language that says if you do this you do not also need to comply with the other products. I think it was great that there was clarification that tips be treated differently than other fees and other things. One thing I would clarify in the language is it says a tip is a fee. Typically, a fee is something that you trade for a service. A tip is a voluntary gift or gratuity. So, not to say that it shouldn't be regulated but it should be treated differently than a fee.

In section 8(a)(3) there's some language on account debiting. It gives a lot of control to the regulator. Basically, it says the regulator can make up whatever rules they want on account debiting. It's not that there can't be any rules around account debiting but we're always concerned when something just says the regulator gets to decide whatever they want and they get to go and run with it. There is already a very robust set of laws and regulations on how accounts can be debited so we think that needs to be looked at. And then lastly, Section 11. We suggested that be struck and it was left in. That basically gives control of the company to a regulator saying essentially you can't sell the company or transfer something unless the regulator approves it. It would be very burdensome if anybody that had an earned wage access license had to get 50 different state regulators to approve the sale, especially small players that might want to get bought by somebody else if they have to get that sort of regulatory approval. So we suggest we take a look at that.

Andrew Kushner, Senior Policy Counsel at the Center for Responsible Lending, thanked the Committee for the opportunity to speak and stated that I'm here on behalf of my organization, a nonprofit, nonpartisan research and advocacy organization that fights predatory lending, as well as the National Consumer Law Center which has also given comments on the model. And I just wanted to express our disappointment with two changes in particular to this version of the model. Number one is the change related to the fee cap. I thought the last version of the model certainly wasn't everything that consumer entities wanted but it certainly represented more of a compromise and a balanced approach than what we've seen, especially in other state legislatures when industry has introduced their version of the bill. It had an exemption from state usury laws, which we're opposed to but an all in holistic fee cap that included both fees and tips and that has been weakened in this version to only include mandatory fees. Number one, I think there's a clarity issue with that provision. It's not entirely clear to me what a mandatory fee is. There's no dispute I think that none of the companies in this industry charge mandatory fees in the sense of that fee that you absolutely have to pay. What they charge are expedite fees to receive earlier access to funds and the language that defines a fee that, it isn't clear whether it includes a $3.99 fee that you have to pay to get access to your money the next day which is in most cases how consumers use these products. So if the intent is not to include it, it feels like that then the fee cap does nothing because the industry really doesn't charge mandatory fees. At a minimum the model needs to be clarified to include that. And then beyond that, we don't believe in

any distinction between fees and tips. These companies use a whole host of techniques to push users to tip. We've detailed this in some of our publications and we think an absolute fee cap that takes into account all monies paid to the to the provider is essential. Separately, there's some weakening around the rules governing tips. I thought that one way that this organization was really doing a great job in breaking ground in the last version of the model is the language around not allowing companies to preset a tip and any tip amount had to be affirmatively selected by the user. That's no longer in the model and that seemed like a pretty common-sense consumer protection especially if tips are going to be excluded from the rate cap. So I think while we weren't fully in favor of the model as it appeared a couple of months ago, it certainly represented a better balance for consumers than this version and we'd like to urge the committee to reconsider the changes I've talked about.

Andy Morrison, Associate Director at the New Economy Project thanked the Committee for the opportunity to speak and stated that we're based in New York City and we work with community and labor partners across the state. We again strenuously oppose any model legislation and we would oppose any legislation being enacted in New York that would exempt earned wage access from the usury laws. The reason being is that we don't have payday lending in New York and that's what earned wage access is. It's just payday lending on a phone and they've used a lot of clever legal fictions and distorted what their product really is to try to evade state laws and now they want to entrench it in in state law that they deserve an exemption. The reason we don't have high-cost payday lending in New York like about 18 other states is that we have a usury law. So it would be a travesty and it would undermine decades of work that's gone on in New York to preserve our strong usury cap and we on behalf of labor groups in New York and community groups really implore you all to not exempt earned wage access from usury laws.

Mr. Barnes stated that in 14 states which includes states like Kentucky, South Carolina, Wisconsin, Illinois, Michigan, and Delaware, they have these real time databases. It is only a red light green light function. It doesn't stop anyone from offering a loan product. It only goes off of what the consumer has taken out. So in 25 plus years, we've never had any sort of hack. It's all just for the state regulator to have that data. It doesn't go into other states. It's just in that central state. So it's something that some of the legislators in this meeting have actually voted for in your states. And so I just wanted to clarify that there's a little bit of misunderstanding on that.

Rep. Brenda Carter (MI) stated that I really appreciate all the work that's went into this Model and we just recently passed legislation similar to this in Michigan and it was bipartisan because we recognized that we had to have some type of transparency and controls on rates and other things. But one of the things that I'm still concerned with in Michigan is the fact that how many times a borrower can take out funds and what the availability is. In a city like mine, if they can borrow from one lender and then go the next day and borrow for another and then another, then there's no way of finding out whether or not this person has actually maximized their income or put themselves in some type of situation where they cannot get out of this hole. So even though I'm not really familiar with this centralized database I would like to learn just a little bit more about it and for us to just consider it, especially in our communities that use payday lending as a source of income control.

Asw. Hunter thanked everyone for their comments and stated that I just want to say as we've been having this conversation over the last several months this industry has really blown up, and especially since COVID. And it's interesting because as we're having conversations in New York about buy now pay later and now we're talking about earned wage access and we've been working on these bills all year long, consumers are using these products at an exponentially high rate. The buy now pay later people are using these for groceries. It's not like they're trying to buy a mattress and split it up in four payments. Yes, maybe some people are doing that, but people are using these products for every day things. Just like with the earned wage access, it's I need my money today. Is it a fee? Is it a tip? Those are questions but there's obviously a broader problem why all of these products are so popular and necessary and I'll reiterate the importance of us being standard bearers to make sure that we are at the forefront of policy that is impacting our constituents on an everyday basis. And as said earlier, with these models you can take them back to your state and work on it but we need to have a foundation and make sure that it's not always pro industry and it's not always pro consumer and that makes it very difficult to get to a consensus but we can't shy away from tackling these hard issues just because they could potentially be contentious. That this is really important. And it literally is people's livelihoods at stake. So we need to get this right and I believe that we have taken all sides into consideration and there's not a group or entity that we have not had conversations with. And now it's time to send in everything that you have before the meeting in November and I do hope that we'll have our final document ready to be able to review and pass in November.

ADJOURNMENT

Hearing no further business, upon a Motion made by Rep. Lehman and seconded by Del. Westfall, the Committee adjourned at 1:30 p.m.