

NATIONAL COUNCIL OF INSURANCE LEGISLATORS
SPECIAL COMMITTEE ON RACE IN INSURANCE UNDERWRITING
INTERIM COMMITTEE MEETING
MARCH 5, 2021
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Special Committee on Race in Insurance Underwriting held an interim meeting via Zoom on Friday, March 5, 2021 at 1:00 P.M. (EST)

Senator Neil Breslin of New York, Chair of the Committee, presided.

Other members of the Committee present were:

Asm. Ken Cooley (CA)	Rep. Brenda Carter (MI)
Sen. Travis Holdman (IN)	Asm. Kevin Cahill (NY)
Rep. Matt Lehman (IN)	Asw. Pam Hunter (NY)
Rep. Joe Fischer (KY)	Sen. Bob Hackett (OH)
Rep. Bart Rowland (KY)	
Rep. Edmond Jordan (LA)	

Other legislators present were:

Rep. Shawn McPherson (KY)
Sen. Jim Burgin (NC)
Rep. Carl Anderson (SC)

Also in attendance were:

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

INTRODUCTORY REMARKS: CHAIR BRESLIN AND INDIANA REPRESENTATIVE MATT LEHMAN – NCOIL PRESIDENT

Senator Neil Breslin (NY), Chair of the Committee, thanked everyone for joining and then turned things over to NCOIL President, Representative Matt Lehman

Rep. Lehman thanked everyone for joining and stated that he is proud to sponsor the proposed definition of “proxy discrimination” alongside Chair Breslin and he believes the definition represents the best path forward for the organization. Rep. Lehman stated that the Committee had a very good discussion on this issue at its last meeting and he would like to thank everyone that participated. In his discussions with Chair Breslin, Rep. Lehman noted that they feel confident that the proposed definition before the Committee represents a solid work product and is something that should be adopted by the Committee so that NCOIL can fulfill its role in providing guidance to states when developing public policy on this first of the two committee charges.

Rep. Lehman stated that he knows Chair Breslin will touch upon this as well, but they both believe it’s vital that the definition of “proxy discrimination” recognize that there is an

intentional act associated with it. This is necessary because the legal term “proxy discrimination” has the word “proxy” right in it, and “proxy” already has a definition that involves volition. It’s important that the definition in statute not be in contradiction with the definition as understood by general society. Such a contradiction would create havoc for essentially everyone involved in the underwriting portion of the insurance industry.

Rep. Lehman stated that he also wants to note that since proxy comes to us with an existing definition, that proxy discrimination needs to remain separate from disparate impact discrimination, which involves no intent. The second charge of this Special Committee is to review individual underwriting factors. The Committee will see that some of those factors have a disparate impact on protected classes, and the Committee may conclude that some of that disparate impact is unfair. That requires separate analysis from the fairly straightforward definition of proxy discrimination. Rep. Lehman then repeated something that he said in December but stated that he thinks it’s important to reiterate: having conversations like these is not always easy, but NCOIL cannot sit idly while decisions that can have a huge impact on our constituents and the state-based system of insurance regulation in general are made without input from state insurance legislators. Indeed, state legislators are those that have been vested with the authority to make such decisions pursuant to the McCarran-Ferguson Act enacted 75 years ago. Rep. Lehman stated that he looks forward to the discussions today.

Chair Breslin stated that he is proud to sponsor the proposed definition of “proxy discrimination” as it deals with such an important and timely issue. The Committee had a very good discussion on this issue at its last meeting in December where it heard from several speakers with very different views on this issue. A number of people reached out to Chair Breslin afterwards saying it was great to see so many people come together on such important issues. The driving force behind crafting the definition in the manner in which it appears is the need to explicitly recognize that “proxy discrimination” involves some affirmative decision or volitional act by an individual or entity. This concept of intent is necessary both because the legal term “proxy discrimination” includes the word “proxy” which comes with an existing definition, and in order to separate it from being equated with disparate impact discrimination, which involves no intent.

Chair Breslin stated that while he doesn’t want to go too far down a linguistics rabbit hole, he does want to spend a little time reviewing the actual, existing definition of “proxy”. One dictionary defines it as: “[o]ne who is authorized to act as a substitute for another.” Another definition reads: “[T]he authority that you give to somebody to do something for you, when you cannot do it yourself; a person who has been given the authority to represent somebody else; something that you use to represent something else that you are trying to measure or calculate.” The words “authorized” and “authority” involve some level of affirmatively and/or intentionally granting permission to someone. The top Merriam-Webster definition of “authorize” reads: “to endorse, empower, justify, or permit by or as if by some recognized or proper authority (such as custom, evidence, personal right, or regulating power).”

Contrast this intentional discrimination which has always been prohibited, with disparate impact, which has, with certain exceptions, always been legal within the insurance industry and involves no intent. Accordingly, equating “proxy discrimination” and disparate impact would both contort the use of the word “proxy” in the phrase so as to render it inconsistent with its plain meaning, and completely revamp the insurance

ratemaking system. Adopting a prohibited disparate impact standard for insurance ratemaking analysis across-the-board would simply be incompatible with basic insurance principles.

Chair Breslin stated that he strongly believes that NCOIL adopting this definition of “proxy discrimination” will be beneficial to not only the organization by demonstrating leadership on such an important issue, but also to states as they begin to deal with these issues in their legislatures. For example, a bill was introduced earlier this week in Colorado containing the term “proxy discrimination” but the bill does not define the term. Everyone on this call today knows the importance of words being defined in legislation. Undefined terms create problems for the legislators that enacted the law, the regulators that enforce the law, courts that are called upon to interpret the law, and those governed by the law.

However, Chair Breslin noted that the Committee’s work does not end with defining the term “proxy discrimination.” More attention should be given by the Committee during its April meeting to the issues surrounding rating factors and disparate impact. As referenced earlier, as a general matter, disparate impact has always been legal within the insurance industry and by definition, there is no intent involved. However, based on the Committee’s discussions during its December meeting, the Committee should further discuss instances where there is overwhelming evidence that disparate impact amounts to unfair discrimination because of, for example, a rating factor’s negative impact on a protected class.

That process recognizes that in insurance, actuarial justification is the one core standard of risk-based pricing that applies to every rating factor. But, from time-to-time state legislators, after extensive debate during which all perspectives all heard, decide that even if certain factors can be actuarially justified, social considerations warrant that they be exempted from the core standard or risk-based pricing. This is what happens across the country in state legislatures when deciding whether or not to prohibit insurers from using certain rating factors in underwriting such credit score, zip code, or gender. That is the proper way to address any social unfairness in the insurance underwriting process rather than imposing a disparate impact standard.

That brings us to the format of today’s meeting, the Committee will first hear any comments and questions from legislators regarding the definition of “proxy discrimination.” Once all legislators are finished speaking, the Committee will then hear any comments and questions from interested persons. Once all comments and questions are heard, Chair Breslin stated that he would entertain a Motion to vote on the definition. Next, the Committee will follow the same format of hearing from legislators first and then interested persons regarding the next steps for the Committee’s April meeting when discussing rating factors and disparate impact.

CONTINUED DISCUSSION AND CONSIDERATION OF “PROXY DISCRIMINATION” DEFINITION, AND AMENDMENTS TO NCOIL PROPERTY/CASUALTY INSURANCE MODERNIZATION MODEL ACT

Asm. Ken Cooley (CA), NCOIL Vice President, thanked Chair Breslin and Rep. Lehman for their work. It is worth noting a very important related concept to the whole point made by Chair Breslin concerning the importance of working within a universe of defined terms of known meaning. The business of insurance is one that if you enact statutes

which are vague in their expression then you can have a lot of liabilities arise during the period of time from when the onset of the statute is until they get clarified. Asm. Cooley stated that he feels that in the area of rating, to introduce uncertainty as to on what are the rates founded on really jeopardizes the capital base of insurers because until that all gets sorted out claims can come in and disputes can arise and it can be a very heavy load to deal with in litigation and claims payouts arising from things not being clear.

Asm. Cooley stated that he feels that there is a special responsibility which only insurance oriented lawmakers would grasp which is that to introduce vagueness into the rating statutes and then passing them in states trusting that its going to get worked out in time actually exposes the capital structure of insurance companies to a very significant legal issue. It runs in favor of being conservative, cautious, and thoughtful in how we pick apart something and examine the importance of language and the extent to which it affords clarity so that we are not opening up the potential for legal problems.

Rep. Brenda Carter (MI) stated that she would like to mention the fact that when she and her colleagues were discussing this in Michigan one of the questions was whether gender orientation could be considered as a rating factor by insurers. NCOIL General Counsel, Will Melofchik stated that question goes more towards the Committee's second charge in terms of discussing specific rating factors. NCOIL CEO, Cmsr. Tom Considine, stated that additionally, if an insurer were to use a neutral factor intentionally as a substitute for gender, that would be unfair discrimination by proxy and would be precluded by this definition. Rep. Carter replied thank you.

Rep. Edmond Jordan (LA) stated that he takes somewhat of a different sentiment to this. He does not see the definition as a move forward but rather backwards. Rep. Jordan stated that he listened to the remarks regarding the definition of certain words and a lot of time was spent on proxy, but not on discrimination. Definitions for discrimination include: bigotry, hatred, inequity, injustice, intolerance, prejudice, and unfairness. If the Committee is not dealing with the disparate impact aspect of these issues, then Rep. Jordan stated he is really not sure of what the purpose of the Committee is.

Definitions are fluid. Rep. Jordan stated that if he said someone was a "bad" man, there is context associated with that – it could mean that you are awful but it also could mean that you may be great. If someone said Patrick Ewing is a "bad" player it could mean that he is good. The truth of the matter is that we can define a word to mean what we want it to mean within an organization or an industry. Rep. Jordan stated that he has a disagreement with that. There is a famous quote which says that if you stick a knife in my back nine inches and pull it out six inches, there's no progress - you have to heal the wound that created the injury. Rep. Jordan stated that he believes folks have been discriminating - not this Committee and not individually, but as an industry there may be some fear on how it got there and how to make a profit without certain factors in place.

Rep. Jordan stated that he believes this Committee is well intended but this is only its second meeting and he does not believe you can fix this in one meeting and then vote the next but if that's the attempt then so be it. Rep. Jordan stated that he understands there are efforts to move forward and he believes everyone in good faith wants to move forward. Rep. Jordan stated that he doesn't think the proposed definition gets the Committee to the place where it needs to be - more work needs to be done. Difficult discussions need to be had and he doesn't think that one leads merely by not wanting to be left behind. Rep. Jordan stated that he understands there are other entities trying to

develop a definition but the fear of being left behind doesn't necessarily mean that you are the leader on the subject. Rep. Jordan stated that he believes that if we want to be leaders we need a more thoughtful approach. That is not to say that this approach is not thoughtful, but the Committee can do better. Rep. Jordan stated that he is willing to work on that and would ask for a commitment from everyone to get there.

Chair Breslin thanked Rep. Jordan for his comments and stated that hopefully that's what the Committee is trying to do - to arrive at a valid insurance industry that does not acknowledge or allow any racism to creep into its rating system. It is not a perfect process because it depends on a lot of people to make sure that it acts that way and along the way mistakes will be made but hopefully if we're all trying to climb the same mountain we'll get to the top together.

Asm. Kevin Cahill (NY), NCOIL Treasurer, stated that he agrees with some of Rep. Jordan's comments in that we have a proactive responsibility to root out discrimination wherever it is but in particular in the area of insurance where there has been a history unfortunately of discriminatory practices in the past. Asm. Cahill stated that while he wholeheartedly supports Chair Breslin and Rep. Lehman on their work and moving this issue forward, and for taking the initiative Cmsr. Considine deserves credit, he believes that even on this first charge the Committee could do more. Asm. Cahill stated that understands that there is a traditional sense of proxy discrimination of requiring an intentional act. However, there is also a belief that proxy discrimination can occur without an intentional act.

Asm. Cahill referred the Committee to a recent Iowa Law School law review article that discusses this very issue especially in age of artificial intelligence. Asm. Cahill stated that for those reasons he won't support the definition but noted again that is not meant to be a slight on the parties involved because he applauds them for their work.

Asw. Pam Hunter (NY) stated that she would like to add on to Rep. Jordan's comments. Foundationally, she feels that this is not the right direction if we're not talking about systemic longstanding discrimination in the industry. Asw. Hunter stated that if you look at long term decisions that have affected communities like redlining, and we're talking about today how we're not going to take into consideration a person's skin color but we're going to talk about someone's zip code, she knows that there are a couple of census tracts where she lives that are the highest poverty rates in the entire country of people of color so they are going to disproportionately have a negative advantage for loans and insurance.

Asw. Hunter stated that she feels strongly that the Committee can do much better in having a broader conversation. Asw. Hunter stated that she knows that the Committee is going to get more in depth in terms of disparate impact and rating factors but if we don't foundationally start in the right direction it won't go to where we need it to be. Asw. Hunter stated that she agrees that this can be more thought out and take more time. While there are other organizations involved, it's not a race to the finish line, but rather making sure we are taking the appropriate steps to right historic wrongs and make sure we have equity going forward. Asw. Hunter stated that she doesn't think the Committee is there yet and it's no disrespect to the people involved or the organization but she believes the Committee can do better.

Chair Breslin stated that anyone who would tell him that there hasn't been racism in the industry is deceiving him and not telling the truth but hopefully everyone learns from mistakes. As the famous saying goes – he who forgets the past is doomed to repeat it. The Committee should continue to talk about the past but sometimes that can also be detrimental if you only focus on the past and Chair Breslin stated that he believes the Committee is looking forward and trying to figure out how to move on to make sure that all classes legally are protected and that the insurance industry is at the forefront of making those changes.

Rep. Lehman stated that the comments made by Rep. Jordan, Asm. Cahill and Asw. Hunter brought up some very good points but they focus more on the second part of the Committee's charges which is the rating factor discussion. The factors will be part of the second charge of the Committee but setting forth a definition is key to setting a bar out there that says "we don't want you playing games if you are moving pieces of the puzzle around." What pieces that are part of that puzzle will be part of the second half of the Committee's discussions. Rep. Lehman stated that he doesn't want to cut anyone off but it seems that the discussions thus far are focused on the second charge and we need to focus on the definition right now that we want to put out there that can go into law so that it can't be used improperly by departments and carriers.

Hearing no other questions or comments from any legislators, Frank O'Brien, VP of State Gov't Relations at the American Property Casualty Insurance Association (APCIA) first thanked Chair Breslin and the Committee for their work on this important issue. As the comments today show it hasn't been easy and APCIA doesn't think it will get any easier but few things that are important are never easy. Second, with regard to the definition, APCIA joins in urging its adoption. In proposing and debating and hopefully adopting the definition, NCOIL is laying out a marker as an initial statement of public policy. By acting in a space where others have not NCOIL fulfills its essential role in assisting lawmakers and others on issues of importance to the state based system of insurance regulation. That is what this Committee and this organization is doing today and will continue to do in the future. Finally, Mr. O'Brien noted that the definition is entirely consistent with the dominant body of case law – it is what the law is now as opposed to what others may want the law to be. The law is a dynamic force and a dynamic object and it is through debate and discussions such as this that change is achieved. But, change begins with a first step and this definition is the first step.

Erin Collins, VP of State Affairs at the National Association of Mutual Insurance Companies (NAMIC) stated that NAMIC is supportive of the NCOIL direction and concept of both identifying proxy discrimination as a space for action as well as the connection of the concept of intent as it is applied there. NAMIC absolutely agrees that unfair discrimination includes this definition and is absolutely prohibited and has no place in our industry. Ms. Collins stated that she would like to hit a couple of points to explain why in NAMIC's view connection to intentionality is the only viable path forward for a definition of proxy discrimination. First, there has been quite a lot said about applying a disparate impact analysis to insurance or just looking at outcomes of underwriting and rating and setting aside risk profiles and actuarial science - that's a challenge. That means that applying risk classification based upon scientific evidence would be disallowed if the outcome was disproportionate. Ms. Collins stated that she can't think of a single factor anywhere that can survive that test. It's not out of an aversion to examining and having an honest discussion about underwriting and rating, it's just that an outcome approach just does not work with risk based pricing. Even if individuals only

belong to one protected class instead of multiple there is very little feasibility that outcomes will directly align with demographics.

Ms. Collins stated that for example, take the factor of age of a vehicle which is a good one because it can work both ways – it's new it has new tech and new safety features, and if it's old maybe it doesn't have safety features and is more susceptible to severity. Ms. Collins stated that she has a car that's two years old and according to a Pew research study, 5% of American women have one of her protected class characteristics and that's a little over 8 million people. Well, what if of those women a disproportionate number drive cars that are two years old compared to the rest of the population. My insurance carrier doesn't know, nor do they want to know, about my 5% characteristic but if you apply a typical disparate impact analysis to the factor of age to the vehicle, two things happen. One, it's highly likely that age of the vehicle doesn't survive that test and is disallowed as a factor and now my neighbor driving the average age vehicle is going to have to subsidize my newer car.

The second thing that happens, and this is important to me as an individual, is that because my insurance carrier will have to test all of their underwriting variables and show that test and prove it out to regulators in this way, all of a sudden by carrier is going to have to ask me about my 5% characteristic and will have to track it and store it. Ms. Collins stated that some people are going to say that she is engaging in hyperbole or it's too blunt of an instrument that she is using or that she doesn't understand how a disparate impact standard would really be applied and maybe they're right because regulators probably wouldn't start with going after age of a vehicle as a factor. They would pick and choose where to apply the standard and issue declarations about certain factors or reject filings if they have time and resources to do that.

Ms. Collins stated that she doesn't consider that a fair system but she can certainly see the practicality of that outcome. But, that's not the whole story here. If we divorce intentionality when we're talking about this broad concept of proxy discrimination and use disparate impact as an underwriting standard as some have called for, the insurance companies will be universally pulled into bad faith litigation on very single factor that they use no matter what the regulators do and that is something no one wants. Accordingly, Ms. Collins stated that the proposed definition is a good path forward. We're all trying to engage and discuss what industry's role can be in combating systemic racism in America.

Ms. Collins stated that when she listens to people smarter than her talk about potential solutions what comes up over and over again is access: access to insurance; increased products and coverages due to competition; decreasing risk through mitigation and that resulting in more access; and how we can attract new and diverse talent in the industry. Ms. Collins stated that those are things we can and should focus on and she is looking forward to that conversation with this Committee. But upending decades of actuarial science and applying something that isn't risk based is not going to create access in the market but rather will constrict the market and make it hard to know what insurance to write and how much and for how many people – that's not the answer. Creating a highly competitive market with lots of companies to choose from with the ability to match rate to risk is the path forward and where we should start. For that reason, NAMIC supports the definition and encourages adoption.

Birny Birnbaum Director of the Center for Economic Justice (CEJ) stated that CEJ appreciates NCOIL's efforts to examine the impact of systemic racism on insurer practices and insurance companies. However, the proposed definition reflects a profound misunderstanding of how systemic racism affects insurance. By defining proxy discrimination only as the intentional use of a proxy characteristic for a protected class, the definition if adopted would memorialize insurer practices that discriminate indirectly on the basis of race, would discourage insurers from examining the racial impact of their practices and would restrict current regulatory efforts to address such unfair discrimination. It is fundamentally incorrect to say that proxy discrimination must involve intent. The argument misunderstands how bias affects insurance outcomes. The proposal basically takes the view that unless you intend to discriminate, there can be no discrimination and relieves insurers from any responsibility to test their practices for systemic bias.

The realistic view is that systemic racism and historic discrimination can be reflected and perpetuated in so called neutral factors. Literally everyone outside the insurance industry trade associations understands that big data algorithms can reflect and reproduce historic discrimination and that presence of systemic racism demands proactive examination of insurer practices for unnecessary racial discrimination. It is also factually incorrect that disparate impact analysis harms risk based pricing. Such analysis is completely consistent with actuarial practices.

Mr. Birnbaum stated that he would like to get to the type of disproportionate impact that is tied to the use of proxies for prohibited characteristics and not to the outcomes. In earlier conversations we described one situation where insurers were using age and value of a home for underwriting factors for homeowners insurance with the result that communities of color were systemically denied home insurance because these communities were characterized by older, lower value homes – results directly tied to historic discrimination in housing. When challenged, insurers discovered that the factors they were using, age and value, were more correlated with race than with insurance outcomes. As a result of the disparate impact challenge the insurer moved to more relevant risk factors such as the condition of the home and its systems with the result that insurance became more available in communities of color and there was a better correlation between risk classifications and outcomes.

This second type of impact involves unintentional, unnecessary discrimination on the basis of race. It's unnecessary because the facially neutral factor that is reportedly associated with the insurance income is in whole or in part a proxy for the protected class characteristic and predictive of that class characteristic and not the outcome. Stated differently, the facially neutral factor has a spurious correlation to the insurance outcome and is really correlated to the protected class characteristic. So, CEJ suggests that a better definition of proxy discrimination to really get at that unnecessary racial discrimination would be: "Proxy discrimination is the use of a non-prohibited factor that, due in whole or in part to a significant correlation with a prohibited class characteristic, causes unnecessary, disproportionate outcomes on the basis of prohibited class membership."

Mr. Birnbaum stated that he will finish by saying that that any efforts to address systemic racism and proxy discrimination have to apply to all aspects of insurer's operations, not just pricing and underwriting. For example, insurers could be marketing based on protected class factors directly or indirectly and that would not be prohibited by the

definition. Yet with big data analysis insurers can micro target customers, focusing on those they view as high value and excluding those they view as low value with the result that those who are low value that happen to be in communities of color would never see preferred offers. Similarly, for anti-fraud and claims settlement, companies are using big data algorithms and sources of data such as facial analytics that are known to have a strong bias.

The other two points are that industry admits that the proposed definition adds no new tools or resources to regulators. During the December meeting of this Committee Mr. Birnbaum stated that he asked The Honorable Nat Shapo, former Director of the Illinois Department of Insurance whether it's his position that if a regulator discovered an insurer using a perfect proxy for race could the regulator take action to stop that discriminatory practice. Mr. Birnbaum stated that Dir. Shapo offered the view that regulators have that authority. So, given that view the proposed definition not only fails to add any new tools but actually restricts activities that insurance regulators have long engaged in to stop the use of blank proxies. Now, they somehow have to prove intent where currently regulators work on things they know have an unnecessary and unfairly disproportionate impact.

Mr. Birnbaum stated that, in closing, CEJ urges NCOIL to reject the proposed definition of proxy discrimination and hopes that the Committee's intent is to address impacts of systemic racism in insurance. If that's the case, the proposed definition accomplishes just the opposite and would memorialize such unnecessary proxy discrimination.

Dir. Shapo stated that he would like to speak for a couple of minutes since his prior testimony was just cited. First, Dir. Shapo stated that the description of his testimony from December is inaccurate. Dir. Shapo stated that the idea that Mr. Birnbaum asked him a question about a perfect proxy and that he gave a particular response doesn't conform to his memory and is not reflected in the record of the hearing. Dir. Shapo stated that he doesn't believe he was asked a question by Mr. Birnbaum, nor does he believe he could have been as NCOIL to his knowledge only allows Committee members to question witnesses – not other witnesses to do so. Also, Dir. Shapo stated that he thinks that the testimony he gave about the subject is quite a bit more nuanced than described by Mr. Birnbaum. Dir. Shapo stated that he did offer a view on the general subject that he thought the language in the current prohibition in rating based upon a protected class like race should be understood to cover proxy discrimination. Dir. Shapo stated that he has a longstanding concern about regulators sometimes not using the tools they have before they seek more and that informed his position that he just recited.

Dir. Shapo stated that he was also particularly concerned about moving toward a definition that could have bought in the same kind of disparate impact outcome under the guise of proxy discrimination which is reflected in the CEJ submission. The submission talked about proxy discrimination but it's clearly about disparate impact and the distinctions between the two have been well covered in this meeting and prior meetings. The bottom line as he understands it is that NCOIL felt strongly it was necessary to define proxy discrimination particularly because of the idea that without a definition it could bleed over to disparate impact, and NCOIL has also mentioned that the NAIC has adopted a proxy discrimination standard without defining the term so as a practical matter that is the position that NCOIL has taken and makes perfect sense.

Dir. Shapo stated that another accuracy point is that he believes on this question about the age and value of a house there is a reference to insurers finding that there was a correlation to race and not a correlation to risk. There wasn't a citation to this assertion in the CEJ letter but the best he can guess is that it's probably a reference to some decision in the 1980s under a federal anti-discrimination statute. Dir. Shapo stated that he believes the statement is that when challenged insurers found that the factors they were using, age and value of home, were more correlated to race than with insurance outcomes. Dir. Shapo stated that he is not aware of anything in the record that says insurers found that and concluded that they were using factors that were more correlated with race than insurance outcomes. Dir. Shapo stated that he thinks what you had there was a very specific federal statute under which litigation was brought that only pertains to housing and thus in the insurance world homeowners insurance, and the defendant insurance companies as rational actors will do in litigation entered into settlement agreements that may have affected the types of factors they used. That doesn't mean that they concluded that they were correlating with race and insurance outcome.

Dir. Shapo stated that those factual quibbles sort of funnel into the basic disagreement he and Mr. Birnbaum have on these issues. When looking at this it's a question of do you think disparate impact on every factor is the way to analyze this or is it better to funnel into what Chair Breslin said before which is to conduct an examination of individual factors and a determination of whether there is social unfairness that outweighs the social fairness of their actuarial justification. There was a lot of discussion about that at the last hearing and its brought up again here. Dir. Shapo stated that his view is that he thinks the concerns raised by certain Committee members are very important concerns but charge two of the discussion and the legislator's application of their political judgment is the well-established way that legislators have addressed these problems in the past.

Mr. Birnbaum stated that the record is clear that in the last Committee meeting he did ask Dir. Shapo that question and he did respond as set out in CEJ's letter. The second point is that it was not the 1980s it was 1990s and it was a claim brought under Federal Fair Housing Act (FHA). The fact that it was brought under the FHA doesn't really import a problem with the issue of whether disparate impact analysis is relevant and useful for insurance and whether it promotes better risk-based pricing or whether it harms. The evidence is that disparate impact analysis improves risk-based pricing. Industry has never been able to provide a single example of how its harms risk-based pricing. The fundamental problem here is that the definition is conflating two issues – its conflating the types of historic discrimination that leads to embedded outcomes such as shorter life expectancy for black Americans or certain diseases that black Americans suffer – that type of outcome can't be separated from actuarial analysis. The type of issue that we're talking about here can be separated from the outcomes and that's where the problem lies.

Cmsr. Considine stated that while Mr. Birnbaum and Dir. Shapo disagree on the issue of whether a question was asked at a prior meeting, he does not believe Chair Breslin would have allowed another interested party to ask another interested party a question at an NCOIL hearing. That has never been done and the record does not reflect that happening. Perhaps Mr. Birnbaum is referring to an exchange that happened at an NAIC meeting.

Rep. Jordan stated that his immediate concern is he is not sure what exactly the Committee is accomplishing. It just seems the Committee is creating a definition of proxy discrimination seemingly in response to the NAIC. And then there is the question of whether the definition eliminates or mitigates discrimination. In his opinion, it does not so he goes back to his first question of what is the Committee accomplishing. The Hippocratic oath of "do no harm" applies here and Rep. Jordan stated that he believes that if the definition is adopted the Committee is probably doing more harm than good. Rep. Jordan stated that he will close by saying if we substitute gender for race and you're hearing complaints from the people who it immediately affects and you move forward then are they really being heard.

Hearing no further comments or questions from legislators or interested persons, upon a Motion made by Sen. Travis Holdman (IN), NCOIL Immediate Past President and seconded by Rep. Joe Fischer (KY), NCOIL Secretary, the Committee voted to adopt the definition by a vote of 7-3. Rep. Jordan, Asm. Cahill and Asw. Hunter were "no" votes. Rep. Carter did not record a vote as she left the meeting prior to the vote being taken.

Chair Breslin then mentioned that the Committee will be meeting again during the NCOIL Spring Meeting next month. The Committee will continue its second charge of discussing disparate impact and specific rating factors. Currently, Peter Kochenburger, Executive Director, Insurance Law LL.M. Program, Deputy Director, Insurance Law Center, Associate Clinical Professor of Law at the University of Connecticut School of Law will be delivering a presentation regarding insurer's use of criminal history in underwriting. Chair Breslin offered the opportunity for everyone to offer suggestions for other topics for the Committee to discuss.

ADJOURNMENT

Upon a Motion made by Asm. Cahill and seconded by Sen. Holdman, the Committee adjourned at 2:30 p.m.