2019 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1142

2019 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee
Peace Garden Room, State Capitol

HB 1142
1/30/2019
31852

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Ellen LeTang typed by Kathleen Davis

Explanation or reason for introduction of bill/resolution:

Relating to interpretation of the state's insurance laws.

Minutes: Attachment 1, 2, 3

Vice Chairman Lefor: Opens the hearing on HB 1142.

Chairman Keiser: Introduces HB 1142. This bill is the restatement of the law limited to liability insurance. It's a reference source. The American Law Institute is one of the most important publications for the courts, attorneys, a reference source used by Judges. The ALI has gone one step too far making policy decisions and placing into their statement, in part, taking over the role of legislative bodies in this specific area. Insurance companies believe the appropriate venue is in the state at the Legislature. This bill restates the authority of the Legislative bodies in our country, relative to liability insurance. Insurance companies & NCOIL support it.

6:40

Rep Kasper: States are sovereign; why don't we just ignore it?

Chairman Keiser: Without this bill, that's what we are doing. The courts are using it. ALI has created policy in the law based on what they think should happen.

Rep Ruby: Are you aware of any instances in ND or is this a preventive measure?

Chairman Keiser: The is a source of authority. I can't say if ND has used it, but they will in the future. This is a great source to rely on.

Rep D Ruby: I like the idea of the stand it takes but I'm concern about the other area. Would this be an overreach to apply to all our laws and require judges to look at these sources first for all of our state laws?

Chairman Keiser: It would be a significant overreach.

Rep Schauer: I agree with you, but will this piece of legislation accomplish what it's supposed to? Will Judges take a look at this, understand it, and not use it in these cases you refer to?

Chairman Keiser: It may not stop a judge, but the attorneys may use it for defense.

Rep Kasper: Line 4, does this only limit it only to insurance law?

Chairman Keiser: That's my understanding.

Rep Kasper: The way the bill is written, Line 12, so there could be

Chairman Keiser: You have to include Line 11, restatement of the law, liability insurance. You would have to redefine.

Rep Kasper: ALI's restatement of the law liability insurance because we're referring to that document it's limited to insurance?

Chairman Keiser: Correct.

Rep M Nelson: I went to their web site. I don't see any harm. How up to date are you with what they're doing with final drafts?

Chairman Keiser: We have had extensive hearings at NCOIL, not as extensive at NCSL and discussion with both sides.

Rep C Johnson: Line 8 and 10, does that line include the courts of this state.

Chairman Keiser: that's correct.

Pat Ward~Represents State Farm: Attachment 1 & 2.

20:30

Rep Kasper: Could you get the 3 states.

Pat Ward: I believe it's TN, WV, OH. I will double check.

Jeff Uben~Insurance Commissioner of ND: I concur with Chairman Keiser & Pat Ward. It's taken a step too far. We support it.

Chairman Keiser: Anyone else in a neutral position? Closed the hearing.
Committee what are your wishes?

Rep D Ruby: Do you agree with Rep C Johnson about adding where it says a person may not apply?

Chairman Keiser: I think we are covered.

Rep. D. Ruby: I move for a Do Pass.

Rep Schauer: second.

Chairman Keiser: Discussion? seeing none, roll call on a Do Pass on HB 1142.
13 yes 0 no 1 absent Motion carried. Rep. Kasper is carrier.

Attachment 3 – submitted, did not testify – Steve Schneider

Date: Jan 30, 2019

Roll Call Vote #: 1

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES

BILL/RESOLUTION NO. 1142

House Industry, Business and Labor **Committee**

☐ **Subcommittee**

Amendment LC# or Description:

Recommendation

☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions ☐ Reconsider ☐

Motion Made by Rep Ruby **Seconded By** Rep Schauer

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	X		Rep O'Brien	X	
Vice Chairman Lefor	X		Rep Richter	X	
Rep Bosch	X		Rep Ruby	X	
Rep C Johnson	X		Rep Schauer	X	
Rep Kasper	X		Rep Adams	X	
Rep Laning	Abs		Rep P Anderson	X	
Rep Louser	X		Rep M Nelson	X	

Total (Yes) 13 No 0

Absent 1

Floor Assignment Rep Kasper

REPORT OF STANDING COMMITTEE

HB 1142: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1142 was placed on the Eleventh order on the calendar.

2019 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1142

2019 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

HB 1142
3/11/2019
Job #33472

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Amy Crane

Explanation or reason for introduction of bill/resolution:

relating to interpretation of the state's insurance laws.

Minutes: Att. #1-3

Chairman Klein: Opened the hearing on SB. All members were present.

Representative Keiser, District 47: introduced the bill. This is a very important bill to the legislative branch of government in North Dakota. The American law institute is an amazing organization. To be selected to be on their board, you have to be nationally recognized and an outstanding attorney in your field. They have taken up reviewing the laws of various states and when all of the states have taken a position on an issue, the ALI has restated it in their documents. The attorney's in the room and certainly when they were in law school, refer to the ALI repeatedly. If you're an attorney in practice and you get into an area on and you need to do research, one of the best resources is the ALI positions. NCOIL, have run into a dilemma, for some reason, the ALI board made a decision, especially in the restatement of liability insurance. In their restatement of this issue only, they began to take the laws that had been passed in some states and have restated it as what they think the law should be and not what states have done. And that's a dramatic change from what they have done in the past. Many states have addressed issues and decided not to do anything. We get lots of legislation that we hear but do not implement and there is a reason for that. This is the first and only case that we're aware of them deciding law. But many lawyers go to the ALI to determine what law is when using it in court It is taking away the authority of legislators to set policy specifically in insurance liability. This bill says the courts may not use the restatement of law from the American Law Institute when we deal with liability insurance as a source of authority on this issue. There is similar legislation that has been passed in some other states. I want to protect the legislative authority of legislators. If you go on the ALI's website, the final draft is on the website, it has been going on for 2+ years and they've made some revisions but it's still up and influencing court decisions based on their statement versus our legislation. Which is not to consider an issue which is an action in and of itself.

Chairman Klein: I sat through a number of presentations that related to this issue. We're not the only state that is concerned about this.

Patrick Ward, Association of North Dakota Insurers and State Farm: testified in support of the bill. I agree with Representative Keiser. As a general rule this is a group of highly respected lawyers, judges, professors, and what they are supposed to do is put together a compilation of law as it's been decided by courts in other states and sort of summarize what the law is, what the majority, and minority views are. But what's happened in the world of liability insurance, is they've decided to comment on what the law should be and how it should be and instead of leaning on the courts and legislators, they've taken the lead on this. So as a result several states have address this problem and passed legislation. I do have a copy a letter Mark Johnson wrote and submitted to the house committee on this issue **(see attachment #1).** And a letter written by six governors to the ALI asking them to back off on this issue **(see attachment #2).**

Jeff Ubben, Deputy Insurance Director: testified in support of the bill. There are times when silence speaks louder than words, oftentimes if no law exists to legislate a certain area it is because the legislative assembly has made the decision that the law is not needed or would be overregulating that specific area. For the ALI to suggest that no law exists because the assembly has not considered it, and for them to impose their own version of what they think the law would or should do, goes too far and takes authority away from the legislative branch.

Senator Piepkorn: Had the ALI not done this, we wouldn't be talking about this?

Jeff: That's correct. I agree with that.

Chairman Klein: The fact that their opinion is held at such a high standard and now with them sort of imposing their thoughts, that's the concern. The fact that we have looked up to them and now we have some concerns as regulators.

Jeff: That's right. We've seen several times in Supreme Court opinions where the ALI is the authority, and it is concerning seeing the weight do carry with the court system.

Chairman Klein: Adjourned the meeting, leaving the hearing on HB 1142 open in case any other individuals wanted to comment on the issue.

See attachment #3 for additional testimony submitted to the committee.

2019 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

HB 1142
3/11/2019
Job #33483

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Amy Crane

Explanation or reason for introduction of bill/resolution:

Relating to interpretation of the state's insurance laws.

Minutes: None.

Chairman Klein: We heard from Representative Keiser earlier but I said I would leave this open in case anyone else wanted to comment. Seeing none I'm going to close the hearing on HB 1142.

Senator Piepkorn: Moved a Do Pass.

Senator Roers: Seconded.

A Roll Call Vote Was Taken: 6 yeas, 0 nays, 0 absent.

Motion Carried.

Chairman Klein will carry the bill.

Date: 3/11
Roll Call Vote #: 1

2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1142

Senate Industry, Business and Labor Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Piepkorn Seconded By Roers

Senators	Yes	No	Senators	Yes	No
Chairman Klein	X		Senator Piepkorn	X	
Vice Chairman Vedaa	X				
Senator Burckhard	X				
Senator Kreun	X				
Senator Roers	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Klein

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1142: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1142 was placed on the Fourteenth order on the calendar.

2019 TESTIMONY

HB 1142

Attachment 1
1.30.19
HB 1142

NAMIC®
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES

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January 28, 2019

The Honorable George Keiser
Chairman, House Industry, Business and Labor Committee
State Capitol Building
600 East Boulevard
Bismarck, North Dakota 58505

Re: Letter in Support of HB 1142 – January 30, 2019 Hearing

Dear Chairman Keiser and Committee Members:

NAMIC is the largest property/casualty insurance trade association in the country, with more than 1,400 member companies representing 40 percent of the total market. NAMIC supports regional and local mutual insurance companies on main streets across America and many of the country's largest national insurers. NAMIC member companies serve more than 170 million policyholders. In North Dakota, we have 169 member companies, including 17 domiciled companies, which underwrite 49% of the state's insurance coverage.

NAMIC writes to express our support for HB 1142, which creates a new section of chapter 26.1-02 which will state:

> **Rules of interpretation.**
> In addition to the rules of interpretation under chapters 1-01 and 1 - 02, in interpreting this title, a person, including the courts of this state, shall apply the Constitution of the United States
> of America and the Constitution of North Dakota, this code, and the common law of this state. A
> person may not apply, give weight to, or afford recognition to, the American Law Institute's "Restatement of the Law, Liability Insurance" as an authoritative reference regarding interpretation of North Dakota laws, rules, and principles of insurance law.

As background, the American Law Institute (ALI) is an independent group of law professors, judges and lawyers that is best known for its Restatements of the Law on topics like torts, contracts, property and other legal areas. The Restatements are meant to be compilations of the common law as it has developed and have been highly persuasive with courts in interpreting and applying the law.

Unfortunately, when the ALI began its *Restatement of the Law, Liability Insurance* (Draft Restatement) it became apparent that the document was part of a trend which is best described in the attached letter from six Governors to the ALI, which quotes the late Justice Antonin Scalia:

Attachment 1
1.30.19
HB 1142

"Over time, the Restatements' authors have abandoned the mission of describing the law, and have

chosen instead to set forth their aspirations for the law ought to be . . . . And it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current
law." (*Kansas v, Nebraska*, 135 S. Ct 1042, 1064 (2015)).

NAMIC wishes to stress that it has no issue with how the North Dakota judicial branch applies the law or goes to a respected persuasive authority to resolve an open issue of law.

We believe that it is fundamental that the policymaking branches of government craft the law. HB 1142 is a clear statement of this.

Thank you for your attention to this matter. If you have any questions or concerns, please do not hesitate to contact me. In the meantime, I remain,

Sincerely,

Mark Johnston
Regional Vice President – Midwest

encl

cc: Mr. Rod Warner, NDAFMIC
Mr. Rob Hovland, ANDI

Attachment 2
1.30.19
HB 1142

April 6, 2018

The Honorable David F. Levi
President
The American Law Institute
4025 Chestnut Street
Philadelphia, Pennsylvania 19104

Dear Judge Levi:

We write today to express our sincere reservations and concerns regarding the American Law Institute's ("ALI") recent drafts of the proposed *Restatement of the Law, Liability Insurance*. It is our understanding that this project represents the ALI's first attempt to address insurance coverage law. As governors focused on protecting and preserving the unique role of states with respect to insurance regulation, we ask that you consider our shared concerns regarding the aims of this unprecedented publication.

Based on our preliminary review of the ALI's December 2017 draft *Restatement of the Law, Liability Insurance* ("Draft *Restatement*"), as well as the recently released March 27, 2018 revisions, we have serious concerns over the direction of the ALI's proposed publication. Indeed, the Draft *Restatement* goes beyond restating black-letter law; in some instances, it reinterprets and purports to modify existing insurance law. As the late Justice Antonin Scalia observed, "Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be . . . . And it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law." *Kansas v. Nebraska*, 135 S. Ct. 1042, 1064 (2015) (Scalia, J., concurring in part and dissenting in part). Justice Scalia's warning is both perceptive and prescient, particularly in light of the McCarran–Ferguson Act's unambiguous commitment of insurance matters to state jurisdiction.

Rather than offering a reliable and authoritative summary of existing law, the Draft *Restatement* proposes changes to established legal principles governing liability insurance contracts and disputes. Many of these proposed changes are properly within the prerogative of our state legislatures, at odds with established common law, or both. Unfortunately, courts have already begun citing the Draft *Restatement* even though it has not been formally adopted or approved by the ALI. From deciding where to locate to whether to hire more employees, businesses frequently rely upon the stability of the insurance market. Thus, we are concerned that the Draft *Restatement* could negatively affect our states' economic development opportunities by creating uncertainty and instability in the liability insurance market. If this trend continues, and courts embrace the ALI's aspirational approach, it could potentially jeopardize the availability and affordability of liability insurance. Therefore, if the ALI does not significantly revise or rescind the Draft *Restatement*, this implicit usurpation of state authority may require legislative or executive action.

Attachment 2
1.30.19
HB 1142

In light of the foregoing concerns, as well as those raised by other stakeholders, we respectfully request that the ALI immediately reconsider and significantly revise or rescind the Draft *Restatement*. Thank you in advance for your consideration of this request. We look forward to hearing from you.

Yours very truly,

Governor Henry McMaster
South Carolina

Governor Kim Reynolds
Iowa

Governor Paul R. LePage
Maine

Governor Pete Ricketts
Nebraska

Governor Greg Abbott
Texas

Governor Gary R. Herbert
Utah

Attachment 3
1.30.19
HB 1142

APCI/American Property and Casualty Insurance Association

January 15, 2019

House Industry, Business, and Labor Committee

Support HB 1142

Chairman Keiser and Members of the Committee,

Representing nearly 60 percent of the U.S. property casualty insurance market, the American Property Casualty Insurance Association (APCI) promotes and protects the viability of private competition for the benefit of consumers and insurers. APCI represents the broadest cross-section of home, auto, and business insurers of any national trade association. APCI members represent all sizes, structures, and regions, which protect families, communities, and businesses in the U.S. and across the globe.

Restatements, such as the Restatement of the Law, Liability Insurance (RLLI), are published by the American Law Institute (ALI). According to the ALI, Restatements "aim at clear formulations of common law . . . as it presently stands or might appropriately be stated by a court." ALI Style Manual, 2015. However, the RLLI does not reflect existing US insurance law. By frequently proposing new law in place of the existing insurance law, the RLLI overreaches into the province of the legislature and the judiciary. This Restatement should not be afforded recognition by courts as an authoritative reference regarding established rules and principles of insurance law. Rather, the legislature should make clear that the law of North Dakota is determined by the United States and North Dakota constitutions, the law expressed in a statute of this State, and the common law and case law precedent from this State. Courts should not apply, give weight, or afford recognition to, the American Law Institute's "Restatement of the Law, Liability Insurance" as an authoritative reference regarding North Dakota rules and principles of insurance law.

For these reasons, we support House Bill 1142.

Steve Schneider
sschneider@aiadc.org
312.782.7720

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> "Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for the law ought to be . . . . And it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law." (*Kansas v, Nebraska*, 135 S. Ct 1042, 1064 (2015)).

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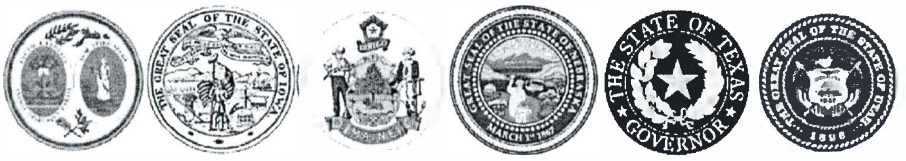
cc: Mr. Rod Warner, NDAFMIC
Mr. Rob Hovland, ANDI



April 6, 2018

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HB1142 3/14/19 Att #2
P.2

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Yours very truly,

Governor Henry McMaster
South Carolina

Governor Kim Reynolds
Iowa

Governor Paul R. LePage
Maine

Governor Pete Ricketts
Nebraska

Governor Greg Abbott
Texas

Governor Gary R. Herbert
Utah

HB 1142 3/11/19 Att #3

APCI/American Property and Casualty Insurance Association

March 11, 2019

Senate Industry, Business, and Labor Committee

Support HB 1142

Chairman Klein and Members of the Committee,

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For these reasons, we support House Bill 1142.

Steve Schneider
sschneider@aiadc.org
312.782.7720