

MINUTES
SENATE AND HOUSE INTERIM COMMITTEES ON INSURANCE AND COMMERCE
State Capitol, Room 171
Little Rock, Arkansas

Tuesday, November 7, 2017

The Senate and House Interim Committees on Insurance and Commerce met jointly at 8:30 a.m. Tuesday, November 7, 2017, at the State Capitol, Room 171, in Little Rock, Arkansas.

Committee members present: Senators Jason Rapert, Chairman; and Larry Teague. Representatives Charlie Collins, Chairman; Robin Lundstrum, Vice Chair; Mark Lowery, Joe Jett, Les Eaves, Grant Hodges, Laurie Rushing, Ken Henderson, DeAnn Vaught, Marcus Richmond, John Maddox, and Les Warren.

Also attending: Representatives Danny Watson, Fred Allen, Charles Blake, Charlotte Douglas, Trevor Drown, Kim Hammer, Douglas House, and Dan Sullivan.

Senator Rapert called the meeting to order.

CONSIDERATION TO APPROVE RESPECTIVE MINUTES [EXHIBITS C-1, C-2]

Representative Jett made a motion to approve the July 7, 2017, House Insurance and Commerce Committee meeting minutes, and the motion carried.

Senator Rapert asked if there were any objections to approving the July 19, 2017, Senate and House Insurance and Commerce Committee meeting minutes, and with no objections, the minutes were approved.

ARKANSAS STATE BANK DEPARTMENT PRESENTATION

Ms. Susannah Marshall, Deputy Commissioner, Arkansas State Bank Department, stated the Bank Department has had a successful 2017 and is positioned very well to close out the year. Overall the state charter banks in Arkansas are operating in a strong financial condition and continue to experience a modest level of growth. There are 79 state charter banks with approximately \$11 billion in total assets; of these 79, three are at or exceeding the \$10 million mark.

The peak number of state charter banks was close to 200 at one point, but Arkansas charter banks are now at their lowest number. The concern about small, local communities being under banked always exists. When acquisitions happened in Arkansas small communities, the resulting bank was committed to providing a financial presence. Arkansas state charter banks are committed to saving those markets. There has not been a significant impact from the low number of charter banks. There are no programs, processes or pro-active measures in-place for assistance, however, if a group wants to charter a bank to assist these communities, the Bank Department is happy to visit with them. There are different business models, and the department will work with them for what works best for a new institution in the smaller area.

In response to a question from Representative Eaves asking how the banks will handle the medical marijuana deposits, Ms. Marshall noted, all laws dealing with this are federal laws and they are charged with implementing the federal law. It is still against federal law to open accounts for marijuana-related businesses.

UPDATE ON ARKANSAS INSURANCE DEPARTMENT (AID) RULE TO ALLOW MEDIGAP PURCHASE FOR SOMEONE UNDER 65 WITH DISABILITY (Act 684 of 2017) [EXHIBITS E1-4]

Mr. Booth Rand, Managing Attorney, AID, stated Act 684 of 2017, went into effect in August and requires the AID to modify its Rule 27, also called the Medigap Rule, to require Medicare issuers to offer a Medigap policy to persons under age 65 with a disability. The rule promulgation process began September 5, 2017, and the administrative record is open until November 13, 2017, for industry comments about the effective date. The Medigap issuer is wanting to wait one year before the changes become effective. The Commissioner wants changes to be effective the first quarter of 2018. These comments are under consideration, and the department is hopeful to have policies available in early 2018.

Mr. Rand answered Senator Rapert's question, noting a delay will not lock out Arkansans from coverage for the year 2018. Arkansas has one company, Blue Cross and Blue Shield, ready to go with the product. AID is waiting for other carriers that are not yet ready.

Senator Rapert noted for the record, many of these companies are offering similar products in other states. Most states around Arkansas have allowed their people to purchase these policies. This is not as if they are having to recreate the wheel, but is a matter of whether they are going to do so in Arkansas. This change to amend the product will allow Arkansans access to coverage that otherwise was not available to them.

Mr. Rand agreed with Senator Rapert and stated that they do not want to disrupt the carriers but do not think this change will be that significant, so AID will give the carrier some time, July 2018, to have their products available.

Senator Rapert stated to clarify what he was hearing is that at least one carrier will offer the product. Mr. Rand said, "Yes". Senator Rapert noted the early bird will get the worm.

Senator Rapert asked to be kept informed and to ensure support of the spirit of the legislation. He noted the committee will meet again to discuss this issue.

INCORPORATION BY REFERENCE

[HANDOUT 1]

Senator Rapert explained there has been discussion at national meetings about issues in other states on a concept known as "incorporation by reference". To illustrate, he noted the ABC Compact is adopted, and 45 states adopt ABC's compact. It also allows for the compact to make changes to its rule book, which applies to the law that the member states adhere to. What has happened over the years, is that changes get made, and as it relates to the National Association of

Insurance Commissioners (NAIC), the rule book gets extremely lengthy, and currently stacks three feet tall. There is a concern that legislatures have not been fully involved in what has been happening in the changes that impact insurance law for every member state, including Arkansas. There have been challenges to the concept and the process. The challenge is based on the unconstitutional delegation of authority; meaning the legislature has unconstitutionally delegated its authority away in not providing oversight of these changes. He said he is not aware that Arkansas is having a problem. The AID is reviewing all statutes to see if there has been that step of legislative approval for the changes implemented through the NAIC.

Ms. Alexandra Stephens (Alix), Legislative Attorney, Bureau of Legislative Research (BLR), prefaced her remarks by noting the BLR is the General Assembly's non-partisan impartial staff services agency, so nothing she says should be interpreted as advocating for or against any issue presented by the research.

She said Senator Rapert asked her to research the "incorporation by reference" and "delegation of authority" and how it's used in Arkansas. She said when legislation is proposed, it is the duty of the General Assembly to enact the laws. Important issues are brought by a member to the BLR to get a bill drafted; it is a step in the process everyone takes. The common drafting device for proposed legislation is to incorporate all or part of provisions of another statute by specific reference to that statute, federal law, or uniform nationally recognized manuals where appropriate.

The potential issue when using "incorporation by reference", is the delegation of legislative power. The question is whether this could be constitutional or not. The delegation of legislative power is done in limited instances and the practice varies among all states. Important questions to be addressed include:

- What powers may the General Assembly delegate?
- To whom may the General Assembly delegate powers? and;
- What is the scope of the delegation?

It is important for a state legislature to give specific guidance and standards to follow when implementing the details of policy contained in legislation. Arkansas follows the general rule that when a legislature adopts a law, or part of a law in existing form in which it has already been enacted by another legislative body, there is no delegation of authority.

When the BLR prepares something that references a federal law it includes the language, "as that law existed on a specific date". This is done for the legislature to have a specific reference to a source or law as it existed at that time.

Senator Rapert said for the record today that this is being looked at in a very clinical way. "Where do we stand? Have we had proper oversight? If not, we want to come back and update our oversight and do what needs to be done as a legislature."

Senator Rapert emphasized the NAIC is not a legislative body but a non-profit entity formed in which its membership is the 50 insurance commissioners from each state, and most of them are appointed to their positions, not elected.

Ms. Stephens said there are potential issues when a statute “incorporates by reference” from a manual or guide book from a third party or non-legislative body. This involves a potential unconstitutional delegation of authority, depending on the facts and whether or not there is an appropriate amount of legislative oversight. These instances are fact intensive, fact-based situations that are decided in a court of law. The General Assembly has delegated authority to the insurance commissioner under Ar. Code § 23-61-108. This is to adopt the rules and regulations including those proposed by the NAIC. Section 23-61-108 in its delegation of authority to the insurance commissioner allows the commissioner to adopt and apply standards drafted by a private entity that were not in existence at the time of the legislative delegation. She noted and said in her memorandum (Handout 1), options were available if the General Assembly wished to adopt mechanisms to lessen delegation concerns such as using “as it existed” language or having the commissioner appear before legislative committees when adopting new policies to authorize new publications.

Senator Teague noted that as per his service on the Revenue and Tax Committee, the Department of Finance and Administration does not get to adopt federal regulations until the legislature passes them into law. He asked if this was the same issue. Matthew Miller, Assistant Director for Legal Services, BLR, said the insurance model is set up where the Insurance Commissioner has more flexibility at the administrative level so as not to have to come back repeatedly to the General Assembly.

Senator Rapert said AID’s omnibus bill is a place where substantive changes that need to be made are typically handled. However, there are not always references included to changes in the NAIC manual.

Senator Rapert stated from his perspective, there is not a problem with what the NAIC has done in their updates. It is a matter of process, and as legislators we are concerned with the adoption of changes in this state being done appropriately and under the law with proper oversight. Expect us to come back for further discussion.

Commissioner Allen Kerr, AID, stated the department is about 30% through its investigation and has found some issues that need to be addressed. Most of NAIC rules pertain to financial practices and financial audits, which are mostly standardized across the states. The expense of individual audits per state is passed along to the citizen/consumer, and standardization is less expensive for the industry. He noted the method by which this is achieved may need some work. NAIC uses the most current edition, and he said if the state addresses each new addition by rule, it is not an unconstitutional delegation.

Ms. Suzanne Tipton, Legal Counsel, AID, stated that of the 30% reviewed, there is a mixture of the way “incorporation by reference” has been done. Some do, as the tax code does, which is “as existed at a certain date” and those are fine, but they need to be updated every time there is a

change. There are other times where it is mentioning a current edition of something or mentioning a publication at a fixed time, and if that changes, it needs to be updated. After the investigation is complete in two to three weeks, it will be known what needs to change. Also, the rules will be looked at to see if those have been kept updated through the process.

Senator Rapert stated that NAIC will refuse to accredit the insurance department under the guidelines if we do not adopt their updates. Therein lies a part of the contention, that an entity is requiring its updates be adhered to or lose accreditation. Commissioner Kerr's department will continue its review, and the committee will meet again on this issue. Senator Rapert concluded the discussion, noting he will be attending the NCOIL meeting the following week and will become president of the organization for 2018.

REPORTS RECEIVED

Commissioner Kerr stated "2017 Medical Malpractice Insurance Market in Arkansas" should stand as written.

With no further business, the meeting adjourned at 9:41 a.m.