LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

January 24, 2020

Friday, January 24, 2020

Persons Present:

Adams, Marguerite (Peggy) L.
Braun, Jessica
Breard, L. Kent
Brown, James A.
Bumgartner, Adrianne L.
Cassagne, Rachal D.
Corbett, William R.
Coreil, Jeffrey
Crigler, James C., Jr.
Crigler, John D.
Cullens, J.E., Jr.
Curry, Kevin C.
Davis, Monette M.
Domingue, Billy J.
Garofalo, Raymond E., Jr.
Gregorie, Isaac M. "Mack"
Hamilton, Leo C.
Handy, Christopher R.
Hargrove, Joseph L., Jr.
Hayes, Thomas M., III
Haymon, Cordell H.
Herring, Jimmie C.
Hester, Mary
Janke, Benjamin West
Kleinpeter, Robert
Knighten, Arlene D.
Kunkel, Nick
Kutcher, Robert A.
Lovett, John
Manning, C. Wendell
McCain, Allena B.
Nedzel, Nadia E.
Norman, Rick J.
North, Donald W.
Philips, Harry "Skip", Jr.
Pirtle, Amy
Price, Donald W.
Richardson, Sally Brown
Riviere, Christopher H.
Roussel, Randy
Saloom, Douglas J.
Scalise, Ronald J., Jr.
Seicshnaydre, Stacy E.
Sole, Emmett C.
Surprenant, Monica T.
Taranto, Todd Charles
Tate, George J.
Title, Peter S.
Waller, Mallory
Weems, Charles S., III
Wilson, Evelyn L.
Winsberg, Gabriel J.
Zeno, Micah C.
Ziober, John David

President Rick J. Norman called the January 24, 2020 Council meeting to order at 10:00 a.m. at the Lod Cook Alumni Center in Baton Rouge. After asking the Council members to briefly introduce themselves, the President called on Mr. Skip Philips, Co-Chair of the Torts and Insurance Committee, to begin his presentation of materials.

Torts and Insurance Committee

Mr. Philips began his presentation by providing the Council with a brief overview of the Committee, noting that he and Mr. Donald Price served as the Co-Chairs of the Committee, with LSU Interim President Tom Galligan and Professor Bill Corbett serving as Co-Reporters. He also noted that the Torts and Insurance Committee had been assigned two resolutions, Senate Resolution No. 220 and House Resolution No. 220, both of the 2019 Regular Session, and explained that today's presentation pertained to House Resolution No. 220, which asked for revisions to the bad faith insurance statutes.

Mr. Philips explained that the Committee had set out to take R.S. 22:1892 and 1973 – the two primary "bad faith" insurance statutes – and synthesize and combine them. He added that, in terms of "new" drafting, the Committee had not made many changes and emphasized that the Committee taken care not to add or alter any existing causes of action. The Chair then gave an overview of the Committee and its work thus far, highlighting the Committee's diverse membership of both defense and plaintiffs' attorneys, as well as judges and professors, and noting that the Committee had met several times so far. He further noted that the Committee had sought to achieve consistency with respect to the various time periods and remedies provided throughout

the two statutes at issue. He highlighted the currently disparate remedies as a major point of improvement, explaining that current law was messy, allowing parties to choose from several different options. Mr. Philips additionally pointed out that the Committee had not sought to address the issue of prescription as it pertained to bad faith insurance claims, reminding the Council that the Law Institute's Prescription Committee had already studied that particular issue and ultimately concluded that this policy decision should be made by the legislature.

Moving to the substance of the day's presentation, Mr. Philips pointed to one other issue that the Committee had not yet addressed in its draft, noting that the Committee had left undecided the issue of whether to include a statement of exclusivity with respect to the remedies set forth. He emphasized that this issue was one about which the Committee was seeking feedback from the Council. Mr. Philips then turned the Council's attention to the Committee's draft proposals. Starting at the beginning of the document, he noted that the idea was to impose the duty of good faith, which includes the listed "sub-duties," on all insurers. He clarified that although there were other provisions in Title 22 that applied separately to specific types of insurers, this provision would apply across the board. A motion was then made and seconded to approve proposed Paragraph (A)(1).

With the floor open for questions, one Council member inquired as to whether there was a reason for inclusion of the word "affirmative" prior to "duty". Mr. Philips clarified that he did not believe the word to be necessary and that the Committee had not sought to accomplish any specific goal by way of its inclusion. Another Council member inquired as to the reason behind replacing "his" with "the," and the Chair explained that this was changed to achieve gender neutrality in conformance with legislative drafting conventions. The Council member then asked whether the language could be inferred to incorporate a third-party claimant, and Mr. Philips responded by noting that the relevant third- versus first-party distinctions were dealt with explicitly so as to avoid that type of confusion. Next, a Council member asked about the use of the word "adjust," inquiring as to whether that term was defined anywhere. The Council member noted his understanding that those in the industry would know what the term meant but nevertheless wondered whether a more specific term might be appropriate. After the Council member asked why the term had been added, Mr. Philips explained that the term was already being used in current law, and the relevant change was made for purposes of efficiency.

A Council member then inquired as to why it was necessary to separate the provision at issue into two separate paragraphs, and the Chair explained that this dichotomy was put into place to clarify the distinctions as to which duties were owed specifically to first versus third parties. The Council member followed up, inquiring whether the thirty-day limits contained in Subsection B might contradict the duties set forth in Subsection A. Mr. Philips noted that he did not believe this to be the case and argued that the separate provisions simply overlapped, with the language providing for both general and specific duties. The Council then voted on the motion on the table, and with all in favor, Paragraph (A)(1) was approved to read as follows:

§ 1973. Good faith duty; claims settlement practices; causes of action; penalties

A.(1) ~~An~~ All insurers~~, including but not limited to a foreign line and surplus line insurer, owes~~ owe to ~~his~~ their insured a duty of good faith and fair dealing, including~~. The insurer has an affirmative duty to adjust claims fairly and promptly and~~ a duty to make a reasonable effort to adjust and settle claims fairly and promptly. ~~with the insured or the claimant, or both. Any~~

Next, Mr. Philips asked the Council to turn its attention to Paragraph (A)(2), explaining that the provision brought third parties into the fold and emphasizing that the Committee wanted to capture time and ensure that the process was moving forward. He further noted that the provision was effectively the same in substance as current law and that a breach of Paragraph (A)(2) that was deemed "reasonable" would not be penalized, noting that this mechanism could be found in Subsection C pertaining to damages. A

Council member asked whether "any party in interest" would include third parties, and after the Chair clarified that it would, the Council member asked whether the rule as explained by Mr. Philips would not in fact be new to the law. Mr. Philips answered that in his belief, it would not be new and emphasized that no new cause of action had been created. He further clarified that the party would need to have some type of interest in the proceeds of the policy, which led to another follow-up question: whether there would be a duty to settle with third parties within thirty days. Mr. Philips explained that this would *sometimes* be the case, pointing out that the proposal provided caveats and that this was nothing new and was, in fact, litigated over frequently.

Returning to the general structure of the provisions discussed thus far, a Council member inquired as to whether he was correct in his understanding that, essentially, "Subsection A is general, and Subsection B 'puts meat on the bones.'" Mr. Philips agreed with this categorization. In response, the Council member pointed out that, although Paragraph (A)(2) "connected" with Subsection B, Paragraph (A)(1) did not. The Council member then suggested the addition of language that would connect Paragraph (A)(1) to Subsection B, proposing that "in accordance with Subsection B" be added at the end of Paragraph (A)(1). Although this suggestion was initially met with agreement from the Council, Mr. Philips highlighted the argument that Paragraph (A)(1) could in fact be *broader* than Paragraph (A)(2). Accordingly, he urged the Council ought to forgo the aforementioned "connection" of Paragraph (A)(1) to Subsection B. Discussion of these competing points followed, and the Council eventually came to an agreement with Mr. Philips that the duties owed to an insured were broader than those owed to third-party claimants.

The Council member who had previously suggested adding "connective" language, although noting that the Chair had made a salient point, nevertheless argued that some language should be added to clarify that Paragraph (A)(1) is indeed broader. Agreeing with this suggestion, Mr. Philips proposed the addition of the language "In addition to the duty of good faith and fair dealing that insurers owe to their insured," at the beginning of Paragraph (A)(2). In response to this suggestion, a Council member pointed out that the qualifiers contained in Paragraph (A)(1) – "reasonable" and "fairly and promptly" – were not found in Paragraph (A)(2). Mr. Philips noted that Paragraph (A)(2) referred to the more specific Subsection B, thus rendering the qualifiers unnecessary. The Council member accepted this point with respect to the language "fairly and promptly" but argued that the concept of reasonableness should nevertheless be carried over into Paragraph (A)(2). At this, a member of the Torts and Insurance Committee noted that the Louisiana Supreme Court had stated that current R.S. 22:1973(B)(1) through (6) – now proposed R.S. 22:1973(B)(4)(a) through (d) – represented the *exclusive* third-party remedies. Thus, the Committee member argued, adding a "reasonableness" requirement would add new causes of action, whereas the current language would *not* change the law. Mr. Philips agreed with this summation of the issue, and the Council accordingly agreed that reasonableness language should not be added.

After additional discussion regarding the addition of language to the pertinent provisions, a Council member moved to add the Chair's suggested language to the beginning of Paragraph (A)(2). The motion was seconded and ultimately carried. The Council then returned to the motion to approve Paragraph (A)(2) as amended. The motion passed, and the provision was adopted as follows:

> (2) In addition to the duty of good faith and fair dealing that insurers owe to their insured, all insurers owe to the insured and third-party claimants the duty to adjust and settle claims in accordance with Subsection B of this Section. ~~who breaches these duties shall be liable for any damages sustained as a result of the breach~~.

Mr. Philips next asked the Council to turn its attention to Paragraph (B)(1). A motion was made and seconded to approve the provision, and a Council member asked whether the language "any party in interest" expanded upon current law. The Chair, answering in the negative, noted that the language had been taken directly from R.S. 22:1892(A)(1) and (2). The Council member pointed out that present R.S. 22:1892(A)(2) dealt solely with property damage and also noted that "any party in interest" is arguably broader than

"third-party claimant". Mr. Philips explained that the Committee had no intent to change anything in that regard, and a friendly amendment was accepted to fix the issue identified by the Council member. Returning to the motion on the floor, newly amended Paragraph (B)(1) was approved as follows:

> B.(1) All insurers issuing any type of contract, other than those specified in R.S. 22:1811, 1821, and Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, shall pay the amount reasonably due any insured within thirty days after receipt of satisfactory proof of loss from the insured or any party in interest. The insurer shall notify the insurance producer of record of all such payments for property damage claims made in accordance with this Paragraph. If the amount due is in dispute, the insurer shall tender to the insured within thirty days of receipt of satisfactory proof of loss the amount that is not reasonably in dispute.

The Chair then turned to Paragraph (B)(2), explaining that this provision was taken from R.S. 22:1892(A)(3) but made more simplistic via the removal of ambiguous language. A motion was made and seconded to approve this provision, as well as Paragraph (B)(3), and with all votes in favor, Paragraphs (B)(2) and (3) were approved as follows:

> (2) Except for claims arising during a declared state of emergency under R.S. 29:721 et seq., the insurer shall initiate loss adjustment of a property damage or medical expense claim within fourteen days after notification of loss by the claimant. In the case of a declared state of emergency, the commissioner may promulgate a rule extending this time period no longer than thirty days.
>
> (3) All insurers shall make a written offer to settle any third-party property damage claim within thirty days of the receipt of satisfactory proof of loss for that claim.

Next, Mr. Philips directed the Council's attention to Paragraph (B)(4), noting that this provision essentially served as a recitation of current R.S. 22:1973(B) and reiterating that each of the causes of action was found in current law. A motion was made and seconded to approve Paragraph (B)(4), and a Council member inquired as to why "knowingly" was removed. Mr. Philips answered that the Committee did not find it necessary given the more detailed Subsection C, which was where the requisite state of mind would now be provided, adding that it may even add unnecessary confusion. Another Council member then suggested some "clean up" revisions, which were accepted as friendly amendments. A Council member then asked whether Paragraph (B)(4) was intended to provide an exclusive list, and Mr. Philips explained that, while there could obviously be other "bad acts," the list set forth in Paragraph (B)(4) was indeed exclusive with respect to third parties. Mr. Donald Price, the other Co-Chair, added that this was a point that had been confirmed by the Louisiana Supreme Court, and the Council member suggested referencing the case in which this was stated in a Comment to the provision.

Another question was then posed with respect to the "knowingly" standard; in particular, the Council member asked whether there were any cases on point. A Committee member answered in the affirmative, adding that the "knowingly" standard was simply applied as a part of the court's overall "reasonableness" inquiry, such that current law was, in fact, consistent with the Committee's proposal in light of the language contained in Subsection C. A Council member then posed a related question, wondering whether someone could be said to have violated the statute if their actions were nevertheless reasonable. Mr. Price clarified that there would indeed be a violation but that the violation simply would not be actionable. The Council member noted his belief that this was an odd dichotomy – that unreasonableness was not itself required for there to have been a "violation" of the statute. The Co-Chairs noted this concern but nevertheless urged the Council member to read each cause of action in concert with the provisions of Subsection C. The Council then returned to the motion on the floor, and with all votes in favor, Paragraph (B)(4) was approved as follows:

(4) Any one of the following acts~~, if knowingly~~ committed or performed by an insurer~~,~~ constitutes a breach of the insurer's duties to an insured or third-party claimant imposed in Subsection A of this Section:

~~(1)~~ (a) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.

~~(2)~~ (b) Failing to pay a settlement within thirty days after an agreement to do so is reduced to writing.

~~(3)~~ (c) Denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge or consent of, the insured.

~~(4)~~ (d) Misleading a claimant as to the applicable prescriptive period.

~~(5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause.~~

~~(6) Failing to pay claims pursuant to R.S. 22:1893 when such failure is arbitrary, capricious, or without probable cause.~~

Mr. Philips moved next to proposed Subsection C, noting that this was the final actual *change* proposed by the Committee, since the remainder of proposed R.S. 22:1973 fell outside of the purview of the legislative resolution and thus was simply copied word-for-word from R.S. 22:1892. A motion was made and seconded to approve Subsection C, at which time a Council member voiced concern over the reference to "good faith and fair dealing." The Council member argued that there was a conceptual issue with allowing third-party claimants to recover all damages while simultaneously referring to duties not owed to them under Subsection A. The Chair noted that he had initially thought that this was a nonissue but nevertheless conceded the point. The Council member suggested that this problem could be cured by simply deleting the language "the duty of good faith and fair dealing as defined in" on lines 7 and 8 of page 2. Mr. Philips accepted this change, as well as an additional suggestion to change "and" to "or" on line 8. Another Council member further suggested replacing "such violation" with "the insurer's conduct" on line 8, and this suggestion was also accepted. The introductory portion of Paragraph (C)(1) therefore read as follows: "In addition to the insured loss, any insurer who violates Subsections A or B of this Section where the insurer's conduct is arbitrary, capricious, or without reasonable cause shall be liable for any or all of the following:"

A Council member then inquired into the meaning behind the phrase "arbitrary, capricious, or without reasonable cause," arguing that the phraseology did not reflect any definitively understood legal standard and was thus ambiguous. The Council member further argued in favor of the mindset instead being made part of the actual violation itself, as opposed to connecting it solely to the ability to recover damages. A guest attendee then expressed apprehension at adding a cause of action that would allow third parties to recover attorney fees, and the Co-Chairs both emphasized that no cause of action was being added, but rather, all that was being done was that the two existing bad-faith statutes were being wedded with respect to what amounts were recoverable. The Council member who had previously argued in favor of the mindset being connected to the actual violation as opposed to the recovery now rephrased his point, arguing now that the deletion of "knowingly" removed a mental component from Paragraph (B)(4). Mr. Price again contended that, even if the Council member was correct in the abstract, the structure of the statute ensured that no issues would result in practice, explaining that Subsection B set out the desired behavior, and Subsection C set out what led to liability.

Taking a brief detour from this issue, a Council member raised the question of whether the term "contract" on line 15 was overly broad and would inadvertently include a settlement agreement. Mr. Philips accepted this as a good point and suggested replacing "contract" with "insurance policy."

Returning to the prior issue of whether the requisite mindset should be connected to the definition of a violation, as opposed to simply set out in relation to recovery, another Council member wondered whether an exclusivity provision might take care of the problem previously articulated. The Council member reasoned that, if there was indeed an issue as suggested, the issue would be that there could potentially be some other form of liability for a "violation" that would not be addressed in Subsection C, but a statement to the effect that the remedies in Subsection C are exclusive would close that door. Mr. Philips, noting that this may be an idea worth exploring, reminded the Council that the issue of exclusivity was one about which the Committee wanted to get the Council's thoughts. Another Council member voiced support for the addition of a statement of exclusivity, opining that, in addition to being a good idea generally, it would take care of the possible issue identified earlier. Other members voiced agreement with this opinion.

Next, several questions were raised with respect to the language of Subsection C – for example, "any or all" and "shall" versus "may". A Council member noted, in support of the prior argument, that this was another problem with baking the condition for liability in with the liability provision itself. Ultimately, a motion was made and seconded to recommit Subsection C to the Committee. The motion carried, and Subsection C was recommitted. Finally, the Chair took up the remainder of the draft proposal, Subsections D through G. After two minor changes – replacing "adequate" with "satisfactory" on line 42 and replacing "probable" with "reasonable" on line 45 – were accepted as friendly amendments, a motion was made and seconded to approve Subsections D through G. The motion carried, and the provisions were approved as follows:

D.(1) The period set herein for payment of losses resulting from fire and the penalty provisions for nonpayment within the period shall not apply where the loss from fire was arson related and the state fire marshal or other state or local investigative bodies have the loss under active arson investigation. The provisions relative to time of payment and penalties shall commence to run upon certification of the investigating authority that there is no evidence of arson or that there is insufficient evidence to warrant further proceedings.

(2) The provisions relative to suspension of payment due to arson shall not apply to a bona fide lender which holds a valid recorded mortgage on the property in question.

(3) Whenever a property damage claim is on a personal vehicle owned by the third party claimant and as a direct consequence of the inactions of the insurer and the third party claimant's loss the third party claimant is deprived of use of the personal vehicle for more than five working days, excluding Saturdays, Sundays, and holidays, the insurer responsible for payment of the claim shall pay, to the extent legally responsible, for reasonable expenses incurred by the third party claimant in obtaining alternative transportation for the entire period of time during which the third party claimant is without the use of his personal vehicle. Failure to make such payment within thirty days after receipt of satisfactory written proof and demand therefor, when such failure is found to be arbitrary, capricious, or without reasonable cause shall subject the insurer to, in addition to the amount of such reasonable expenses incurred, a reasonable penalty not to exceed ten percent of such reasonable expenses or one thousand dollars whichever is greater together with reasonable attorney fees for the collection of such expenses.

(4) When an insurance policy provides for the adjustment and settlement of first-party motor vehicle total losses on the basis of actual cash value or replacement with another of like kind and quality, and the insurer elects a cash settlement based on the actual cost to purchase a comparable motor vehicle, such costs shall be derived by using one of the following:

(a) A fair market value survey conducted using qualified retail automobile dealers in the local market area as resources. If there are no dealers in the local market area, the nearest reasonable market can be used.

(b) The retail cost as determined from a generally recognized used motor vehicle industry source; such as, an electronic database, if the valuation documents generated by the database are provided to the first-party claimant, or a guidebook that is available to the general public. If the insured demonstrates, by presenting two independent appraisals, based on measurable and discernable factors, including the vehicle's preloss condition, that the vehicle would have a higher cash value in the local market area than the value reflected in the source's database or the guidebook, the local market value shall be used in determining the actual cash value.

(c) A qualified expert appraiser selected and agreed upon by the insured and insurer. The appraiser shall produce a written nonbinding appraisal establishing the actual cash value of the vehicle's preloss condition.

(d) For the purposes of this Paragraph, local market area shall mean a reasonable distance surrounding the area where a motor vehicle is principally garaged, or the usual location of the vehicle covered by the policy.

E.(1) All claims brought by insureds, workers' compensation claimants, or third parties against an insurer shall be paid by check or draft of the insurer or, if offered by the insurer and the claimant requests, electronic transfer of funds to the order of the claimant to whom payment of the claim is due pursuant to the policy provisions, or his attorney, or upon direction of the claimant to one specified; however, the check or draft shall be made jointly to the claimant and the employer when the employer has advanced the claims payment to the claimant. The check or draft shall be paid jointly until the amount of the advanced claims payment has been recovered by the employer.

(2) No insurer shall intentionally or unreasonably delay, for more than three calendar days, exclusive of Saturdays, Sundays, and legal holidays, after presentation for collection, the processing of any properly executed and endorsed check or draft issued in settlement of an insurance claim.

(3) Any insurer violating this Subsection shall pay the insured or claimant a penalty of two hundred dollars or fifteen percent of the face amount of the check or draft, whichever is greater.

F.(1) When making a payment incident to a claim, no insurer shall require repairs be made to a motor vehicle, including window glass repairs or replacement, in a particular place or shop or by a particular entity.

(2) An insurer shall not recommend the use of a particular motor vehicle service or network of repair services without informing the insured or claimant that the insured or claimant is under no obligation to use the recommended repair service or network of repair services.

(3) An insurer shall not engage in any act or practice of intimidation, coercion, or threat to use a specified place of business for repair and replacement services.

(4) The commissioner may levy the following fines against any insurer that violates this Subsection:

(a) For a first offense, one thousand dollars.

(b) For a second offense within a twelve-month period, two thousand five hundred dollars.

(c) For a third or subsequent offense within a twelve-month period, five thousand dollars.

(5) A violation of this Subsection shall constitute an additional ground, under R.S. 22:1554, for the commissioner to refuse to issue a license or to suspend or revoke a license issued to any producer to sell insurance in this state.

~~The provisions of this Section shall not be applicable to claims made under health and accident insurance policies.~~

G. The Insurance Guaranty Association Fund, as provided in R.S. 22:2051 et seq., shall not be liable for any special damages awarded under the provisions of this Section.

At this time, Mr. Philips asked the Council for a policy vote with respect to adding a statement of exclusivity in Subsection C. A motion was made and seconded to direct the Committee to add a statement to the effect that Subsection C shall provide the exclusive remedy for breach by insurers of the duty of good faith and fair dealing. The motion carried. Mr. Philips then concluded his presentation, and the Council adjourned for lunch, during which time there was a meeting of the Membership and Nominating Committee.

Membership and Nominating Committee

After lunch, the President called on Mr. Emmett C. Sole, Chairman of the Membership and Nominating Committee, to present the Committee's supplemental report to the Council, a copy of which is attached. Mr. Sole announced that Lee Ann Wheelis Lockridge had been nominated as the Secretary of the Law Institute by virtue of her position as Interim Dean of LSU Law, that Clinton Bowers had been nominated to one of the practicing attorney seats on the Council, and that three honor graduates from Loyola Law School had been nominated to serve as junior members of the Council. A motion was made and seconded to adopt these nominations as presented, and the motion passed with no objection.

Mr. Sole then concluded his presentation, and the President called on Professor Sally Brown Richardson, Reporter of the Property Committee, to begin her presentation of materials.

Property Committee

Professor Richardson began by explaining to the Council that bond for deed contracts have existed in Louisiana law since 1934. These contracts provide for the sale of immovable property by making payments in installments, with ownership of the property transferring to the buyer upon the completion of all of the installment payments. She specifically noted that the Committee is in no way recommending the repeal of bond for deed contracts as a mechanism for the purchase of immovable property. However, there is existing language in both Civil Code Article 477(B) and R.S. 9:2948 that is unquestionably unconstitutional in light of the 2004 amendment to Article VII, Section 20 of the Louisiana Constitution that precisely prohibits the granting of a homestead exemption on bond for deed property.

The Reporter revealed that in the 1980s and 1990s, issues arose regarding whether, with respect to a bond for deed contract, the buyer was eligible for the homestead exemption prior to completing all of the installment payments for the immovable property. Tax assessors throughout the state began treating such property differently, prompting the legislature to enact R.S. 9:2948 to allow all buyers under bond

for deed contracts to benefit from the homestead exemption by being fictitiously recognized as the owner of the property for this limited purpose. The Louisiana Supreme Court struck down the statute as unconstitutional, however, and the legislature thereafter enacted Civil Code Article 477(B) to include the exact same language as the statute that had previously been held unconstitutional. The Attorney General has since issued two opinions declaring Civil Code Article 477(B) unconstitutional, and the voters approved the prohibitory constitutional amendment.

Professor Richardson continued to explain that unfortunately, R.S. 9:2948 and Civil Code Article 477(B) remain "on the books," and the Committee is concerned that the retention of this language in the first article in the Title of the Civil Code on ownership creates an awkward and unclear notion of what it means to be an owner. The Council agreed with the Committee and adopted the following:

Article 477. Ownership; content

~~A.~~ Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law.

~~B. A buyer and occupant of a residence under a bond for deed contract is the owner of the thing for purposes of the homestead exemption granted to other property owners pursuant to Article VII, Section 20(A) of the Constitution of Louisiana. The buyer under a bond for deed contract shall apply for the homestead exemption each year.~~

~~**R.S. 9:2948. Bond for deed buyer deemed owner for purposes of homestead exemption**~~

~~Notwithstanding any other provisions of law to the contrary, the buyer under a bond for deed contract shall be deemed, for purposes of the homestead exemption only, to own any immovable property he has purchased and is occupying under bond for deed, and may be eligible for the homestead exemption provided in Article VII, Section 20(A) of the Constitution of Louisiana if otherwise qualified. The buyer under a bond for deed contract shall apply for the homestead exemption each year.~~

At this time, Professor Richardson concluded her presentation, and the President called on Mr. Randy Roussel, Reporter of the Common Interest Ownership Regimes Committee, to begin his presentation of materials.

Common Interest Ownership Regimes Committee

Mr. Roussel began by informing the Council that he intended to start with Subpart C on management of the community and would return to Subpart B after the Committee reexamined the proposals that had been recommitted during the November and December 2019 Council meetings. He further noted that Subpart A, which consisted of definitions, would be presented last because these provisions are being fine-tuned as the project continues.

Directing the Council to page 28 of the materials, the Reporter began with Section 3.1, which requires homeowner associations to be organized as nonprofit corporations. With no discussion the following was approved:

3.1. Organization of lot owners association

A lot owners association shall be organized as a nonprofit corporation authorized to do business in Louisiana. The membership of the association at all times consists exclusively of all lot owners or, following termination of the planned community, of all former lot owners entitled to distributions of proceeds in accordance with Section 2.12 or their heirs,

successors, or assigns. The association shall have an executive board. The association shall be formed prior to filing the declaration for registry.

Next, the Reporter introduced Section 3.2(A) for discussion. The Council questioned whether Paragraph A(16) limits the court's ability to evict an owner for the nonpayment of assessments. Mr. Roussel stated that this language is intended to prevent owners from the use of common areas only. The lot owners association would file suit and execute a judgment for the nonpayment of dues. Moving to Section 3.2(B), the Reporter noted that the intent is to allow the association to proceed directly against a lessee or an occupant, as a matter of law, for a violation of the community documents. This would eliminate administrative hurdles for the association when addressing issues with people who are not lot owners but who are occupying the lot and taking advantage of the common areas. The Reporter used the example of an occupant who brings glass to the pool in violation of the rules. The association cannot evict the occupant from the house, but it can prohibit him from using the pool. The Reporter also again noted the distinct differences between enforcement of community rules and eviction.

One Council member commented that he was concerned by the fact that the proposal would not allow the association to evict a lessee or occupant that the lot owner refused to evict despite violations of the provisions of the community documents or possible criminal behavior. Council members acknowledged the strong protection of ownership in the law but questioned whether those protections should be extended to mere occupants of the property. The Council then noticed a possible inconsistency between Subsections A and B in that some of the provisions in Subsection A allow the association to proceed against occupants, but Subsection B authorizes the association to proceed against the occupant only for the late payment of assessments. The Council concluded that perhaps Subsection B should not be limited to Paragraph A(11) and (16) to ensure that the association has the authority to regulate the use of the common areas against any lessee or occupant. The Council favored giving associations more freedom to handle problems and suggested clarifying that Subsection B creates a right for an association to take action against a lot owner for the behavior of his lessee or occupant. The Reporter cautioned against granting broad powers to resolve interpersonal disputes through the association but agreed to take these provisions back to the Committee for further debate.

The Council also discussed the proper term to capture who the Committee identified as an "occupant." A few Council members suggested using precarious possessor as a broader and defined civil law alternative out of concern that the term "occupant" has a different meaning in the Code of Civil Procedure. Other Council members felt that the term "occupant" was perfect to capture both lessees and any other person on the property regardless of whether they have permission to be there. The term "inhabitant" was also suggested. The Reporter noted that he did not want to dive into the actual relationships between owners and who may physically be on the lot, but that he would ask the Committee to review the terminology and consider adding a definition of "occupant."

Moving along, Sections 3.2(C), (D), (E) were presented and adopted with little discussion. In Section 3.2(F), the Reporter reassured the Council that the Committee was comfortable with all of the provisions of the Nonprofit Corporation Law applying as a default to the community documents and this new Planned Community Act. The following were approved:

3.2. Powers and duties of the lot owners association

* * *

C. The executive board may determine whether to take enforcement action by exercising the power of the association to impose sanctions or commence an action for a violation of the provisions of the community documents, including whether to compromise any claim for unpaid assessments or other claim made by or against it.

D. The decision of the executive board in taking enforcement action in accordance with Subsection C of this Section may not be arbitrary or capricious.

E. The executive board shall establish a reasonable method for lot owners to communicate, which may include by electronic transmission, with the executive board on matters concerning the association.

F. In the event the community documents fail to provide for a certain action or procedure, the general provisions of this Part and of the Nonprofit Corporation Law, R.S. 12:201 et seq., shall govern.

Next, Mr. Roussel directed the Council's attention to Section 3.3 and explained that present R.S. 9:2792.7 exempts members of the executive board and officers of the association from certain liability. That notion is important for nonprofit homeowner associations because service is voluntary and uncompensated. The Council discussed the fact that intentional violations of civil law are exempt from the limitation under the broad language of Paragraph A(2). The Reporter noted that the Committee did not attempt to cover every possible scenario but instead left the language broad enough for reasonable court interpretations, and that this Section is modeled after corporate law and the duty of care and loyalty required of officers and directors. The Council asked that the Committee consider adding a definition of the term "member" because this Act refers to lot owners as "members" of the association, but corporate law uses that term to refer to the makeup of the board. Subsections A and B were approved as follows:

3.3. Executive board members and officers

A. Members of the executive board and officers of the association shall exercise the degree of care and loyalty required of an officer or director and are subject to the conflict of interest rules and limitations of liability governing directors and officers in accordance with the Nonprofit Corporation Law, R.S. 12:201 et seq. Nevertheless, no executive board member or officer shall be liable to the association or its members for money damages for any action taken, or any failure to act, as a member or officer, except for any of the following:

(1) A breach of the duty of loyalty to the association or the members.

(2) An intentional infliction of harm on the association or the members.

(3) An intentional violation of criminal law.

B. The protection against liability of a member or officer for conduct described in Subsection A of this Section may be limited or rejected in the community documents. The association may purchase insurance against that liability as provided in R.S. 12:1-857.

The Council discussed Subsection C and determined it to be unnecessary and perhaps contradictory with Subsection A, which requires both the duty of care and loyalty. As a result, this provision was removed from the proposal. Regarding Subsection D, the Reporter noted that the idea is taken from both the uniform act and existing corporate law due to the transient nature of association boards and the lack of institutional knowledge in this situation versus in a corporation. The Council approved the following:

D. The executive board shall not do any of the following:

(1) Amend the declaration.

(2) Amend the bylaws.

(3) Terminate the planned community.

(4) Elect members of the executive board, but it may fill vacancies in its membership for the unexpired portion of any term or, if earlier, until the next regularly scheduled election of executive board members.

(5) Determine the qualifications, powers, duties, or terms of office of executive board members.

E. The executive board shall propose a budget to be approved in accordance with Section 3.16.

At this time, Mr. Roussel noted that Sections 3.4 and 3.5 involve controversial property right issues but, considering the late hour, decided to conclude his presentation. The January 24, 2020 Council meeting was then adjourned.

Jessica Braun

Nick Kunkel

SUPPLEMENTAL MEMBERSHIP AND NOMINATING COMMITTEE REPORT

January 24, 2020

This committee respectfully makes the following supplemental nominations to fill vacancies on the Council of the Louisiana State Law Institute for 2020 as follows:

AS SECRETARY

Lee Ann Wheelis Lockridge; Paul M. Hebert Law Center, Room 400, University Station, Baton Rouge, Louisiana, 70803.

PRACTICING ATTORNEY ELECTED AS MEMBER:
For two-year term expiring, December 31, 2021

ECS. 1. CLINT BOWERS.

THREE HONOR GRADUATES
LOYOLA UNIVERSITY SCHOOL OF LAW

Leila Mohammad Abu-Orf; 155 N. Dorgenois Street, New Orleans, Louisiana, 70119.

Darrinisha Gray; 201 Saint Charles Avenue, Suite 3702, New Orleans, Louisiana, 70170.

Jeffrey M. Surprenant; 1653 Soniat Street, New Orleans, Louisiana, 70115.

Respectfully submitted,

Rick J. Norman, *President*
L. David Cromwell
Kevin C. Curry
Leo C. Hamilton
Thomas M. Hayes, III
Emmett C. Sole
Monica T. Surprenant
Susan G. Talley

MEMBERSHIP AND NOMINATING COMMITTEE
By Emmett C. Sole
Emmett C. Sole, Chair
January 24, 2020