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CHIEF EXECUTIVE OFFICER: Thomas B. Considine

May 5, 2017

Richard Revesz
Director
American Law Institute
4025 Chestnut St.
Philadelphia, PA 19104

Stephanie Middleton
Deputy Director
American Law Institute
4025 Chestnut St.
Philadelphia, PA 19104

Re: Concerns with ALI's proposed Restatement of the Law of Liability Insurance

Dear Director Revesz and Deputy Director Middleton:

On behalf of the National Conference of Legislators (NCOIL), I write to you expressing NCOIL's concern regarding the American Law Institute's (ALI) proposed Restatement of the Law of Liability Insurance (the proposed Restatement). While NCOIL just recently learned of this issue and our review of the proposed Restatement is, accordingly, ongoing, several of its provisions that go beyond established law are of immediate concern because they appear to address matters which are properly within the legislative prerogative.

NCOIL is a national legislative organization created by and comprised of State legislators, principally serving on State insurance and financial institutions committees around the nation. NCOIL writes Model Laws in insurance, works to both preserve the State jurisdiction over insurance as established by the McCarran-Ferguson Act seventy years ago and to serve as an educational forum for public policy makers and interested parties. Founded in 1969, NCOIL works to assert the primacy of legislators in making State policy when it comes to insurance and educate State legislators on current and perennial insurance issues.

We understand that the proposed Restatement will be presented to the ALI membership for approval at the ALI's annual meeting, scheduled to commence on May 22, 2017. NCOIL respectfully requests that the ALI defer that vote pending further review by NCOIL and its members. Our request is driven in no small part by the weight the ALI's Restatements have historically been accorded by the bench and bar. Restatements – according to the ALI's Revised "Style Manual" - are supposed to be "clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court." Against that standard, however, the proposed Restatement appears to be a Restatement in name only as it contains several departures from established law. For example:

- *Insurance contracts do not need to be enforced as written*: The bedrock principle of insurance contract construction in most states is the "plain meaning rule" – pursuant to which courts give words their plain, ordinary and popular meaning. But Section 3(2) of the proposed Restatement states that "[a]n insurance policy term is interpreted according to its plain meaning, if any, unless extrinsic evidence shows that a reasonable person in the policyholder's position would give the term a different meaning."

- *Insurers in breach of a defense obligation may be forced to pay uncovered claims*: As per Section 19, an insurer found to have unreasonably failed to defend the policyholder loses all coverage defenses - a "bad faith" penalty without any need to demonstrate that an insurer acted in bad faith.

- *Insurers that reasonably refuse a settlement demand are liable for damages in excess of limits and punitive damages, irrespective of law or public policy to the contrary*: Section 24 purports to announce a public policy elevating over other settlement considerations the importance of an outcome that will "protect the insured from a judgment in excess of the applicable policy limits." As per Section 27, an insurer's reasonable rejection of a settlement demand will create an excess of limits exposure and liability for "any other foreseeable harm," including punitive damages, even where such damages are uninsurable as a matter of law and/or public policy.

- *Policyholders – but not insurers – can shift attorneys' fees:* Under the American Rule, a party to an action pays her/his own attorneys' fees, absent a statutory or contractual provision to the contrary. But Section 48(4), Section 49 (3) and Section 51(1) allow policyholders (and only policyholders) to seek recovery of their attorneys' fees, even though the overwhelming majority of states either do not permit attorney fee shifting or do so as a matter of specific statutory law.

Our concerns with the proposed Restatement are not confined to the provisions cited above, but these provisions represent clear examples where the draft proposes significant changes to current law. Such matters are the primary prerogative of the legislative branch of government, which consists of publicly elected and accountable individuals who must consider all relevant policy considerations such as the impact of proposed law changes on the availability and affordability of insurance. Indeed, the ALI itself recognizes that an "unelected body like The American Law Institute has limited competence and no special authority to make major innovations in matters of public policy."

NCOIL submits that the ALI should not endorse and publish this work as a Restatement, as opposed to a Principles project or some other designation. To the extent it intends to do so, however, NCOIL asks that the ALI defer any vote on the proposed Restatement pending further review. The interests of all stakeholders – policyholders, insurers, legislators, regulators, the courts, and the ALI – are best served by continued discussion of what positions the Restatement should take, as well as when it should defer action to legislative bodies better suited to make public policy determinations.

NCOIL is unaware of any urgency requiring that the proposed Restatement be approved or published in 2017. It is far more important to ensure that all interested voices are truly heard, considered and reflected in a work that is a Restatement in substance as well as title. We welcome representatives of the ALI to come to a meeting of the NCOIL Property & Casualty Committee later this year to have a dialogue around the Restatement issues.

I note that should the ALI refuse our invitation for a dialogue and proceed towards seeking approval of the proposed Restatement from ALI membership at its annual meeting, NCOIL will be forced to consider passing a Resolution that opposes the proposed Restatement as a misrepresentation of the law of liability insurance, and as a usurpation of lawmaking authority from State insurance legislators. NCOIL will circulate the Resolution to all State legislative bodies and State regulators across the country to alert them of the problems associated with the proposed Restatement and to urge them to join in opposition.

We appreciate the ALI's consideration and look forward to hearing from you.

Very truly yours,

Thomas B. Considine
Chief Executive Officer
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cc:

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