



May 11, 2017

Professor Richard Revesz, Director  
American Law Institute  
4025 Chestnut Street  
Philadelphia, PA 19104

Dear Professor Revesz:

As the American Law Institute (ALI) considers presenting for final approval a proposed Restatement of Liability Insurance on May 23, 2017 during the ALI's annual meeting, we feel a great urgency to appeal to you to defer the vote. Our respective associations, the American Insurance Association (AIA) and the National Association of Mutual Insurance Companies (NAMIC), have made known throughout the development and review of this work our abiding concern that the Restatement in too many instances proposes black-letter rules that depart from or chip away longstanding insurance common law. Our associations see in many sections of the Restatement a troubling "reshaping" of fundamental aspects of the insurance law based on aspirations and not existing majority views, and without solid, appropriate justification.<sup>1</sup>

The ALI Style Manual requires that if a Restatement declines to follow a majority rule it should say so explicitly and explain why. The ALI rules require that the Reporters' policy views are confined to the Reporters' notes, which are not the official position of the ALI. But there are obvious departures from both requirements with this Restatement, and despite some improvements, divergence from the majority rule is not always transparent. The authors admit that Restatement rules have been advanced, not because they restate the existing common law, but because the Reporters feel the rules are "grounded" in case law. In other instances, minority rather than majority positions have been adopted in the Restatement based on the subjective observations by the Reporters that the positions have "better reasoning" and "better consequences." There is no showing that these observations are in agreement with broad, prevailing views on the better approach or likely consequences; we respectfully submit that they are not. These circumstances are revisions rather than restatements, are unacceptable and point to the need for further review of the Restatement draft.

In addition, we believe that it is worth pointing out that the development of this proposed Restatement has been, and continues to be, an evolving process. Taking more time for the evaluation of this Restatement, particularly in light of the many complex and inter-related areas addressed in the work, beyond our ongoing concerns over departures from the common law, only seems appropriate. ALI members should have time to carefully consider the many complex issues presented in the Restatement draft. There are changes to Sections 13, 24, 36, 42, and 43 in Chapter 3, and the entire

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<sup>1</sup> A number of examples of instances where the Restatement diverges from the majority rule without demonstrating why or how the majority rule allegedly is "outmoded or undesirable" have been highlighted in submissions to the project, and in motions filed in anticipation of the Annual Meeting.

final chapter (Chapter 4) of the Restatement that have never been considered previously by the ALI's full membership, and yet plans are made for a final vote of the Restatement draft in its entirety this month.

Even more concerning is that some of these changes in proposed black-letter rules are significant changes by the Reporters that have come for the first time in the Proposed Final Draft, after the Council approved a prior draft. These changes have not been discussed in any meeting of the ALI Advisors, Members Consultative Group, or the Council. Thus, we strongly urge the ALI to defer a vote of final approval on the Proposed Final Draft and recommit the project for further evaluation.

Finally, we would also like to share some thoughts on the Reporters' very recent remarks (May 8, 2017) that attempt to dismiss significant insurance industry contributions to this project, which bolster our belief that the ALI should allow for more review of this project. This Restatement is the ALI's first restatement on a highly-specialized topic affecting a regulated industry and the contributions dismissed by the Reporters represent decades of collective experience in insurance law and regulation, contracts and litigation. As such, we believe they are very useful resources that should be considered in the building of a reliable Restatement of the Law of Liability Insurance.

We urge the ALI not to follow a process that closes off effective, thorough consideration by your members of the many substantive and serious points raised in these contributions because a final vote is slated for May 23, 2017. It is our hope that you and the Reporters will recognize the value of this exchange of views and that you will allow more time for consultation, deliberation and evaluation of the Restatement. Doing so would help ensure that this project fully benefits from the receipt and exchange of information, critical examination of issues, and opportunities for research-based knowledge to inform decision making, which historically has been the hallmark of ALI's work.

Sincerely,



J. Stephen ("Stef") Zieleski  
Senior Vice President & General Counsel  
American Insurance Association (AIA)



Thomas Karol  
General Counsel - Federal  
National Association of Mutual Insurance Companies (NAMIC)

cc: Stephanie Middleton, Deputy Director