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CHIEF EXECUTIVE OFFICER: Thomas B. Considine



**PRESIDENT:** Sen. Jason Rapert, AR  
**VICE PRESIDENT:** Rep. Bill Botzow, VT  
**TREASURER:** Rep. Matt Lehman, IN  
**SECRETARY:** Asm. Ken Cooley, CA

**IMMEDIATE PAST PRESIDENTS:**  
Rep. Steve Riggs, KY  
Sen. Travis Holdman, IN

February 27, 2018

The Honorable Thomas A. Balmer  
Chief Justice  
Oregon Supreme Court  
1163 State Street  
Salem, OR 97301-2563

Dear Chief Balmer:

On behalf of the National Council of Insurance Legislators (NCOIL), I write to alert you to a project that The American Law Institute (ALI) has underway, which proposes to change basic and settled tenets of insurance law, including in ways that directly conflict with existing state statutory provisions. We therefore believe that your input as a State Judicial Presiding Jurist, is both appropriate and needed before this project - the proposed Restatement of the Law, Liability Insurance, which would purport to set out the common law of insurance nationwide – is finalized.

As you know, the ALI publishes Restatements of the Law, model statutes, and Principles of the Law, which are respected publications that have been cited in published cases over 201,000 times. The ALI now plans to present a Restatement of the Law, Liability Insurance for final approval at its annual meeting in May 2018 addressing, for the first time, the common law governing liability insurance and proposing black-letter rules. Early drafts of this ALI Restatement project, however, have been criticized as designed not to restate the common law as it stands, but to advance aspirational goals of changing the law. NCOIL's review of drafts of the ALI project found that there are numerous places where this ALI Restatement project draft abandons settled insurance law rules and contradicts state statutory provisions governing insurance, and it repeatedly proposes new law.

Following months of efforts by NCOIL engaging with the ALI to address concerns with this proposed Restatement project, I write to express our continuing concerns and to urge your careful review of this project. NCOIL's efforts to engage the ALI in dialogue about our concerns have included a May 2017 letter to ALI detailing concerns; an invitation to hear from this project's ALI Reporter, who addressed a general session of NCOIL's Annual Meeting in November 2017; and subsequent correspondence both in late 2017 and early 2018 with ALI representatives about NCOIL's concerns.

Specifically, NCOIL has pressed the ALI to make substantive changes to the project draft to avoid interference with the role of legislators in making state policy when it comes to insurance. Although ALI recently has stated that its leadership group, the ALI Council, directed that some provisions in the draft will be changed, NCOIL has received no assurance that many of the problematic areas that NCOIL has highlighted will be modified.

This ALI liability insurance Restatement project is still in progress. There is time for further modification. Thus, we believe it is critical that you review and evaluate this ALI project before it is finalized due to your standing with the ALI as a State Judicial Presiding Jurist. NCOIL has pointed out specific Sections of the proposed Restatement where modification is needed to avoid impinging on the legislative prerogative. For example:

Section 8, which imposes a new "substantiality" requirement for determining whether an insured's misrepresentation was material. This is at odds with existing statutory and common law governing misrepresentations and rescission. Existing law asks whether or not -- but for the misrepresentation -- a policy would have been issued on the same terms, not whether it would have been issued only on substantially different terms.

Section 27, which imposes responsibility for damages for insurer breach of settlement duties, including punitive damages awarded against the policyholder. This proposed rule disregards individual states' public policy determinations concerning insurability of punitive damages and is unsupported by any common law rulings.

Section 36, which would excuse late notice under a claims-made and reported policy if the claim is considered to be too close to the end of the policy term to permit reporting during the policy period and the policy does not contain an extended reporting period. This overrides insurance contract terms. Whether an extended reporting period should be required in this context is a legislative judgment.

Sections 48, 49(3) and 51(1), which introduce broad one-way fee-shifting and override legislative determinations concerning whether and when there should be any departure from the American Rule concerning who bears litigation fees.

I also want to point out that, in addition to the above provisions, NCOIL is very concerned with provisions of the proposed Restatement that go beyond established common law, which include:

Section 3, which departs from the settled insurance law "plain meaning" rule. The alternative approach proposed in the Restatement is a departure from settled insurance law in approximately 40 states.

Section 13(3) which forbids reliance on undisputed non-liability facts in determining the duty to defend, except in four cases. This alters the common law standards and would force a defense of uncovered claims, thereby increasing costs.

Section 19, which imposes a forfeiture of coverage defense for certain breaches of the duty to defend. It is a punitive provision and does not adhere to the common law.

In light of these concerns, NCOIL's Executive Committee has passed a Resolution expressing its deep concerns regarding this ALI project, a copy of which is enclosed with this letter. As NCOIL considers further steps consistent with the enclosed Resolution, and as the ALI project progresses, I write both to urge your involvement in the ALI process, and to express NCOIL's hope that significant changes will be made to the direction of the ALI Restatement of the Law, Liability Insurance project to avoid the problems seen in the drafts produced to date.

Developing a body of aspirational common law, particularly from a group as influential as the ALI, could lead State legislatures to step in to codify existing liability insurance law. Given the significance of this ALI project to insurance law and the insurance system, we believe that members of the judiciary should exercise their right to evaluate and be heard on this ALI Restatement project. This project presents significant questions about the expectations for a Restatement to serve as a resource for the judiciary on the existing common law, as well as the implications of allowing such a project to tread on legislative prerogatives and propose serious changes in insurance law.

We therefore urge you to alert your colleagues to our concerns and to engage with the ALI on the important issues raised by this proposed Restatement project.

Very truly yours,

A handwritten signature in black ink that reads "Tom Considine". The signature is written in a cursive, slightly slanted style.

Thomas B. Considine  
Chief Executive Officer  
National Council of Insurance Legislators

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## **National Council of Insurance Legislators (NCOIL)**

### **Resolution Encouraging the American Law Institute to Materially Change the Proposed Restatement of the Law of Liability Insurance**

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*Adopted by the NCOIL Property and Casualty Insurance Committee on November 16, 2017, and the NCOIL Executive Committee on January 5, 2018*

*Sponsored by Sen. Neil Breslin (NY) and Sen. James Seward (NY)*

**WHEREAS**, the American Law Institute (“ALI”) intends to publish a Restatement of the Law of Liability Insurance (the “proposed Restatement” or “Restatement”); and

**WHEREAS**, ALI Restatements have traditionally been held in high regard and relied upon by courts as authoritative references regarding established rules and principles of law; and

**WHEREAS**, such Restatements, in the ALI’s own words, are “primarily addressed to courts” and “aim at clear formulations of common law and its statutory elements of variations and reflect the law as it presently stands or might appropriately be stated by a court” (ALI Style Guide, 2015); and

**WHEREAS**, NCOIL members became aware of this proposed Restatement in the spring of 2017 and upon review of the draft, identified several areas which, contrary to the above-stated intent, are inconsistent with well-established law and purport to address matters which are properly within the legislative prerogative; and

**WHEREAS**, NCOIL, through its Chief Executive Officer, Thomas B. Considine, addressed a letter dated May 4, 2017 (“the Considine letter”), to ALI leadership in an effort to identify particular concerns and effect reconsideration of and significant changes to the proposed Restatement; and

**WHEREAS**, NCOIL members were encouraged to learn that, after receipt of the Considine letter, ALI leadership made the decision to defer a final vote on the proposed Restatement until 2018, with the recognition that the Restatement would benefit from another year of work; and

**WHEREAS**, the subsequent drafts of the proposed Restatement have reflected only very minor changes to the insurance legal rules proposed and have no substantive changes in

the rules proposed on the topics of particular concern identified in the Considine letter;  
and

**WHEREAS**, during its General Session on November 16, 2017, NCOIL hosted a panel presentation which included the proposed Restatement's lead Reporter, and it was apparent from Reporter commentary that no or minimal substantive changes to the proposed Restatement are anticipated before it is submitted to the ALI Council and then the ALI membership for final approval;

**NOW, THEREFORE, BE IT RESOLVED THAT NCOIL** urges ALI leadership, members and Reporters to abide by ALI's own acknowledgement that "[a]n unelected body like The American Law Institute has limited competence and no special authority to make major innovations in matters of public policy," and instead afford proper respect to the legislative prerogative, and the expertise and the jurisdiction of NCOIL members; and

**BE IT FURTHER RESOLVED THAT NCOIL** urges the ALI to effect meaningful change to the proposed Restatement so that it is consistent with well-established insurance law and respectful of the role of state legislators in establishing insurance legal standards and practice; and

**BE IT FURTHER RESOLVED THAT**, should such meaningful change not occur prior to its final approval, NCOIL urges that the Restatement of the Law of Liability Insurance should not be afforded recognition by courts as an authoritative reference regarding established rules and principles of insurance law, as Restatements traditionally have been afforded; and

**BE IT FURTHER RESOLVED THAT NCOIL** urges state legislators across the country to adopt resolutions declaring that this Restatement should not be afforded such recognition by courts; and

**BE IT FURTHER RESOLVED THAT NCOIL** shall develop and promulgate, as appropriate, model legislation intended to maintain the viability, predictability and optimal functionality of the insurance market and its practices; and

**BE IT FURTHER RESOLVED THAT**, a copy of this Resolution shall be sent to ALI Leadership, the reporters of the Restatement of the Law of Liability Insurance, and further published in such a manner to reach and inform ALI members, and

**BE IT FINALLY RESOLVED THAT** a copy of this Resolution expressing NCOIL's concern that the Restatement does not afford proper respect to the expertise and jurisdiction of state insurance legislators and that the Restatement of the Law of Liability Insurance should not be afforded recognition as an authoritative reference, shall be sent to state chief justices, state legislative leaders and members of the committees with jurisdiction over insurance public policy, as well as to all state insurance regulators.