



April 6, 2018

The Honorable David F. Levi
President
The American Law Institute
4025 Chestnut Street
Philadelphia, Pennsylvania 19104

Dear Judge Levi:

We write today to express our sincere reservations and concerns regarding the American Law Institute's ("ALI") recent drafts of the proposed *Restatement of the Law, Liability Insurance*. It is our understanding that this project represents the ALI's first attempt to address insurance coverage law. As governors focused on protecting and preserving the unique role of states with respect to insurance regulation, we ask that you consider our shared concerns regarding the aims of this unprecedented publication.

Based on our preliminary review of the ALI's December 2017 draft *Restatement of the Law, Liability Insurance* ("Draft *Restatement*"), as well as the recently released March 27, 2018 revisions, we have serious concerns over the direction of the ALI's proposed publication. Indeed, the Draft *Restatement* goes beyond restating black-letter law; in some instances, it reinterprets and purports to modify existing insurance law. As the late Justice Antonin Scalia observed, "Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be And it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law." *Kansas v. Nebraska*, 135 S. Ct. 1042, 1064 (2015) (Scalia, J., concurring in part and dissenting in part). Justice Scalia's warning is both perceptive and prescient, particularly in light of the McCarran-Ferguson Act's unambiguous commitment of insurance matters to state jurisdiction.

Rather than offering a reliable and authoritative summary of existing law, the Draft *Restatement* proposes changes to established legal principles governing liability insurance contracts and disputes. Many of these proposed changes are properly within the prerogative of our state legislatures, at odds with established common law, or both. Unfortunately, courts have already begun citing the Draft *Restatement* even though it has not been formally adopted or approved by the ALI. From deciding where to locate to whether to hire more employees, businesses frequently rely upon the stability of the insurance market. Thus, we are concerned that the Draft *Restatement* could negatively affect our states' economic development opportunities by creating uncertainty and instability in the liability insurance market. If this trend continues, and courts embrace the ALI's aspirational approach, it could potentially jeopardize the availability and affordability of liability insurance. Therefore, if the ALI does not significantly revise or rescind the Draft *Restatement*, this implicit usurpation of state authority may require legislative or executive action.

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In light of the foregoing concerns, as well as those raised by other stakeholders, we respectfully request that the ALI immediately reconsider and significantly revise or rescind the Draft *Restatement*. Thank you in advance for your consideration of this request. We look forward to hearing from you.

Yours very truly,



Governor Henry McMaster
South Carolina



Governor Kim Reynolds
Iowa



Governor Paul R. LePage
Maine



Governor Pete Ricketts
Nebraska



Governor Greg Abbott
Texas



Governor Gary R. Herbert
Utah