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National Council of Insurance Legislators (NCOIL)

Guidance for States Responding to the American Law Institute's Restatement of the Law: Liability Insurance

**To be discussed during the Property & Casualty Insurance Committee on March 17th, 2019*

Drafting Note: While the majority of the Restatement of the Law: Liability Insurance (Restatement) that was approved at the 2018 annual meeting of the American Law Institute is noncontroversial and reflects settled rules and principles of insurance law, it does contain several provisions that depart from those rules and principles both substantively and significantly. This document is meant to serve as guidance for states seeking to respond to those provisions by means of enacting legislation to prevent court adoption of new legal principles set forth in the Restatement. Below are specific issues that states should consider as the basis for such legislation, either in the form of an omnibus bill or separate bills. States should work with stakeholders and the insurance department to amend the appropriate portion of insurance code to reflect the settled law on the issues below in order to avoid the Restatement being construed as the state's settled law on those issues.

- 1.) Insurers have no independent duty to screen defense counsel for impairment or otherwise second-guess the competency of counsel who has been determined fit to practice law by the [governing licensing body in the applicable state].
- 2.) For those states in which the legislatures have considered and rejected a "tort" of bad faith as well as a private right of action under that state's Unfair Claim Practices Act, the legislature should affirmatively enact legislation stating that the terms and conditions of an insurance contract and the contractual obligation of good faith and fair dealing govern the duties between insurer and insured.
- 3.) Insurance contracts shall be governed by the same standards as other contracts, and thus not have a separate set of standards under the law. Accordingly, existing standards relating to rescission shall apply and additional requirements such as a new "substantiality" test shall not be superimposed on the requirements of a misrepresentation under the contract.

4.) Policy language requiring a claim to be made and reported during the policy period will be enforced if the policyholder does not purchase an extended reporting period.

5.) Any party seeking recovery under a contract – including an insurance contract – has a duty to mitigate its damages and cannot recover for loss it could have avoided without undue risk.