

Atlantic Corporate Center
2317 Route 34, Suite 2B
Manasquan, NJ 08736
732-201-4133
CHIEF EXECUTIVE OFFICER: Thomas B. Considine



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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

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.