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November 28, 2017

David F. Levi
President
American Law Institute
4025 Chestnut St.
Philadelphia, PA, 19104

Roberta Cooper Ramo
Council Chair
American Law Institute
4025 Chestnut St.
Philadelphia, PA, 19104

Dear President Levi and ALI Council Chair Ramo:

I write on behalf of the National Council of Insurance Legislators (NCOIL)¹ to express NCOIL's serious and continuing concern regarding the American Law Institute's (ALI) proposed Restatement of the Law of Liability Insurance (the proposed Restatement). NCOIL, as you may know, is a national legislative organization created by and comprised of State legislators, principally serving on State insurance and financial institutions committees around the nation. NCOIL develops model laws in insurance and financial services, works to preserve the State jurisdiction over insurance as established by the McCarran-Ferguson Act seventy years ago, and serves as an educational forum for public policy makers and interested parties. Founded in 1969, NCOIL works to assert the primacy of legislators in making State policy when it comes to insurance and educate State legislators on current and longstanding insurance issues. I ask that you share NCOIL's concerns with the proposed Restatement's Advisers, ALI Council, and others in its leadership.

On May 5, 2017, NCOIL wrote to Director Revesz and Deputy Director Middleton, with copies to the proposed Restatement's Reporters Professors Tom Baker and Kyle Logue, about the need to ensure that all interested voices are truly heard, considered, and reflected in a work that is a Restatement of the Law, Liability Insurance, in substance as well as title. Our May 5, 2017 letters explained that several of the proposed Restatement's provisions go beyond established insurance law and thus were of immediate concern because they appear to address matters which

¹ On November 19, 2017 NCOIL approved revisions to its Bylaws and Articles of Organization changing its name to the National Council of Insurance Legislators.

are properly within the legislative prerogative. We gave specific examples of these concerns, where the draft proposes significant changes to current common law. These included its departure from the plain meaning rule (Section 3), the forfeiture of coverage defenses for certain breaches of the duty to defend (Section 19), the breadth of damages to be payable by insurers for failure to settle (Section 27), and the imposition of one-way fee-shifting (Sections 48, 49(3) and 51(1)). As our May 5, 2017 letter stated, such matters are, in the first instance, the primary prerogative of the legislative branch of government, which consists of publicly elected and accountable individuals who must consider all relevant policy considerations such as the impact of proposed law changes on the availability and affordability of insurance. We note that the fact that state legislatures have not adopted provisions in these areas noted above, as well as others, does not mean they have not considered them.

NCOIL made clear that we would welcome representatives of the ALI to come to an NCOIL meeting to have a dialogue around the Restatement issues. After our letter was sent, the ALI leadership decided to defer the organization's final consideration of the proposed Restatement, indicating that the project would benefit from another year of work. NCOIL applauded this recognition of the need for additional work on this project. Consistent with that decision, and to follow up on its concerns, NCOIL invited the proposed Restatement Reporters to speak during a general session at its Annual meeting earlier this month in Phoenix, AZ. During that general session on November 16, 2017, NCOIL heard Professor Tom Baker and project participants, Laura Foggan, Peter Kochenburger, and Victor Schwartz, speak about the Restatement project and its approach to liability insurance law. NCOIL members, who are State insurance legislators from across the country, then had the opportunity to ask questions about the Restatement; they expressed deep concerns about the project's intrusion into making law - rather than restating or reporting the law of liability insurance.

It was apparent from the general session at NCOIL's Annual meeting earlier this month that the Reporters continue to adhere to the same approach in going beyond established law that NCOIL expressed concern about in our May 5 letter. Specifically, in multiple instances, the proposed Restatement engages in law-making by announcing new legal rules rather than articulating the law impartially according to existing precedents. The ALI Reporters should not be exercising the legislative power to make new laws through Restatement proposals. In fact, in the general session at its Annual meeting earlier this month, NCOIL learned that the Black-letter rules on the topics highlighted in our May 5 letter, as well as other Sections of concern, remain unchanged even as this ALI project apparently nears completion.

Following the general session described above, at the meeting of the NCOIL Property-Casualty Insurance Committee, the proposed Restatement was again a topic of discussion, and a Resolution was passed by unanimous voice vote by said Committee. On behalf of the NCOIL Executive Committee, I am writing to share this Resolution with you, and to again urge the ALI to conform the Restatement to existing law, and to defer to legislative bodies better suited to

make public policy determinations on areas of new law². Again, we would like to point out specific Sections of the proposed Restatement that impinge on the legislative prerogative, 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 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 12, which introduces new liability on insurers, for defense counsel's malpractice, if defense counsel is an employee of the insurer and/or if the insurer "has undertaken a duty to select defense counsel [or] . . . to supervise defense counsel and the insurer breaches that duty." This newly invented rule creates tension with attorneys' professional responsibilities to exercise independent professional judgment and would alter the relationship between defense counsel, their clients, and insurers;

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 18, which introduces a new rule that, with limited exceptions, the duty to defend terminates only on court adjudication that the insurer does not have a duty to defend the action. This requirement for court approval does not reflect existing law, and will increase costs and burdens on courts and the parties with unnecessary litigation;

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;

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

² For areas of the law where the ALI believes existing law should change, NCOIL leaves it to the ALI as to whether it wishes to supplement the Restatement of Law with the Principles Statement that originally was intended.

contract terms. Whether an extended reporting period should be required and/or a late notice defense should be permitted in this context is a legislative judgment;

Section 48, which ignores the important principle of mitigation of damages, although the common law provides that any party seeking recovery under a contract has a duty to mitigate its damages and cannot recover for loss it could have avoided without undue risk, burden or humiliation; and

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.

NCOIL respectfully requests that the ALI carefully review what positions the Restatement should take, as well as when it should defer action to legislative determinations. This request is driven in no small part by the weight the ALI's Restatements have historically been accorded by the bench and bar.

Should there not be meaningful change in the proposed Restatement, NCOIL will be forced to oppose the proposed Restatement project as a misrepresentation of the law of liability insurance, and as a usurpation of lawmaking authority from State insurance legislators. Shortly, NCOIL's Executive Committee will be determining what action to take in relation to the Property-Casualty Insurance Committee Resolution enclosed, including the role NCOIL will take alerting State Chief Justices, State legislative leaders and members of the committees with jurisdiction over insurance public policy, as well as State insurance regulators, about NCOIL's concern that the Restatement is, in numerous places, a misstatement of the law, and does not afford proper respect to the expertise and jurisdiction of State insurance legislators and should not be afforded recognition as an authoritative reference.

Before taking any further action, NCOIL writes now to ensure that the ALI leadership has the opportunity to consider these concerns. We request the courtesy of a reply on or before December 18, 2017, addressing whether or not the ALI will make the type of substantive changes NCOIL has requested to avoid interference with the role of legislators in making State policy when it comes to insurance.

Very truly yours,



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

*Adopted by the NCOIL Property and Casualty Insurance Committee on November 16, 2017
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.