

December 1, 2017

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

Dear President Levi,

A number of general counsel of major corporations wrote the American Law Institute (ALI) leadership in advance of the 2017 ALI Annual Meeting to express strong concern about the direction of several pending Restatement projects. We, the undersigned general counsel are writing again to restate the serious concerns which have not been addressed in the most recent draft of the two pending Restatement projects. We write to respectfully ask that you, as the President and steward of the ALI, and the ALI Council assume a meaningful role in overseeing the development and direction of the organization's work products to assure they are in accord with the ALI's own principles governing Restatements.

The two pending Restatements, namely the Restatement of the Law, Liability Insurance, and the Restatement of the Law, Consumer Contracts, risk causing irreparable harm to the ALI's reputation in the legal community due to their lack of adherence to the ALI's own principles. These projects have been ongoing for the better part of a decade and now appear nearing completion, yet deviate in extraordinary ways from the principles the ALI has laid out for what a Restatement should (and should not) be and from the type of balanced work product which common law judges have traditionally expected from the ALI.

These projects, as well as other more recent pending ALI work products, are illustrative of a troubling trend in which modern Restatements appear to increasingly depart from the organization's core objective, as set forth in the ALI Style Manual, to provide "clear formulations of common law . . . and reflect the law as it presently stands or might appropriately be stated by a court." They also appear inconsistent with the organization's cautions that any changes to prevailing common law be "accretional" and that "[w]ild swings" in the law be avoided in a Restatement because the ALI "has limited competence and no special authority to make major innovations in matters of public policy." But this is precisely what these two pending ALI Restatements would do.

The Restatement of the Law, Liability Insurance

The Restatement of the Law, Liability Insurance is the ALI's first-ever project on the topic of insurance law and the ALI's first-ever industry-specific Restatement. The ALI leadership made a sound decision to postpone a final vote of approval of this Restatement at the 2017 Annual Meeting to allow time for additional work on the project. The project Reporters' subsequent announcement of a "listening tour" to address outstanding concerns with the Restatement also signaled the prospect of meaningful improvements. Despite these assurances, minimal changes have been made to this Restatement. Indeed, the Reporters acknowledged in the ensuing

Restatement draft issued in August 2017 that “relatively few changes to the black letter” were made. Further, the Reporters have suggested that no major substantive changes will be forthcoming, which likely means that the version of the Restatement that was postponed at the 2017 Annual Meeting to allow for additional work will be substantially the same as the one submitted to the ALI Council and ALI membership for a vote of final approval in 2018.

The failure of the Reporters to meaningfully address key sections of the Restatement that generated concern at the 2017 Annual Meeting makes the ALI leadership’s decision to postpone the project ring hollow and suggests a “broken promise” to address legitimate outstanding concerns. Numerous aspects of this Restatement have generated concern for both insurers and non-insurers. The two examples discussed in the prior general counsel letter continue to illustrate key concerns. The Restatement continues to endorse a “new version” of the basic rule that contract terms are interpreted according to their “plain meaning” which would allow extrinsic evidence to be considered even when a contract is clear. This provision would create uncertainty, invite unnecessary collateral litigation, and set an unsound precedent with respect to the interpretation of insurance policy terms, and possibly terms in other types of contracts.

In addition, this Restatement continues to include an unprecedented endorsement of one-way attorney fee shifting which departs from the bedrock “American Rule” that each party is responsible for his or her own attorney’s fees. The project, in multiple contexts, recommends that an insurer that loses a dispute with a policyholder should have to pay that policyholder’s legal fees as a matter of common law rule. Although some of the undersigned general counsel might benefit from such a provision in the capacity of a corporate policyholder, it is wholly inappropriate to address the very controversial issue of one-way attorney fee shifting in the context of a Restatement on the topic of liability insurance where attorney fee shifting is not inherently an insurance law issue. Rather, this issue reflects a broader public policy matter most often determined by state legislatures, not common law judges.

Other innovative provisions that recommend major departures from prevailing law have been documented in numerous project submissions. The issues raised by these submissions have largely gone unaddressed by the Reporters and this raises concerns about ALI process. We understand that a new draft of the Restatement is forthcoming and hope that it will not follow suit.

The Restatement of the Law, Consumer Contracts

Similar fundamental concerns also continue to exist with respect to the Restatement of the Law, Consumer Contracts. This first-of-its-kind project to “restate” the law of so-called “consumer contracts” moves the ALI into uncharted territory in a variety of ways. No other Restatement project in the ALI’s history has truncated a general area of law to develop a set of rules aimed specifically at “consumers,” especially where no court has articulated a separate set of consumer contract rules which operate differently from the general law of contracts. In effect, the ALI appears to be restating a topic of its own creation, which plainly seeks to “make major innovations in matters of public policy.”

The Honorable David F. Levi

December 1, 2017

Page 3

Given the lack of a clear common law basis for separate “consumer contract” rules, the project’s Reporters have relied on other sources of law to support proposed rules. They have looked to statutory sources of law, such as consumer protection statutes and regulations, as their primary support for some Restatement provisions. Such statutory law, however, was created to address unfair business practices in the marketing and sales of products and services; it was not created as a basis for the law of contracts. By attempting to graft select elements of statutes and regulations to create a common law foundation for novel “consumer contract” rules, the project is making major public policy innovations that are contrary to the purpose of a Restatement.

If adopted by courts, this Restatement, similar to the Restatement of the Law, Liability Insurance, would radically depart from existing law. It proposes to create broad new legal remedies and imbue judges with broad new authority to invalidate or reform long-accepted contracts. Rather than promote clarity and uniformity in the law – two longstanding ALI goals – the Restatement would inject chaos into courts’ analysis of contracts between businesses and consumers by inviting recognition of a new regime.

Finally, the two Restatements discussed do not appear to be isolated instances of ALI work products departing from the organization’s standards. Similar overarching concerns have been expressed with respect to other more recent ALI projects.

We, the undersigned, believe that as ALI President you are in a position to take an oversight role in the development of Restatements and other ALI work products and that you, as well as the ALI Council, can play an active role in assuring adherence to the principles governing Restatements. We respectfully ask that you take action through the considerable means at your disposal as President to protect the ALI’s reputation and legitimacy within the legal community and to ensure its legacy.

Respectfully submitted,

Susan L. Lees
Executive Vice President, Secretary &
General Counsel
Allstate Insurance Company

Peter Y. Solmssen
Executive Vice President & General
Counsel
American International Group, Inc.

David G. Leitch
Global General Counsel
Bank of America

Eric Nitcher
General Counsel
BP

Suzette M. Long
General Counsel & Corporate Secretary
Caterpillar Inc.

Joseph Wayland
Executive Vice President and General
Counsel
Chubb Limited/Chubb Group

Lynn R. Charytan
Executive Vice President and General
Counsel
Comcast Cable

The Honorable David F. Levi

December 1, 2017

Page 4

Janet Langford Carrig
Senior Vice President Legal, General
Counsel and Corporate Secretary
ConocoPhillips Company

Kelly McNamara Corley
Executive Vice President, General Counsel
and Secretary
Discover Financial Services

Michael J. Harrington
Senior Vice President and General Counsel
Eli Lilly and Company

Brackett B. Denniston, III
Former Senior Vice President & General
Counsel
General Electric

Dan Troy
Senior Vice President & General Counsel
GlaxoSmithKline

Anne T. Madden
Senior Vice President & General Counsel
Honeywell International Inc.

C. Thomas Evans, Jr.
Senior Vice President, Secretary & General
Counsel
Kemper Corporation

James Kelleher
Chief Legal Officer and Executive Vice
President
Liberty Mutual Holding Company Inc.

Suzanne Gagle
Vice President and General Counsel
Marathon Petroleum Corp.

Stephen Gauster
Senior Vice President and Interim General
Counsel
MetLife

James C. Stansel
Executive Vice President & General
Counsel
Pharmaceutical Research and Manufacturers
of America

Randi Cigelnik
SVP, Corporate Secretary and General
Counsel
Property Casualty Insurers Association of
America (PCI)

Edward W. Moore
Senior Vice President, General Counsel and
Chief Compliance Officer
RPM International Inc.

Kimberly Phillips
Associate General Counsel, Global
Litigation, Americas
Shell Oil Company

Steve McManus
Senior Vice President and General Counsel
State Farm Insurance

Robert L. Bradley
Vice President & General Counsel
TAMKO Building Products, Inc.

David Robinson
Executive Vice President and General
Counsel
The Hartford Financial Services Group, Inc.

Kenneth F. Spence III
Executive Vice President and General
Counsel
The Travelers Companies, Inc.

Craig Silliman
Executive Vice President of Public Policy &
General Counsel
Verizon

Dennis F. Kerrigan, Jr.
Chief Legal Officer
Zurich North America