

May 19, 2017

The Honorable David F. Levi
ALI President-Designate

Director Richard Revesz
Deputy Director Stephanie Middleton
American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104

Dear Leadership and Members of the American Law Institute,

We are writing to express our strong concern about the recent direction of the American Law Institute (ALI) away from its core mission with respect to pending Restatements of Law that will be considered at the forthcoming 94th ALI Annual Meeting. As general counsel of major corporations, we fully appreciate that no other private organization of practicing attorneys, judges, and law professors has had more influence on the development of American law than the ALI. Nevertheless, the approach taken in several pending Restatements risks causing irreparable harm to the organization's reputation in the legal community.

The forthcoming Annual Meeting presents both the leadership and membership with decisions that will be vital to the credibility of ALI's work in the years and decades ahead. As you know, the ALI membership is scheduled to vote on whether to give final approval to the Restatement of the Law of Liability Insurance. The membership is also scheduled to discuss the Restatement of the Law of Consumer Contracts. Fundamental concerns exist with respect to both projects which go to the heart of the integrity of ALI Restatements of Law.

The Restatement of the Law of Liability Insurance is the ALI's first venture into the highly complex field of liability insurance. This fact alone warrants extra caution and attention in developing recommended "black letter" common law rules. As you are aware, this project began as a Principles of Law project which allowed the Reporters greater leeway in fulfilling academic aspirations. Restatements, in comparison, are supposed to be based on existing law and comport with the ALI Style Manual's enumerated "elements" for a Restatement. The Proposed Final Draft of the Restatement of the Law of Liability Insurance, however, appears to contain vestiges from when the work product was a Principles project, as well as numerous subsequent provisions which do not satisfy the traditional elements of a Restatement.

For example, all of the undersigned seek to use words in our contracts that are clear and coherent. We expect courts will follow the "plain meaning" of these words. The Restatement of the Law of Liability Insurance departs from this most basic "plain meaning rule" to allow extrinsic evidence to be considered even when a contract is clear. This provision would set a troubling precedent with respect to the interpretation of insurance policy terms, and possibly terms in other types of contracts.

In addition, this Restatement includes an unprecedented endorsement of one-way attorney fee shifting that departs from the traditional “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 would have to pay that policyholder’s legal fees, but if the insurer prevailed, it would have to pay its own attorney’s fees. Although we, the undersigned, might benefit from such a provision in our capacity as corporate policyholders, 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. The Restatement’s approach to attorney fee shifting, similar to the project’s approach to the “plain meaning rule,” could set a troubling precedent in contexts outside of insurance.

These examples represent only a small sampling of the concerns about this Restatement. Our understanding is that a number of motions have been submitted by ALI members addressing other specific ongoing project concerns, including an overarching request to postpone the scheduled final project vote or recommit specific provisions that do not comport with the elements of a Restatement. We agree with the underlying objective of these motions: the ALI should not finalize this project at the Annual Meeting.

Many of the same basic concerns with the Restatement of the Law of Liability Insurance exist with respect to the proposed Restatement of the Law of Consumer Contracts. Although this Restatement will not be voted on at the Annual Meeting, the idea that the ALI is even considering this project as a Restatement is deeply troubling. As general counsel, we address a multiplicity of legal issues every day. In our collective experience, we do not believe that so-called “consumer contracts” represents a separate body of law from the general law of contracts.

It is our understanding that the ALI has never before followed a path of creating separate legal rules for “consumers” versus any other entity. We are also unaware of any courts making such a distinction and applying the law differently based solely on whether a party is a business or an individual “consumer.”

Of equal importance, this Restatement attempts to create separate “consumer contract” rules that are not grounded in existing case law. It relies on a patchwork of other laws, most notably state consumer protection statutes. As you are aware, such statutory law was designed to prevent deceptive marketing practices; it is not a basis for the development of contract law. Yet, this Restatement proposes to give consumers broad new legal remedies to challenge virtually any contract involving consumers, and appears to empower judges to exert broad new authority to change contracts absent existing common law precedent.

Both of these Restatement projects demonstrate that the ALI has reached a key decision point between allowing Restatements of Law to reflect a Reporter’s subjective and aspirational views of what a common law rule “should be” versus the ALI’s governing directive of clarifying and simplifying prevailing common law rules. We respectfully submit that the ALI should pursue the latter approach to preserve the credibility and reliability of its body of work

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Respectfully submitted,

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