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May 5, 2017

Director Richard L. Revesz  
The American Law Institute  
4025 Chestnut Street  
Philadelphia, PA 19104

Dear Director Revesz:

I write on behalf of DRI to express serious concerns about the ALI's Restatement of the Law, Liability Insurance project. Having recently obtained the Proposed Final Draft of this Restatement that was published by the ALI on March 28, 2017, we are gravely concerned that many provisions contained therein are at odds with the common law of insurance, and will impede the ability of our members to represent policyholders pursuant to the tripartite relationship, and will adversely impact the consumers by driving up the costs of insurance. Furthermore, and contrary to the Reporters' stated goals and expectations, the proposed draft may engender more insurance coverage controversies and litigation.

DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation, and DRI is recognized as "The Voice of the Defense Bar." It advocates for 22,000 defense attorneys, commercial trial attorneys, and corporate counsel in defending the integrity of the civil judiciary. For more than fifty-five years, DRI has been committed to enhancing the skills and professionalism of defense lawyers and anticipating and addressing issues germane to defense lawyers and the civil justice system.

A large percentage of our membership is directly engaged in the defense of civil suits, and in many instances DRI's attorney members are hired by liability insurance companies to represent policyholders in tort cases. Some DRI members also represent insurers in coverage litigation or are employed by liability insurers in diverse claims capacities. Moreover, virtually all DRI members represent clients – both individuals and businesses – who are directly impacted by the benefits and costs of insurance products. As such, DRI has a nuanced understanding of the issues that the Restatement of the Law of Liability Insurance is addressing and the consequences that the draft provisions in this Restatement will have for the defense bar and the clients represented by these lawyers. Finally, through its Center for Law and Public Policy and the work of its Insurance Law Committee, DRI has followed the proposed Restatement of the Law, Liability Insurance project.

DRI urges that the American Law Institute give further consideration to the possible adoption of the Proposed Final Draft of the Restatement of the Law, Liability Insurance,

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which we understand is proposed for final approval at its upcoming May Annual Meeting. In preparing drafts of a proposed Restatement of the Law, Reporters are tasked to identify the majority rule and should only diverge from it if recent trends in the case law have shown the majority rule to be "outmoded or undesirable." Respectfully, in many instances, the black letter rules and Comments in this Restatement adopt rules that are entirely new, or have only been adopted in a handful of states, and are not in accordance with the majority rule. Furthermore, in many cases, the Reporters clearly diverge from the majority rule without demonstrating why or how the majority rule allegedly is "outmoded or undesirable." This is particularly true, for example, of the Reporters' abandonment of the "plain meaning rule" for interpreting insurance policies. That rule has been in place for decades and has been adopted in nearly every state in the country. Jettisoning it in favor of a "plain meaning presumption" will cause confusion in the courts, call into question the credibility of this Restatement as a whole and delay and increase the cost of insurance coverage litigation generally.

The ALI's Revised Style Manual states that black letter rules shall be crafted "with the care and precision of a well-drawn statute." Many of the sections in the Proposed Final Draft fall far short of this standard and seem likely to introduce confusion and controversy into an area of the common law that does not need of more of either. Based upon our review of the Proposed Final Draft, there are numerous individual sections that are seriously flawed in their statements of the common law and basic principles of insurance jurisprudence. We also observe that there are Comments in additional Sections which subtly undermine the existing law, and which appear to date back to the origins of this project as a "Principles of the Law of Liability Insurance," untethered to the common law. In sum, the Proposed Final Draft of this Restatement does not codify existing common law, but instead repeatedly stakes out new and controversial positions without adequate grounding in law or public policy. A Restatement of the Law, Liability Insurance that is an advocate for dramatic changes in the law would be an abrupt departure from the reliable, clear statement of existing law that lawyers and courts have come to expect as the scholarly work product in the ALI's Restatements. The ALI should not adopt this Restatement project as it stands.

Of particular significance to DRI, the Restatement draft proposes a new set of rules governing the relationship between policyholders, their defense counsel and insurers. Specifically, in Section 12, the Restatement sets out new rules concerning the liability of the insurer for defense counsel's conduct of the policyholder's defense. If adopted, Section 12 would provide that "An insurer exercising the right to defend a legal action is subject to liability for the negligence or other breach of professional obligation of defense counsel and related service providers in relation to the action if: (1) Defense counsel is an employee of the insurer acting within the scope of employment; or (2) The insurer negligently selects or supervises defense counsel, including by retaining counsel with inadequate liability insurance." This Section would create new direct liability on the part of the insurer to the insured for the acts of defense counsel, and would do so in the absence of appropriate support in the case law for applying direct liability in this setting. DRI submits that the new proposed grounds for insurer liability for "selection" or "supervision" of defense counsel are vague and unworkable and should not be introduced through a proposed ALI Restatement of the Law. In fact, the Restatement draft itself acknowledges that "[t]here is little case law on this topic." Proposed Final Draft at p. 112, line 2.

Promoting a new cause of action against insurers for the “selection” or inadequate or negligent “supervision” of defense counsel raises many issues of great concern to DRI. It would encourage greater intrusion into the professional services of defense counsel by insurers, impede the relationship between defense counsel and policyholders and tread on the ethical obligations of defense counsel to their clients. Further, the new proposal to create insurer liability for retaining defense counsel “with inadequate liability insurance” poses additional concerns because of unsettled ethical rules regarding whether and when attorneys should be required to disclose information about their purchase of malpractice insurance. State courts, attorney licensing agencies, and bar associations currently are evaluating these important attorney ethics issues. Yet the important legal and public policy implications of Section 12 are not fully considered or addressed in the Proposed Final Draft. Likewise, the draft does not fully take account of the other, existing remedies for negligence or other breach of professional obligations of defense counsel, such as a malpractice action against the attorney. There is no basis in the common law for Section 12(2) to appear in a Restatement. Further, imposing liability based on the presumed right of insurers to direct the conduct of defense counsel may give rise to conflicts with the independent and ethical duties of defense counsel and is at odds with the Restatement of the Law of Lawyering.

In addition to the controversial proposals in Section 12 of the proposed Restatement of the Law, Liability Insurance, there are many other sections of the draft that also depart from the common law to propose new rules, reinforcing that this project is far from a typical “Restatement” of the Law. In another example, the Restatement takes on the question of fee-shifting, i.e., the recovery of attorneys’ fees and other costs incurred to litigate a claim and proposes new common law rules to expand fee-shifting in insurance disputes beyond existing statutory authority. Section 48(3) provides that available remedies include court costs or attorneys’ fees to a prevailing party “when provided by legislation.” But then the draft also proposes further instances of fee-shifting – in addition to where it is provided by legislation – in Section 48(4) and in Section 49 (3).

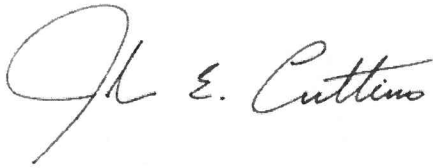
But only a handful of jurisdictions allow attorney fee-shifting as a matter of common law in insurance disputes. The overwhelming majority of states either do not permit attorney fee shifting or do so as a matter of specific statutory law. See, e.g., *ACMAT Corp. v. Greater New York Mut. Ins. Co.*, 923 A.2d 697, 699 (Conn. 2007) (rejecting fee-shifting for prevailing insured in declaratory judgment action where the “sole issue in this appeal is whether we should adopt a common-law exception to the American rule” in absence of bad faith by the insurer). The Restatement lacks adequate common law support for its fee-shifting proposals, and fails to give appropriate deference to the existence of specific statutes addressing potential one-way attorney fee shifting. We respectfully suggest that the ALI’s role in a Restatement is not and should not be to override legislative judgments or declare public policy. Fee-shifting is an area where a seeming majority of state legislatures have spoken. Given this backdrop, the Restatement should defer to states’ existing law with respect to potential fee-shifting. (See 1 Allan D. Windt, “Insurance Claims & Disputes: Representation of Insurance Companies and Insureds” § 8:14 (5th ed. 2007) (analyzing the multiple theories put forth in support of allowing insureds to recover attorneys’ fees incurred in a declaratory judgment action and concluding that courts “have failed, in the few cases in which they have tried, to provide any persuasive justification for those rules”).

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The Proposed Final Draft of the Restatement of the Law, Liability Insurance should be sent back for further consideration and review, with an eye toward bringing its provisions in line with the existing common law and eliminating the many instances where it advocates new rules without sufficient grounding in the law or consideration of the impact and policy considerations. DRI strongly urges the ALI not to approve the Proposed Final Draft of this project at its annual meeting later this month.

Very truly yours,

A handwritten signature in cursive script that reads "John E. Cuttino". The signature is written in black ink and is positioned above the typed name and title.

John E. Cuttino  
DRI President