August 11, 2014

Tom Baker and Kyle D. Logue c/o The Executive Office
American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104-3099

VIA EMAIL:

Re: The Principles of the Law of Liability Insurance: Preliminary Draft No. 6 (March 10, 2014) Chapter 3, Topic 2 - Allocation and Contribution (Sections 40-46).

Dear Reporters,

The undersigned ALI Advisers and interested counsel are writing to express our strong support for your original language in the above-referenced draft sections on the topic of allocation and contribution among multiple insurers. We firmly believe your original language properly states that the default rule should be "all sums" or *joint and several liability*, and that the burden for contribution and subrogation should be on the insurer, not the policyholder.

Without a doubt, the law should encourage the timely availability of insurance funds to facilitate environmental cleanups, and discourage unnecessary litigation between policyholders and insurers. This is particularly true in complex long-tail environmental claims triggering multiple policies. The "all sums" rules stated in Preliminary Draft No. 6 accomplish those objectives far more effectively than the alternative allocation and contribution theories that have been advanced by others in connection with this draft.

In case you are considering alternatives to an "all sums" default rule, we bring to your attention the attached historical documentation that supports that rule and your original draft language.

Historical Documentation

As evidenced by insurance company filings with regulators throughout the U.S., the standard Commercial General Liability policy, if in effect at the time of the injury or damage, is intended to provide full coverage up to the policy limits. For an extensive discussion on drafting history and rationale, see *Insurance Coverage Litigation*, Second Edition, Eugene Anderson, Esq., Jordan S. Stanzler, Esq., Lorelie S. Masters, Esq., Aspen Publishing (2013 Supplement) (sec. 4.18).

We also attach a brief *amicus curiae* (*Thomson, Inc. et al. v. XL Insurance, Inc. et al.*, No. 49A05-1109-PL-470, 2014) on the "all sums" allocation rule, along with the appendix of supporting historical documents, filed by United Policyholders in the Indiana Supreme Court. Part II of this brief discusses the drafting history support for this rule.

Below is a list of the more prominent appellate decisions supporting this sound approach that may be helpful in preparing your Reporter's Notes.

Appellate Decisions

A majority of courts have held that, without an explicit *pro rata allocation* clause in the insurance policy, insurance companies "cannot limit their obligations to a *pro-rata* share or portion of the policyholder's liability." Anderson et al, *supra* at p. 252 (quoting *Monsanto Co. v. C.E. Heath Comp. & Liab. Ins. Co.* 652 A.2d 30 (Del. 1994), *infra*).

Under the majority rule, because standard general liability insurance policies require the insurance company to pay "all sums," the policyholder is entitled to coverage in full under each of the triggered insurance policies, up to the limits of liability, if any, of each policy. *Id.* at 253. This rule applies regardless of how many policies are triggered. *Ibid.*

In further support of your originally stated position, we direct you to a growing list of appellate decisions from state and federal courts across the country, which have holdings in agreement with the "all sums" approach to allocation and contribution. *See*:

California
State of California v. Continental Ins. Co., 55 Cal.4th 186, 281 P.3d 1000 (2012);
Aerojet-General Corp. v. Transport Indemnity Co., 948 P.2d 909, 919 (Cal. 1997);

Delaware
Hercules Inc. v. AIU Ins. Co., 784 A.2d 481,491 (Del. 2001); and *Monsanto Co. v. CE Heath Comp. & Liab. Ins. Co.*, 652 A.2d 30 (Del. 1994) (interpreting Missouri law);

Illinois
Zurich Insurance Co. v. Raymark Industries, Inc., 514 N.E.2d 150, 165 (Ill. 1987); *John Crane, Inc. v. Admiral Ins. Co., et al.*, 2013 IL App (1st) 093240 (Mar. 5, 2013); *Benoy Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 679 N.E.2d 414 (Ill. App. 1997).

Indiana
Allstate Insurance Co. v. Dana Corp., 759 N.E.2d 1049, 1060 (Ind. 2001);

Minnesota
In re Silicone Implant Ins. Coverage Litig., 667 N.W.2d 405 (Minn. 2003);
SCSC Corp. v. Allied Mutual Insurance Co., 536 N.W.2d 305, 318 (Minn. 1995);

Missouri
Doe Run Resources Corp. v. Certain Underwriters at Lloyd's, London, 400 S.W.3d 463 (Mo. Ct. App. 2013).

New York
Continental Cas. Co. v. Rapid–Am. Corp., 80 N.Y.2d 640, 593 N.Y.S.2d 966 (1993) (defense costs);

Ohio
Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co., 769 N.E.2d 835, 840 (Ohio 2002); *Penn. Gen. Ins. Co. v. Park-Ohio Indus., Inc.*, 126 Ohio St.3d 98, 102, 930 N.E.2d 800, 805-06 (2010);

Oregon
Cascade Corp. v. American Home Assur. Co., 135 P.3d 450 (Ore. App. 2006) (interpreting ORS §465.480 (3)-(5) Env. Ins.);

Pennsylvania
J.H. France Refractories Co. v. Allstate Insurance Co., 626 A.2d 502 (Pa. 1992);

Rhode Island
Emhart Indus., Inc. v. Century Indem. Co., 559 F.3d 57 (1st Cir. 2009) (Rhode Island);

Texas
Lennar Corporation v. Markel American Insurance Company, 413 S.W.3d 750 (Tex. 2013); *American Physicians Insurance Exchange v. Garcia*, 876 S.W.2d 842, 854-855 (Tex. 1994);

Washington
American Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co., 951 P.2d 250 (Wash. 1998); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 15 P.3d 115 (Wash. 2000);

Wisconsin
Plastics Engineering Co. v. Liberty Mutual Insurance Co., 759 N.W.2d 613, 621-622 (Wis. 2009); and

District of Columbia
Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034, 1047-50 (D.C. Cir. 1981), cert. denied 455 U.S. 1007 (1982).

The undersigned attorneys are ALI Council Members, Advisers and interested counsel who are dedicated to promoting clarity and uniformity in the law of liability insurance. This is also the stated goal of the American Law Institute.

Thank you for your hard work on this project and, in advance, for your consideration of our input and information.

Sincerely,

Amy Bach, Esq., Executive Director, ALI Adviser
United Policyholders

Lorelie S. Masters, Esq., Partner, ALI Adviser
Timothy W. Burns. Esq., Partner
Perkins Coie, Washington D.C.

John G. Buchanan III, Esq., Partner, ALI Adviser
Covington & Burling LLP, Washington D.C.

Barry S. Levin, Esq., Partner, ALI Adviser
Orrick, Herrington, and Sutcliffe, San Francisco, CA

Jonathan M. Goodman, Esq., Executive Counsel, ALI Adviser
General Electric Company

David L. Mulliken, Esq., Partner, ALI Adviser
Latham and Watkins

Larry Stewart, Esq., Partner, ALI Adviser
Stewart Tilghman Fox Bianchi & Cain

David H. Brown, Esq., Partner, ALI Adviser
Brown and Kornegay

Ann V. Kramer, Esq., Partner
Timothy P. Law, Esq., Partner
Reed Smith