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# Concerns Mount Concerning the American Law Institute's Restatement of the Law, Liability Insurance

**Laura A Foggan**  
Crowell & Moring LLP  
Washington

The American Law Institute (“ALI”) recently approved its first foray into insurance law, a Restatement of the Law, Liability Insurance (“Restatement”),<sup>1</sup> which is now being prepared for publication. The ALI’s Restatements of the Law are a set of treatises on legal subjects that seek to inform judges and lawyers about general principles of common law. The new ALI liability insurance project was penned by Reporters Tom Baker of the University of Pennsylvania and Kyle D. Logue of the University of Michigan. It is slated for publication in late 2018 or early 2019. But before the official text is even published, a growing number of voices have expressed concern that the Restatement does not reflect existing US insurance law and should not be afforded recognition by courts as an authoritative reference regarding established rules and principles of insurance law. Those objecting have included lawyers and insurance scholars submitting input for the Reporters’ consideration in drafting the Restatement,<sup>2</sup> as well as officials in several US states, who have questioned whether it properly reflects existing insurance law principles and rejected reliance on it.

Through legislative action, or in formal letters to the ALI from state Governors or Insurance Commissioners, officials in eleven US states already have questioned the reliability of the Restatement as a reflection of existing insurance law. The insurance commissioners of Michigan,<sup>3</sup> Idaho<sup>4</sup> and Illinois<sup>5</sup> have each written to the ALI to express concerns that the Restatement goes beyond codification of the law and could adversely impact the insurance system and thus matters they oversee as regulators. The Governors of South Carolina, Maine, Texas, Iowa, Nebraska and Utah<sup>6</sup> jointly wrote to the ALI to underscore their concerns about how this project alters fundamental insurance law principles. And the legislatures of Tennessee<sup>7</sup> and most recently, Ohio,<sup>8</sup> have enacted new laws repudiating the Restatement’s overreach into altering the common law – specifically with respect to rules giving insurance contract language its plain meaning in Tennessee and more broadly with respect to efforts to impose the Reporters’ judgments about public policy on the law of Ohio.

Government leaders in other states have expressed similar concerns. For instance, Senator Jason Rapert of Arkansas, who is President of the National Council of Insurance Legislators (NCOIL), has made clear that insurance legislators do not view this project as an authoritative reference regarding establishes rules and principles of insurance law, but rather a drafter’s wish list — and an overreach into constitutionally protected legislative prerogatives that must be rectified. Thus, with comments like these, additional states seem poised to enact legislation repudiating the Restatement’s handling of US insurance law.

Traditionally, ALI restatements have been held in high regard and relied upon by courts as authoritative references presenting an orderly statement of the US common law. In ALI’s own words, restatements are meant



to “aim at clear formulations of common law . . . and reflect the law as it presently stands or might appropriately be stated by a court.” (ALI Style Manual, 2015). But some of the ALI’s more recent projects have moved away from codifying existing law to become more subjective in their work. The final products now resemble what the authors wish the law would say, rather than a restatement of what it actually is.

In a 2015 United States Supreme Court opinion, the late Justice Antonin Scalia explained the problem like this:

[M]odern Restatements ... are of questionable value, and must be used with caution ... Over time, the Restatements’ authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be ... And it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law.<sup>9</sup>

Justice Scalia’s concerns are reflected in the “aspirational” nature of the new liability insurance Restatement. Insurance regulators in several states have found that it ignores what the legislatures and the majority of courts have determined and substitutes ideas the Reporters think are better than existing insurance law. For instance:

Michigan Department of Insurance and Financial Services Director Patrick McPharlin wrote that the goal of creating a stable marketplace in which the terms of contracts and related rates are reasonable and fair could be jeopardized by the Restatement. He wrote “to voice concerns that the proposed Restatement could significantly alter the environment in which insurance contracts are interpreted in a way that would create instability for insurers and higher prices for consumers.” He further noted that the Restatement “seems to represent an attempt

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to impose liability ‘reform’ on the insurance industry, regardless of existing statutes and case law.” Letter from Patrick McPharlin to ALI Director Richard Revesz (May 15, 2017).

Idaho Director of Insurance Dean Cameron also wrote to the ALI about the revisions to existing insurance law proposed by the Restatement. He explained that such changes to black-letter law were not only of concern to insurers and policyholders but might also be of concern to regulators. He noted that the revisions “could significantly alter the course of doing business ergo, its regulation.” Letter from Dean Cameron to ALI Director Richard Revesz (April 5, 2017).

And, Illinois Department of Insurance Director Jennifer Hammer wrote to the ALI Leadership that, rather than provide a general summary of the principles of insurance law, this Restatement “seems to depart from the basic intent of restatements and instead express the vision of what the law should be or become.” She wrote that, to the extent the ALI chose to make a deviation from clarifying and simplifying prevailing common law rules and instead reflect the Reporters’ subjective views of what the law should be, the Illinois Department would like to “conduct further research, consult with other regulators, and determine the impact such rules will have on the individuals we protect and regulate.” Letter from Jennifer Hammer to ALI Leadership (May 17, 2017).

Despite repeated warnings about the need to reconsider provisions seeking to change black-letter law, the final Restatement contains many provisions that lack legal authority, or adopt a minority rule. For example:

The Restatement invents a new tort outside the insurance contract terms for negligent selection of defense counsel, creating a duty for insurers to second-guess professional licensing boards in screening defense counsel for impairment or competency even when determined fit to practice law by the governing body in the applicable jurisdiction. This raises substantial public policy concerns, and imposes undesirable costs and uncertainty on the retention of defense counsel. *See* Restatement, Section 12.

In determining rights to rescission, the Restatement would superimpose a new “substantiality” test on the requirement of a material misrepresentation that is established by existing statutes and case law in most jurisdictions. This provision would serve only to inject confusion and fuel litigation. *See* Restatement, Section 8.

Where a state’s public policy dictates that an insurer cannot be compelled to pay for punitive damages assessed against a wrongdoer, the Restatement would change this rule (in the event of a breach of duties with respect to settlement) and hold the insurer liable for an insured’s punitive damages, even if public policy is otherwise or punitive damages are specifically excluded from policy. *See* Restatement, Section 27. These sections are illustrative of the problem, which runs deeper into the

Restatement as a whole. Given all of these concerns, it is not surprising that leading academics and commentators have voiced objections to this Restatement. For instance, one scholar noted that the Restatement’s proposals “risk significant disruption of current law with uncertain, unintended, and adverse consequences on liability insurance markets in the form of higher prices, less availability of coverage, reductions in policy limits purchased, aggravation of the judgment proof problem, and increased adverse selection and moral hazard.”<sup>10</sup>

Representatives of many corporations have joined in expressing concern about the deviation from existing law in the Restatement, noting that the project contains numerous provisions which do not satisfy the traditional elements of a restatement. These corporate leaders are insurance buyers. They opined 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.”<sup>11</sup>

The National Council of Insurance Legislators (NCOIL) has devoted considerable time to discussing the Restatement, and concluded that “this Restatement is as much a drafters’ wish list as an authoritative reference regarding established rules and principles of liability insurance law.” NCOIL has stated that it “will not allow the constitutionally protected legislative prerogatives in each state to be infringed upon by an unelected body. Legislative action includes the passage as well as the consideration and non-passage of bill language.” Further, NCOIL has stated that it “will examine all necessary steps to rectify this overreach, including the necessity for a model law that accurately states what the law is on certain liability insurance law topics.”<sup>12</sup>

While opposition continues to build, a handful of courts already have begun citing to the Restatement, making clear there will be a battle over the weight this project should be accorded in the courts. The ALI is arguably the most prestigious legal organization in the country and its reputation has been grounded in superior, unbiased legal analysis. Many courts are not aware that this Restatement has been criticized as reflecting subjective views of the law, rather than a faithful report of the established common law insurance rules. They should not be lulled into reliance on this Restatement without careful review of its provisions.

All state officials – legislative, regulatory and judicial – should be on the lookout for Restatement rules that plow new ground by adopting minority or invented insurance law rules, instead of prevailing law. As was done in Tennessee and Ohio, other state legislatures are considering action to protect their role in determining the public policy of the state. As the ALI itself recognizes, “An unelected body like The American Law Institute has limited competence and no special authority to make major innovations in matters of public policy.”<sup>13</sup>

1 References to the Restatement of the Law, Liability Insurance are to Proposed Final Draft No. 2 (April 13, 2018), which was approved by the ALI at its annual meeting in May, 2018.

2 The Reporters and the ALI received over 200 submissions on this project, most of which – including the letters cited in this article -- are posted on the ALI website. See <https://www.ali.org>.

3 See May 15, 2017 Letter to the ALI from Patrick McPharlin, Director of the Michigan Dep’t of Insurance and Financial Services.

4 See April 5, 2017 Letter to the ALI from Dean Cameron, Director of the Idaho Dep’t of Insurance.

5 See May 19, 2017 Letter to the ALI from Jennifer Hammer Letter, Director of the Illinois Dep’t of Insurance.

6 See April 6, 2018 Letter to the ALI from Governors of South Carolina, Maine, Texas, Iowa, Nebraska and Utah.

7 Tennessee HB 1977/SB 1862 (providing inter alia, “[a] policy of insurance must be interpreted fairly and reasonably, giving the language of the policy of insurance its ordinary meaning”).

8 Ohio S.B. 239, Sec. 3901.82 (“The Restatement of the Law, Liability Insurance that was approved at the 2018 annual meeting of the American law institute does not constitute the public policy of this state and is not an appropriate subject of notice.”)

9 *Kansas v. Nebraska*, 135 S. Ct. 1042, 1064 (2015) (Scalia, J., concurring in part and dissenting in part).

10 Scott E. Harrington, Economic Perspectives on the Restatement of the Law on Liability Insurance Project (March 20, 2017).

11 Letter to ALI Leadership from Senior Legal Officials of TAMKO Building Products, Inc., ConocoPhillips, Brunswick Corporation, Eli Lilly and Company, Novartis Corporation, RPM International Inc., Shell Oil Company, GlaxoSmithKline and Johnson & Johnson (May 19, 2017). See also Letter from 27 Legal Officers of Major Corporations to David F. Levi, ALI President (Dec. 1, 2017).

12 Statement of NCOIL President Sen. Jason Rapert of Arkansas.

13 ALI Style Manual, 2015.