Reigning in New Ways to Sue Where Lawmakers Never Intended

BY CHRISTOPHER E. APPEL

It may surprise some legislators to know that when courts develop the state common law of torts they routinely look to a document developed by a private group called the American Law Institute (ALI). The ALI represents the elite of the legal community, and is composed of law professors, judges, and distinguished public and private sector lawyers from around the country. The document to which courts refer is called the Restatement of Torts, and its content is supposed to reflect the most sound liability rules and public policy derived from judicial decisions.

The first Restatement of Torts was developed in the 1930s, the second in the 1960s and 1970s, and the third began in the 1990s and continues to this day. The latest part is called the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*. Much of this new Restatement presents fair liability rules, but some parts, unfortunately, seek rather dramatic departures in the law.

The principal author or "Reporter" of the new Restatement, Professor Michael Green,[1] has recently acknowledged as much when teaming up with former plaintiffs' lawyer and President of the Association of Trial Lawyers of America (now called the American Association for Justice) Larry Stewart for an article in *Trial*, the monthly publication of the trial lawyer group. In the article, titled "The New Restatement's Top 10 Tort Tools," the two authors discuss their most prized changes in the recently finalized Restatement, and the potential of this "powerful new tool" to create or enhance tort liability in unprecedented ways.[2]

One of the "top ten" changes discussed is to call upon state judges to take provisions from enacted legislation and create new ways to sue people, even where the legislature never stated or intended such a result. Following the adoption of the new Restatement by the ALI, ALEC revised its model *Transparency in Lawsuits Protection Act* (Act) specifically to address this major change.

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The original ALEC model Act targeted what are called "implied causes of action." Implied causes of action are court-created causes of action. When interpreting a statute or regulation a court injects its opinion on what it thinks the legislature intended, and recognizes a new basis in which to bring a private lawsuit. Because the existence of a private cause of action is highly amorphous and often unpredictable, it can result in judicial activism. ALEC's model Act addresses this problem by requiring that any law establishing a new private right to sue must expressly state such legislative intent, and that courts may not "second-guess" the will of the legislature. Thus, the model Act effectively eliminates this avenue for judicial activism.

The new Restatement, however, sponsors an entirely new way to use legislation to create an avenue to sue. It invites judges to recognize what are known as affirmative duties of care, which, when breached, will, as a practical matter, result in the same new and unexpected liability. The model Act was amended to prevent courts from circumventing the core objective of the Act by simply implying an affirmative duty based upon a statute when not permitted to imply a private cause of action under that statute.

A touchstone of American legal tradition is that a person or entity generally owes no duty to rescue or render assistance to another. Affirmative duties represent an exception to this basic rule and require a person or entity to act to rescue or reduce risks of harm to another. Traditionally, affirmative duties are narrowly drawn. They may exist by virtue of the relationship of the parties (e.g. employers owe a duty to protect employees) or by certain actions undertaken by a defendant, such as beginning a rescue attempt.

Under the new Restatement, courts may "imply" an affirmative duty based upon their reading of any statute or other law.[3] They are permitted to determine the scope of any new affirmative duty they create, and recognize such a duty regardless of the actual intent of the state legislature when the law was enacted.[4] The new Restatement

[1] The Restatement (Third) of Torts: Liability for Physical and Emotional Harm *project has had a series of Reporters. The original project Reporter, Professor Gary Schwartz, passed away in 2001. He was succeeded by Texas School of Law Dean William C. Powers and Wake Forest University School of Law Professor Michael Green. Dean Powers became the President of the University of Texas in 2006, placing the principal drafting responsibilities of the Restatement project with Professor Green.*

[2] *Michael D. Green & Larry S. Stewart, The New Restatement's Top 10 Tort Tools,* Trial, *April 2010, at 44.*

[3] *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm, *§ 38 (Final Proposed Draft No. 1, April 6, 2005).*

[4] *See id.*

provides a very broad rule in which courts need only find that an affirmative duty is not "inconsistent with" any statute requiring an actor to act for the protection of another for a new duty to be created under the common law of the state.[5] The effect of this new "black letter" rule presents both a highly ambiguous and remarkable proposition for courts; judges are empowered to recognize affirmative duties where they have never before existed and where there is no case law or other authority to support them. While affirmative duties have been narrowly circumscribed for centuries, the new Restatement has the potential to radically transform tort liability and wreak legal chaos in a state adopting the rule.

For example, a court could read a common law affirmative duty into almost any law related to protective services, custody, control, or oversight authority. Judge Richard Posner of the 7th Circuit Court of Appeals has also cautioned that under such a rule "every statute that specified a standard of care would be automatically enforceable by tort suits for damages—every statute in effect would create an implied private right of action."[6]

Equally as disconcerting as the potentially sweeping scope of the new rule (i.e. any statute, regulation, local ordinance, or other law is fair game) and the lack of clear standards for courts to apply the rule is the utter lack of legal authority supporting the rule. The traditional purpose of the ALI's Restatement of Law project is to "restate" what the law actually is in a clear manner. The part of the new Restatement addressing affirmative duties seemingly abandons this neutral and objective approach, and instead adopts rules that are not mentioned in any prior restatements and that do not exist under any state's law.

Such a lack of authority is especially problematic because, although not bearing the force of law, restatements are viewed as a supremely objective tool for judicial education;[7] not a "reformist" proposal of a law professor. Rather than establishing clear, balanced liability rules, this part of the new Restatement, ironically, is far more likely to increase judicial confusion and lead activist courts down a slippery slope of recognizing new affirmative duties in ways never before imagined.

The ALEC model *Transparency in Lawsuits Protection Act* prevents courts from engaging in an open-ended exercise with regard to recognizing affirmative duties. It provides a common sense way of infusing greater clarity in the legislative process by requiring that state legislatures be explicit when creating new affirmative duties of care just as the legislature should be when creating any new private statutory cause of action. The model Act further instructs courts not to read into a statute a common law duty of care or private cause of action unless one is expressly provided.

The model Act recognizes that whether a law creates a new private cause of action or an affirmative duty of care is a significant public policy decision that should be reached by the legislature after close consideration and deliberation. By requiring such action to be done in a clear and transparent manner, the Act would eliminate confusion in the courts, needless and wasteful litigation over the possible meaning of a statute, inconsistent results, and unfair surprise for both plaintiffs and defendants.

It is also important to note that the model Act does not otherwise impact courts' inherent authority to develop state common law; the model Act only states that a court cannot use a statute to do so unless it is stated in the statute. Thus, the overall effect of the model Act is simple: the legislature must clearly state how law is to be enforced, and it is not the role of the judiciary to step in the legislature's shoes to make that policy judgment.

With the published volume of the new Restatement part on affirmative duties coming out this year, many state courts are likely to soon be confronted with claims seeking to expand common law duty rules. ALEC members should be aware of this effort to upend and reshape the traditional limits of affirmative duties, and understand how the *Transparency in Lawsuits Protection Act* can provide a vital safeguard against such expansion of tort liability.

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Georgia, for example, enacted a version of the model Act last year. Texas Gov. Rick Perry is also pursuing passage of the Act, as are other states appreciative of the urgency and potential consequences of the new Restatement's approach. The new *Restatement* is indeed a "powerful new tool" for creating tort liability, and legislation is needed to curb its excesses.

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[5] Restatement (Third) of Torts: Liability for Physical and Emotional Harm, *§ 38 cmt. e.*

[6] *Cuyler v. United States, 362 F.3d 949, 952 (7th Cir. 2004).*

[7] *The ALI's purpose is "educational" and includes "promot[ing] the clarification and simplification of the law and its better adaptation to social needs." The Am. Law Inst., Bylaw §1.01, reprinted in 74 A.L.I. Proc. 521 (1997).*