

RESHAPING THE TRADITIONAL LIMITS OF AFFIRMATIVE DUTIES UNDER THE THIRD RESTATEMENT OF TORTS

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INTRODUCTION

“Trial lawyers handling tort cases have a powerful new tool: the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*.”¹ So reads the first sentence of an April 2010 article jointly authored by Restatement Reporter Professor Michael Green² and former President of the Association of Trial Lawyers of America (now called the American Association for Justice) Larry Stewart in *Trial* magazine, the monthly publication of the trial lawyer group. In the article, titled “The New Restatement’s Top 10 Tort Tools,” the authors discuss significant liability creating or enhancing changes in the Restatement and its “Many Clarifications and Modifications That You Can Use to Your Clients’ Advantage.”³ Included on this “Top Ten” list of trial lawyer treasures are several provisions of Chapter 7 of the new Restatement dealing with Affirmative Duties, the subject of this

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1. Michael D. Green & Larry S. Stewart, *The New Restatement’s Top 10 Tort Tools*, TRIAL, April 2010, at 44.

2. 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.

3. Green & Stewart, *supra* note 1, at 44.

Article.⁴

Traditionally, those in charge of the Restatement projects of the American Law Institute (ALI) have avoided any publication that could present the appearance of an agenda favoring either plaintiffs or defendants.⁵ While there is not an ALI “rule” against such activity, the reason for this tradition is that Restatements are primarily a vehicle for judicial education.⁶ They are viewed by judges as an objective and neutral voice that “restates” the most thoughtfully reasoned existing case law, reflecting sound liability rules and public policy.⁷ The review process behind each Restatement is set to preclude ALI Reporters and their Advisory Committees from writing their own “tort code”; some case law must exist to support each black letter rule.⁸

In many respects, Chapter 7 of the new Restatement fulfills this core mission. As the product of over a decade of drafting and refinement,⁹ it offers a more streamlined approach to the fundamentals of tort law than the Second Restatement, which was adopted in 1965, and reflects several generations of legal development.¹⁰ It also develops topics that were more inchoate at the time of the Second Restatement. For example, the new Restatement speaks to important affirmative duty issues that the previous Restatement did not anticipate.¹¹

Nevertheless, there are a few areas, several of which are mentioned in Professor Green and former ATLA President

4. *Id.* at 47.

5. *E.g.*, Victor E. Schwartz, *The Restatement, Third, Torts: Product Liability: A Model of Fairness and Balance*, 10 KAN. J.L. & PUB. POL'Y 41, 41 (2000).

6. The ALI's purpose is “educational” and includes “promot[ing] the clarification and simplification of the law and its better adaptation to social needs” AM. LAW INST., BYLAWS § 1.01(A) (2007), available at <http://www.ali.org/index.cfm?fuseaction=about.bylaws>.

7. See John P. Frank, *The American Law Institute, 1923-1998*, 26 HOFSTRA L. REV. 615, 638-39 (1998) (noting that as of March 1994 there were 125,000 published court citations to Restatements, covering all fifty states).

8. Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability—The American Law Institute's Process of Democracy and Deliberation*, 26 HOFSTRA L. REV. 743, 746 (1998). The ALI does conduct other projects, such as the Model Penal Code, where full latitude to “create” law is available. *Id.* at 746, n.13.

9. See Current Projects: Restatement Third, Torts: Liability for Physical and Emotional Harm, AM. LAW INST., http://ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=16 (last visited Apr. 10, 2011) (stating that the project was approved in 1996).

10. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM intro. (2005) (stating that the new installment replaces and supersedes Divisions 2 and 3 of the Restatement Second, “complet[ing] the coverage of significant terrain in tort law.”).

11. See *infra* Section I.

Stewart's "Top Ten" article,¹² that endeavor to push the traditional boundaries of affirmative duties into new and uncharted territory. This Article examines these changes, and their potential to dramatically expand liability. Specifically, the Article focuses on two key sections of Chapter 7 of the new Restatement, which invite courts down a new path of broad liability expansion.

Part I begins with an overview of Chapter 7 of the new Restatement for judges and other readers who may be unfamiliar with its organization and content. It examines the similarities and differences of this Restatement with the *Restatement (Second) of Torts*. Part II then identifies how several of these differences could, if adopted by courts, be used to create or enhance liability in unprecedented ways. Part III discusses the public policy effects of implementing these changes, and the potential for blurring or eradicating traditional common law duty lines.

The Article concludes that specific provisions in Chapter 7 that open the door to broad and possibly unintended liability should not be adopted by courts. They are unlike the traditional, objective Restatement provisions and should be treated with great skepticism. The Article further demonstrates that sound public policy counsels in favor of maintaining longstanding affirmative duty rules that place both plaintiffs and defendants on sound footing and provide each party with clear duty lines and notice of conduct that will result in liability.

With Chapter 7 scheduled for final publication in 2011, and sections already discussed by some state high courts,¹³ it is highly likely that more courts will be confronted with claims seeking to expand common law duty rules. The purpose of this Article is to assist courts in their evaluation of this new and expansive Restatement chapter.

I. OVERVIEW OF AFFIRMATIVE DUTIES IN THE THIRD RESTATEMENT OF TORTS

Affirmative duties arise when tort law places an obligation of due care on one party, typically the defendant, to prevent or limit an injury to another.¹⁴ This duty may exist because the defendant

12. Green & Stewart, *supra* note 1, at 47.

13. *E.g.*, *A.W. v. Lancaster Cnty. Sch. Dist.* 0001, 784 N.W.2d 907, 917 (Neb. 2010); *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 696-97 (Iowa 2009). *But see* *Riedel v. ICI Americas, Inc.*, 968 A.2d 17, 20 (Del. 2009) (declining to adopt any section of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm).

14. *E.g.*, *Bacchus v. Ameripride Serv., Inc.*, 179 P.3d 309, 313 (Idaho 2008) (stating that an affirmative duty to assist someone else only arises when a special relationship exists between the parties); *Hills v. Bridgeview Little League Ass'n*, 745 N.E.2d 1166, 1179 (Ill. 2000) ("The general rule [is] that one has no affirmative duty to control others . . ."); *Coombes v. Florio*, 877 N.E.2d 567, 575 (Mass. 2007) ("[A] person has no duty to act affirmatively to protect

either created the risk of harm or by virtue of the relationship of the parties, which irrespective of the risk, creates a duty of care.¹⁵ Chapter 7 of the new Restatement takes a more straightforward approach to affirmative duties than past Restatements. In the First and Second Restatements, affirmative duties were broken down into two subsets: (1) duties to control third persons, and (2) duties based on the conduct of the actor.¹⁶ The Third Restatement simplifies this approach, considering “only whether a duty exists.”¹⁷ In addition, as explained in the Scope Note to Chapter 7, the chapter does not delve into “[w]hether that duty is breached, whether the breach is a factual cause of physical harm, [or] whether there is some basis on which the harm is beyond the actor’s scope of liability”¹⁸ The chapter is intended to cover *only* where affirmative duties exist as a matter of law; a determination that is made by state and federal courts applying state law.¹⁹

Chapter 7 includes eight consecutively numbered sections.²⁰ This organizational scheme alone represents an improvement over the Second Restatement, which requires cross-reference to other Restatement topics that do not focus squarely on whether an affirmative duty should exist as a matter of law.²¹ Chapter 7 separates these topics in a clearer and more “user-friendly” manner, which is likely due to the Reporter’s decision to adopt a more uniform approach to affirmative duties.²²

another from harm.”).

15. *E.g.*, *Williams v. California*, 664 P.2d 137, 145 (Cal. 1983) (“[T]he existence of a special relationship between the parties will give rise to [an affirmative] duty.”); *Downs v. Bush*, 263 S.W.3d 812, 819 (Tenn. 2008) (“[I]ndividuals have an obligation to refrain from acting in a way that creates an unreasonable risk of harm to others”).

16. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM ch. 7, scope note (Proposed Final Draft No. 1 2005).

17. *Id.*

18. *Id.* Answers to these issues can be found in Chapters 3-6 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, which are published and final. *See generally* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (2005).

19. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM ch. 7, scope note (Proposed Final Draft No. 1 2005); *see id.* § 38 cmt. b (Proposed Final Draft No. 1 2005) (stating “there is no general federal common law”).

20. *Id.* §§ 37-44.

21. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 319, 323 (1965) (addressing, respectively, duty when one assumes control over the conduct of a dangerous person and liability when one undertakes to render services to another). *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM ch. 7, scope note (Proposed Final Draft No. 1 2005) (noting that Sections 319 and 323 of the Second Restatement result in overlap).

22. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND

The first section of Chapter 7 of the Third Restatement, Section 37, states the traditional American rule that no affirmative duty exists where an actor's conduct "has not created a risk of physical harm to another."²³ Stated plainly, there is no general duty in tort law to rescue or protect another person from injury. While the prior Restatements each include similar language,²⁴ the Third Restatement eliminates any inquiry of nonfeasance (that is, the failure to act) versus malfeasance (that is, an openly hostile act), reasoning that "this distinction can be misleading" under certain circumstances.²⁵ Instead, Section 37 focuses exclusively on whether a risk of harm is created to determine the existence of a duty.²⁶ Section 37 further provides an important caveat, which could be read to strengthen the new Restatement's embodiment of American common law tradition: the *sole* exceptions to the "no duty" rule are housed in the subsequent sections of Chapter 7.²⁷

Section 38, the first section to provide for an affirmative duty, states, "When a statute requires an actor to act for the protection of another, the court may rely on the statute to decide that an affirmative duty exists and its scope."²⁸ This topic and black letter rule is not addressed in either of the previous Restatements²⁹ and represents new ground for the ALI. The new rule invites a court to read an affirmative duty into a statute or regulation where the purpose or design of the statute is consistent with that duty.³⁰ The rule applies when the statute or regulation at issue does not provide for or bar a private right of action; Section 38 is intended

EMOTIONAL HARM, ch. 7, scope note (Proposed Final Draft No. 1 2005) (stating that Chapter 7 tries to eliminate a redundancy present in the First and Second Restatements and avoids using sub-chapters).

23. *Id.* § 37 (Proposed Final Draft No. 1 2005).

24. *See* RESTATEMENT (SECOND) OF TORTS § 314 (1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."); RESTATEMENT OF TORTS § 314 (1934) ("The actor's realization that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.").

25. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 37 cmt. c (Proposed Final Draft No. 1 2005).

26. *Id.*

27. *Id.* § 37 (stating that there is no affirmative duty "unless a court determines that one of the affirmative duties provided in §§ 38-44 is applicable.").

28. *Id.* § 38.

29. *See id.* § 38 cmt. a (noting that "[t]he Restatement Second of Torts § 874A provided that statutes might play a role in the creation of new claims," but also that "Section 874A has not played any appreciable role in the recognition of affirmative duties based on statutory provisions . . .").

30. *See id.* § 38 cmt. e ("[W]hen a court finds that permitting tort actions would be inconsistent with the statute's design or purpose, imposing a tort duty is improper.").

to apply to areas where the law does not provide a clear enforcement mechanism.³¹ For example, in one of the illustrations provided, a court would be permitted to recognize an affirmative duty on the part of a landlord to repair locks based on a municipal ordinance requiring landlords to provide working locks.³²

The next section providing for an affirmative duty, Section 39, returns to familiar Restatement territory. The black letter rule restates and combines Sections 321 and 322 of the *Restatement (Second) of Torts* to provide that when an actor's prior conduct creates a continuing risk of harm, the actor owes an affirmative duty of reasonable care to minimize the harm.³³ This is essentially the inverse rule of Section 37, which provides that no duty exists where a person does not create a risk of harm.³⁴ The key aspect of the rule in Section 39 is that it applies regardless of whether the conduct creating a risk of harm is tortious; the threshold inquiry is, again, only whether a risk of harm is created.³⁵ To illustrate the point, Section 39 provides a nearly identical example to that of the Second Restatement in which a golfer hitting a ball owes a duty of care to an individual who suddenly appears in the ball's path and is at increased risk of being struck.³⁶

The duty rule in Section 39 is somewhat duplicative of the general duty of reasonable care provided for in the new Restatement, a point the Reporters acknowledge,³⁷ yet a clear distinction exists justifying separate treatment as an affirmative duty. This occurs where an actor's prior conduct is not *currently* creating the risk.³⁸ An example provided is an automobile driver who collides with another driver; regardless of the driver's negligence, he or she has an affirmative duty to prevent further harm to the other driver in the aftermath of the collision.³⁹

31. *See id.* (“[T]ort law can serve an enforcement role when the policy reflected in the statute is important, and the statute does not contain adequate enforcement provisions.”).

32. *Id.* § 38 cmt. b, illus. 1.

33. *Id.* § 39 cmt. a.

34. *See supra* notes 23-27 and accompanying text.

35. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, § 39 cmt. c (Proposed Final Draft No. 1 2005) (“The duty imposed by this Section is justified by the actor’s creating a risk (even if nontortiously) . . .”).

36. *Compare id.* at § 39 cmt. c, illus. 1 (Proposed Final Draft No. 1 2005), *with* RESTATEMENT (SECOND) OF TORTS § 321 cmt. a, illus. 1.

37. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, § 39 cmt. d (Proposed Final Draft No. 1 2005) (“This Section imposes a duty that might be subsumed under the general duty of reasonable care in § 7.”).

38. *See id.* (“[T]his Section is most often invoked when an actor engages in a discrete, nontortious act that creates a continuing risk of harm and causes harm at a later time.”).

39. *Id.*

Section 40, similar to Section 39, sets forth another traditional area of affirmative duties: a duty based upon a “special relationship.”⁴⁰ While the term “special relationship” carries no independent significance,⁴¹ the law has developed to recognize a select group of relationships between two or more parties as requiring a duty of care where the traditional default “no duty” rule would otherwise apply.⁴² Section 40 finds its counterpart in Section 314A of the Second Restatement and lists the same special relationships: a common carrier and its passengers; an innkeeper and its guests; a land possessor who lawfully holds its premises open to the public and land entrants; and, if required by law, a custodian and those in its custody.⁴³

In addition to these traditional special relationships, Section 40 includes several other relationships as requiring a duty of reasonable care. The first, derived from Section 314B of the Second Restatement,⁴⁴ applies to the employer and employee relationship where the employee is “in imminent danger” or “injured and therefore helpless.”⁴⁵ Section 40 also adds two entirely new special relationships: a school and its students and a landlord and its tenants.⁴⁶ The final relationship added by the new Restatement builds from the custodian relationship and recognizes an affirmative duty where “the custodian has a superior ability to protect the other.”⁴⁷

Each of these affirmative duties “requires only *reasonable* care under the circumstances,” which represents a more generalized duty of care than that expressed in the previous Restatement.⁴⁸ In addition, while the Second Restatement “expresses no opinion as to whether there may not be other [special] relations” giving rise to an affirmative duty,⁴⁹ the Third

40. *Id.* § 40.

41. *Id.* § 40 cmt. h.

42. *See, e.g.*, *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477, 482 (D.C. Cir. 1970) (placing duty of care on landlord to take protective measures to prevent criminal acts from being perpetrated against tenants); *Baker v. Fenneman & Brown Properties, LLC*, 793 N.E.2d 1203, 1206-10 (Ind. 2003) (finding that a restaurant owner owes an ill patron a duty of care); *Wagenblast v. Odessa Sch. Dist.* No. 105-157-166J, 758 P.2d 968, 973 (Wash. 1988) (finding that a school district owes a duty of care to students engaged in interscholastic sports).

43. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §§ 40(b)(1), (2), (3), (7)(a) (Proposed Final Draft No. 1 2005); *see also* RESTATEMENT (SECOND) OF TORTS § 314A.

44. RESTATEMENT (SECOND) OF TORTS § 314B.

45. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, § 40(b)(4) (Proposed Final Draft No. 1 2005).

46. *See id.* §§ 40(b)(5), (6).

47. *Id.* § 40(b)(7)(b).

48. *Id.* § 40 cmt. d.

49. RESTATEMENT (SECOND) OF TORTS § 314A caveat.

Restatement takes the approach that “[t]he list of special relationships provided in this Section is not exclusive.”⁵⁰ Rather, the Third Restatement states that, in addition to the new special relationships listed, courts are free to recognize others, and it even suggests that “[o]ne likely candidate” is the relationship among family members.⁵¹

Section 41 similarly addresses special relationships, but in the case where the risk of harm by one in a special relationship is to a third party.⁵² A classic example, expressly provided for in the black letter rule of Section 41, is the affirmative duty a parent has to dependent children to prevent the child from harming others.⁵³ Section 41 also includes the affirmative duty of a custodian to control the conduct of those in its custody from risks of harm to third parties, an employers’ duty to control the conduct of its employees from harming others, and a mental health professional’s duty to prevent harm to others caused by his or her patients.⁵⁴ These four scenarios are similarly represented in Sections 316, 317, and 319 of the Second Restatement;⁵⁵ Section 318, dealing with a duty of land possessors to control risks to third parties,⁵⁶ is addressed separately in Chapter 9 of the new Restatement.⁵⁷

Section 42 covers the creation of an affirmative duty of care to reduce the risk of harm to another when one “undertakes to render

50. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 cmt. o (Proposed Final Draft No. 1 2005).

51. *Id.*

52. *Id.* § 41(a).

53. *Id.* § 41(b)(1).

54. *Id.* §§ 41(b)(2)-(4). In effect, Section 41(b)(4) adopts the approach taken by the California Supreme Court in the seminal case, *Tarasoff v. Regents of the University of California*, where the court recognized an affirmative duty on the part of a psychiatrist to warn a third party when the patient threatened imminent bodily harm. *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976).

55. RESTATEMENT (SECOND) OF TORTS §§ 316, 317, 319 (discussing, respectively, the duty of a parent to control conduct of his or her child, the duty of a master to control the conduct of his or her servant, and the duty of those in charge of a person exhibiting dangerous propensities).

56. *Id.* at § 318.

57. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 51 (Tentative Draft No. 6 2009) (defining the general duty of care owed by a land possessor to entrants on the land). In Chapter 9, all land possessors owe a duty of reasonable care to those who come on the premises, except for the so-called “flagrant trespasser.” See *id.* § 52(a) (stating that the only duty owed by a land possessor to a flagrant trespasser is “the duty not to act in an intentional, willful, or wanton manner to cause physical harm.”). This newly fashioned legal term finds no support in the case law of any state and represents one of the more controversial provisions of the new Restatement. See *infra* Section III.A.

services to [the other].”⁵⁸ While such an undertaking could include rendering services to aid an imperiled person,⁵⁹ Section 42 is intended to apply more broadly.⁶⁰ Under the black letter rule, an actor who renders services to another owes an affirmative duty when the actor fails to exercise reasonable care and either the actor increases the risk of physical harm to the recipient of the services, or the recipient reasonably relies on the actor’s exercise of reasonable care.⁶¹ For example, if a neighbor agreed to watch another’s pet when she is out of town and neglected to do so, the caretaker neighbor would owe an affirmative duty under Section 42.⁶²

Section 323 of the Second Restatement contains similar language under the heading “Negligent Performance Of Undertaking To Render Services.”⁶³ Section 42 of the new Restatement incorporates these same concepts, but uses broader language. For instance, where Section 323 of the Second Restatement states the affirmative duty as one in which the actor renders services to another “which he should recognize as *necessary* for the protection of the other’s person or things,”⁶⁴ Section 42 finds a duty whenever that actor renders services which he “knows or should know” reduces the risk of harm.⁶⁵ The duty in Section 42 also applies regardless of any altruistic purpose on the part of the rescuer.⁶⁶ In addition, while the Second Restatement expresses no opinion on whether the making of a contract constitutes an “undertaking” for the purposes of finding an affirmative duty,⁶⁷ Section 42 of the new Restatement broadly defines an undertaking to include any voluntary rendering of services, whether gratuitously, for consideration, or pursuant to a contract or promise.⁶⁸ Section 42 further provides that an undertaking is not limited to services rendered on behalf of a

58. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 42 (Proposed Final Draft No. 1 2005).

59. Section 44 more directly covers this situation. *Id.* § 44.

60. *See id.* § 42 cmt. a (noting that Section 42 applies to people undertaking services both gratuitously and for consideration).

61. *Id.* § 42.

62. *Id.* § 42 cmt. f, illus. 3.

63. RESTATEMENT (SECOND) OF TORTS § 323. Section 325 of the Second Restatement, titled “Failure to Perform Gratuitous Undertaking to Render Services,” which similarly dealt with the affirmative duty created by undertaking a rescue, was subsumed by Section 323. *See id.* § 325 (stating that subject matter now covered by Section 323).

64. *Id.* § 323 (emphasis added).

65. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 42 (Proposed Final Draft No. 1 2005).

66. *Id.* § 42 cmt. d.

67. RESTATEMENT (SECOND) OF TORTS § 323 caveat 1.

68. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §§ 42 cmt. d, cmt. e (Proposed Final Draft No. 1 2005).

specific individual, but may include “a class of persons.”⁶⁹

Section 43 provides an important complement to the affirmative duty rule of Section 42 by addressing the duty owed to third persons while voluntarily rendering services in an undertaking to reduce the risk of physical harm. Similar to the previous section, the black letter rule of Section 43 provides that an actor who renders services to another owes an affirmative duty to a third person if the actor’s failure to exercise reasonable care exposes that third person to an increased risk of physical harm.⁷⁰ Additionally, the actor owes an affirmative duty of reasonable care to a third party if the actor has undertaken to perform a duty owed by the recipient of services to that third party, or the recipient of services, the third party, or another relies on the actor exercising reasonable care in the undertaking.⁷¹ An example would be a community organization offering to clear snow and ice from the sidewalk in front of a store and, following an ice storm, failing to render this service.⁷² If a third party slipped on the uncleared ice, the community organization would owe an affirmative duty to that third party because it undertook a duty owed by the store owner to the third party.⁷³

Generally speaking, Section 43 restates the rule provided in Section 324A of the Second Restatement, but, as with Section 42,⁷⁴ broadens the language and scope of the rule.⁷⁵ Section 43, like the Second Restatement, expresses no opinion on whether increased risk or reliance is required in all cases.⁷⁶ Section 43 later explains, however, that when an actor undertakes a duty of another who owes a duty to third parties, in effect “voluntarily stepping into the shoes of another,” there is no requirement of an increased risk of physical harm or reliance to find a duty.⁷⁷ Rather, this affirmative duty is grounded in the preexisting duty of the actor whose duty was voluntarily undertaken by someone else.⁷⁸

69. *Id.* § 42 cmt. d.

70. *Id.* § 43(a).

71. *Id.* §§ 43(b), (c).

72. *E.g., id.* § 43 cmt. g, illus. 2.

73. *Id.*

74. *See supra* notes 58-69 and accompanying text.

75. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §§ 43 cmt. a, cmt. c (Proposed Final Draft No. 1 2005) (noting that Section 43 replaces Section 324A of the Second Restatement, and also “parallels [the new] § 42 but extends the duty that is owed to third persons.”); *see also* RESTATEMENT (SECOND) OF TORTS § 324A cmt. a (noting that Section 324A parallels Section 323 of the Second Restatement).

76. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 43 cmt. e (Proposed Final Draft No. 1 2005); RESTATEMENT (SECOND) OF TORTS § 324A caveat 1.

77. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 43 cmt g (Proposed Final Draft No. 1 2005).

78. *See id.* (stating that the mere act of “voluntarily stepping into the shoes

The final section of Chapter 7, Section 44, covers the related duty created when a person “takes charge of another,” or as it is more commonly referred to, attempts a rescue.⁷⁹ This section might more simply be described as the duty owed where an “imperfect” rescue has been attempted. Similar to Sections 42 and 43, Section 44 is intended to apply to situations where a person renders aid to another in peril and either the rescuer’s failure to exercise reasonable care increases the risk of harm or the injured person’s reliance on the rescuer to exercise reasonable care under the circumstances results in physical harm. The black letter rule provides simply that a duty of reasonable care is owed whenever a person “takes charge” of another who reasonably appears to be imperiled and unable to protect himself or herself.⁸⁰ The rescuer’s duty lasts while the imperiled person is in the rescuer’s care, and when the rescuer discontinues aid or protection he or she has a duty to refrain from putting the imperiled person in a “worse position” than existed before the rescuer stepped in and took charge.⁸¹

The rule provided in Section 44 represents the traditional formulation of the “rescue doctrine.”⁸² Section 324 of the Second Restatement provided a nearly identical rule.⁸³ Section 44 differs from Sections 42 and 43 in that Section 44 deals exclusively with rescues and does not require reliance or an increased risk of physical harm.⁸⁴ It *does* require, however, that an actor have the purpose of benefitting the other, unlike Section 42.⁸⁵ Thus, Section

of another who has a preexisting duty justifies imposing the duty on the actor.”).

79. *Id.* § 44.

80. *Id.* § 44(a).

81. *Id.* § 44(b).

82. See Peter F. Lake, *Recognizing the Importance of Remoteness to the Duty of Rescue*, 46 DEPAUL L. REV. 315, 331 (1997) (describing an exception to the general no duty rule as, “[T]he defendant . . . begins a rescue and does it amiss.”); Philip W. Romohr, *A Right/Duty Perspective on the Legal and Philosophical Foundations of the No-Duty-to-Rescue Rule*, 55 DUKE L.J. 1025, 1032 (2006) (“One who has no duty to rescue a person in peril, yet undertakes a rescue of that person, becomes bound to exercise reasonable care in the rescue attempt.”); Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1461-62 (2008) (noting that an exception to “the general no-duty-to-rescue rule is triggered by the defendant voluntarily rendering aid to the plaintiff.”).

83. See RESTATEMENT (SECOND) OF TORTS § 324 (providing that “[o]ne who, being under no duty to do so, takes charge of another who is helpless” owes a duty to “exercise reasonable care to secure the safety of the other” and not leave the party in a “worse position”).

84. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 44 cmt. a (Proposed Final Draft No. 1 2005) (noting that Section 44’s predecessor in the Second Restatement, Section 324, did not require reliance or an increased risk of physical harm).

85. *Id.* § 44 cmt. c.

44 is a more narrow exception to the general default “no duty” rule.⁸⁶

Under the Third Restatement, the foregoing exceptions in Sections 38 through 44 represent the exclusive set of circumstances in which an affirmative duty arises. While in many respects these duties pattern the Second Restatement, they are, by design, considerably broader in scope. Some of these reformulated rules also add ambiguous language which, if adopted, may present significant new litigation issues, and as the next section discusses, could lead to unprecedented expansions of liability.

II. AVENUES TO MUDDY TRADITIONAL LIMITS OF AFFIRMATIVE DUTIES

Embedded in Chapter 7’s restatement of affirmative duties are two areas in particular that propose broad expansion of liability against civil defendants. They are found in Sections 38, 42, and 43, which collectively cover a wide range of relationships and risks of harm. These liability-enhancing provisions do not, however, implicate the most sacrosanct and uniform rules of affirmative duty, such as the duty owed when attempting a rescue, nor do they represent a direct assault on the general “no duty” rule. Instead, these changes are more furtive, affecting rules and interpretations that are less indomitable and understood, yet nevertheless can have equally profound liability effects. As a result, the new Restatement is poised to dilute the well-formed limits of affirmative duties and to call upon courts to revisit traditional duty rules.

A. *Affirmative Duty Based on Statute*

By far the most open and dramatic change in Chapter 7 is Section 38. This section is, again, entirely new, addressing an issue of statutory interpretation in which the previous Restatements did not encompass. The black letter rule begins innocuously enough by stating that a court may rely on a statute requiring an actor to protect another to determine that an affirmative common law duty exists.⁸⁷ The rule further provides that the court shall determine the scope of the newly minted duty it recognizes under the statute.⁸⁸ In lacking any additional refinement, this 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

86. *See id.* (noting that the duty in Section 44 is “limited in scope and purpose.”).

87. *Id.* § 38.

88. *Id.*

support them.

Even a non-lawyer can appreciate the potential confusion and chaos that could develop from such a broad legal rule. A court, for example, could read a common law affirmative duty into almost any law related to protective services, custody, control, or oversight authority. Furthermore, a court could do so while acting within the spirit of the rule, even if such action was not the actual intent of the legislature in enacting the law. All that is needed is a law that can plausibly be interpreted as requiring an actor to act for the protection of another.

The comments to Section 38, rather than providing an important restraint on judicial activism, literally invite courts to create new affirmative duties at common law. Comment c provides: “When the legislature has not provided a remedy, but the interest protected is physical harm, courts may consider the legislative purpose and the values reflected in the statute to decide that the purpose and values justify adopting a duty that the common law had not previously recognized.”⁸⁹ The comments go on to explain the significance of such a judicial determination: “Employing a statute to provide a tort duty where none previously existed creates a new basis for liability not previously recognized by tort law.”⁹⁰

In addition, the comments clearly envision a broad range of law in which the “values reflected in the statute” can trigger a new common law tort duty, and accordingly, tort liability.⁹¹ Section 38 is intended to apply to state and federal statutes, any regulations promulgated by state and federal agencies, and even ordinances or other laws adopted by municipalities and local governments.⁹² Indeed, the Restatement does not appear to foreclose the possibility of any form of law creating a state common law tort duty.

With regard to the use of a federal law to create a state tort law affirmative duty—a proposition with profound implications for federalism and state rights⁹³—the Restatement justifies its approach by stating that it is “analogous to a court determining that a violation of a federal provision constitutes negligence per se in a tort case governed by state law.”⁹⁴ This is not a very accurate

89. *Id.* § 38 cmt. c.

90. *Id.* § 38 cmt. d.

91. *Id.* § 38 cmt. c.

92. *Id.* § 38 cmt. b.

93. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (“The enactment of a federal rule in an area of national concern, and the decision of whether to displace state law in doing so, is generally not made by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress.”).

94. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 38 cmt. b (Proposed Final Draft No. 1 2005).

or effective analogy because such a violation would only provide evidence of negligence (that is, the breach of an *existing* duty of care) that satisfies the burden of proof; it is entirely distinct from a court creating a new duty that could be violated. The Restatement does not appear to consider the potential for federal provisions to supplant state tort law in significant ways.⁹⁵ The comments to Section 38 provide that federal law is fair game so long as it does not preempt state tort law liability;⁹⁶ the result is that federal law requiring the protection of another will either trump state tort law through preemption or, alternatively, trump state tort law by imposing a new common law duty. Thus, Section 38 threatens to significantly expand the scope and impact of federal law, and in ways that may be contrary to both existing state common law duty rules and the will of Congress.

In addition to the boundless array of law that Section 38 invites courts to turn into new tort claims, Section 38 provides no effective standards or criteria to guide courts in determining which laws should give rise to an affirmative duty. The black letter rule of Section 38 provides only the ambiguous consideration of whether a law requires an actor to act for the protection of another.⁹⁷ The comments and illustrations suffer from similar vagueness. In fact, in examining case law, the Reporters' readily acknowledge that "it is difficult to discern any specific rule that emerges."⁹⁸ The principal inquiry for courts to make in applying Section 38 is whether an affirmative duty is consistent with the legislative purpose of a law requiring an actor to act for the protection of another. Alternatively, the comments instruct that "when a court finds that permitting tort actions would be inconsistent with the statute's design or purpose, imposing a tort duty is improper";⁹⁹ hardly a model of clarity for courts seeking to reach predictable and fair outcomes.

The remaining, equally ambiguous, inquiry is whether the law at issue either provides for or bars a private right of action.¹⁰⁰ Section 38 is designed to operate in the "interstices" of these opposing areas where the precise enforcement of the law is vague.¹⁰¹ The rationale appears to be that if a private right of

95. The Reporters' Note for Section 38, however, does cite two cases that address this concern: *Marquay v. Eno*, 662 A.2d 272, 277 (N.H. 1995); and *Cuyler v. United States*, 362 F.3d 949, 952 (7th Cir. 2004). RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 38 reporters' note, cmt. c (Proposed Final Draft No. 1 2005).

96. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 38 cmt. b (Proposed Final Draft No. 1 2005).

97. *Id.* § 38.

98. *Id.* § 38 cmt. e.

99. *Id.*

100. *Id.* § 38 cmt. c.

101. *Id.*

action already exists, there is no need to determine whether an affirmative duty exists that could give rise to similar tort liability, and if a private right of action is expressly barred, an affirmative duty could not be consistent with the law.¹⁰² The challenge for courts is determining the existence of a private right of action in the absence of express language. This separate “implied cause of action” inquiry similarly examines the legislative purpose and intent of the law; an analysis which suffers from comparable ambiguity and inconsistency.¹⁰³ Hence, to summarize, Section 38 applies an amorphous standard for where a law is “consistent with” an affirmative duty to a law that, by definition, is amorphous and vague as to its enforcement.

The illustrations to Section 38 further provide only minimal guidance for courts. Two examples of Section 38’s potential application are provided, and they may actually serve to increase judicial confusion. The first illustration, mentioned previously, involves the landlord tenant relationship,¹⁰⁴ which is already regarded as one of the new “special relationships” giving rise to an

102. *See id.* (stating that, without an express provision for or prohibition of a duty, courts should be free to adopt one that is consistent with the “purpose and values reflected in the statute”).

103. The course taken by courts in finding implied rights of action has been far from clear. Initially, the United States Supreme Court, in *Cort v. Ash*, developed a vague and subjective four-factor test to determine the availability of private claims from a statute: (1) the plaintiff is a member of the class for whom the statute was enacted; (2) there is an indication of legislative intent to create or deny an implied remedy; (3) a private cause of action is consistent with the underlying purposes of the legislative scheme; and (4) the cause of action is one traditionally relegated to state law. *Cort v. Ash*, 422 U.S. 66, 78 (1975). The Court later moved away from this test, however, instead concentrating solely on congressional intent. *E.g.*, *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 23-24 (1979) (noting that the four factors of *Cort* did not carry equal weight; rather, “[t]he central inquiry remains whether Congress intended to create . . . a private cause of action.” (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979)); *see also* Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 869-70 (1996) (noting that the Supreme Court, as well as most lower federal courts, focus on congressional intent in ascertaining whether a private right of action is implied in a statute); *but see* Michael A. Mazzuchi, Note, *Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism*, 90 MICH. L. REV. 1062, 1093 (1992) (noting that the first *Cort* factor persists in the context of implied rights of action under Section 1983). State courts, however, possess much broader authority to find private rights of action in federal statutes, limited only by the doctrine of preemption. Pauline E. Calande, Comment, *State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action*, 94 YALE L.J. 1144, 1162-63 (1985). State courts have been similarly unpredictable in finding the existence or prohibition of private rights of action in federal law. John H. Bauman, Note, *Implied Causes of Action in the State Courts*, 30 STAN. L. REV. 1243, 1244 (1978).

104. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §§ 38 cmt. c, illus. 1 (Proposed Final Draft No. 1 2005).

affirmative duty under another section of Chapter 7.¹⁰⁵ The facts are that the landlord fails to fix a broken lock on the rear door of a tenant's apartment despite several repair requests by the tenant.¹⁰⁶ A burglar later breaks in, stealing the tenant's property.¹⁰⁷ A municipal ordinance requires landlords to provide and maintain locks, but is silent about private rights.¹⁰⁸ According to the new Restatement, a court "should take the ordinance into account" in determining whether the landlord owes the tenant a common law duty to maintain the locks.¹⁰⁹ The illustration does not state that the court should or should not recognize an affirmative duty, but only that the ordinance is something to think about. Again, the guidance to courts is unclear, as is any standard to apply.

Section 38's second illustration provides a slightly more definitive conclusion, but one that raises the question of how and why the outcome is any different or less ambiguous. In this example, a statute requiring public schools to test for scoliosis is held not to create a common law affirmative duty, in effect denying a student delayed in her scoliosis diagnoses the ability sue the school under common law.¹¹⁰ The only additional facts provided are that a provision in the statute states that the legislature "sought to minimize the expense incurred by school districts, including school districts that did not comply with their statutory obligations."¹¹¹ The illustration states that this expression of the legislature's desire to preserve school districts' financial resources "counsels against the court finding that [the school district] had an affirmative duty . . ." ¹¹² No further analysis is provided as to why this expression of a tangential legislative goal proves outcome determinative with respect to recognizing an affirmative duty.

Equally as disconcerting as the lack of clear standards for courts to apply such a broad new rule is the lack of legal authority supporting the rule. While the comments submit that courts "regularly confront" the role of statutes in providing an affirmative duty,¹¹³ there is comparatively little discussion on how courts traditionally approach this analysis or how common it is for a new duty to be recognized in the common law from a statute. The Reporters' Note for Section 38 merely states, "Courts frequently have not made a clear distinction between implied rights of action

105. *Id.* § 40(b)(6).

106. *Id.* § 38 cmt. c, illus. 1.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* § 38 cmt. c, illus. 2.

111. *Id.*

112. *Id.*

113. *Id.* § 38 cmt. a.

and statutorily supported tort duties,¹¹⁴ which does not validate the rule of Section 38. Recognizing an implied private right of action involves a separate statutory analysis of whether the legislature, in enacting the statute, intended to confer a private action.¹¹⁵ That courts often do not distinguish an implied right of action and the creation of a statutorily supported common law tort duty makes sense because they are separate doctrines; a court would have little reason to do so. This would appear to undercut much of the case law cited in the Reporters' Note to support Section 38's black letter rule. For example, Illustration 2, discussed above, is based on a case in which the court determined that an implied private cause of action existed, not an affirmative duty.¹¹⁶ The case on which Illustration 1—the only other rule example provided—is based also did not support the finding of a common law tort duty.¹¹⁷

Stated simply, there is a clear dearth of case law supporting recognition of a new common law tort duty based upon a statute. The vast majority of cases cited in the Reporters' Note either deal with statutory, not common law, duties,¹¹⁸ or examine allegedly analogous situations that are also not directly on point.¹¹⁹ Nevertheless, in one of the cases cited in the Reporters' Note that is directly on point, *Cuyler v. United States*, the Court of Appeals for the Seventh Circuit expressly rejected the notion that a statutory obligation could provide the basis for a tort duty that did not exist under the common law.¹²⁰ The decision, authored by Judge Richard Posner, held that Illinois' Abused and Neglected Child Reporting Act did not create a common law tort duty on the part of hospital personnel to report suspected abuse of a child by his babysitter.¹²¹ The court reasoned that if it were to recognize such a tort duty, "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

114. *Id.* § 38 reporters' note, cmt. c.

115. *See supra* note 103.

116. *Uhr v. E. Greenbush Cent. Sch. Dist.*, 720 N.E.2d 886, 891 (N.Y. 1999).

117. *See Brock v. Watts Realty Co.*, 582 So. 2d 438, 441 (Ala. 1991) (finding a statutory duty for a landlord to provide working locks, but not addressing whether statute gave rise to a duty at common law).

118. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding that Title VI does not create a private right of action to enforce regulations promulgated pursuant to the statute); *Worley v. Weigels, Inc.*, 919 S.W. 589, 593-94 (Tenn. 1996) (interpreting state statute to find that seller of alcohol is not liable for injuries caused by an intoxicated underage driver).

119. *See, e.g., Ashburn v. Anne Arundel Cnty.*, 510 A.2d 1078, 1085 (Md. 1986) (holding that no "special relationship" existed between defendant police officer and the plaintiff victim).

120. *Cuyler*, 362 F.3d at 952.

121. *Id.* at 951-52.

action—which clearly is not the law.”¹²²

The same reasoning applies to Section 38. Laws that require an actor to act for the protection of another or specify a standard of care in providing protection could be transformed into significant new common law tort duties. Section 38 specifically points to laws providing for the reporting of child abuse and other crimes as “fertile ground” for this new exception to the traditional “no duty” rule to take root.¹²³ But the potential effect of the rule is far more sweeping; a point punctuated by the total lack of judicially manageable standards and case law support to apply the rule.¹²⁴ Courts debating whether to adopt Section 38 should consider these issues before opening the door to what the Restatement even admits is new and “controversial” tort liability.¹²⁵

Finally, courts should appreciate the Russian-roulette power of Section 38. It gives plaintiffs’ lawyers an unfair weapon to force settlements. Plaintiffs’ lawyers will understand that a defendant who fails to settle a case risks not only a potential loss in that specific case, but the threat that a court under Section 38 will create a whole new unprecedented way to sue that could adversely affect the defendant in a myriad of litigation in the future. In that regard, it is not surprising that Restatement Reporter Michael Green and former ATLA President Larry Stewart prominently referred to Section 38 in their list of plaintiffs’ lawyers “Top Ten Tools” in the new Restatement.¹²⁶ Courts should reject Section 38 and leave the creation of new ways to sue under statutes to the appropriate branch of government: the legislature. Unlike courts, the legislature can make such new laws prospective and consider all points of societal views, not just the inquiry of plaintiffs’ lawyers seeking a new way to sue.

B. Affirmative Duty Based on Risk Reduction “Undertaking”

A second major change in the new Restatement, one that is more subtle than Section 38, is the treatment of an “undertaking” to reduce a risk of physical harm and establish an affirmative duty of care, which is found in Sections 42 and 43. Again, these sections involve an actor’s failure to exercise reasonable care in an undertaking, the result of which increases the risk of harm to the

122. *Id.* at 952.

123. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 38 reporters’ note, cmt. e (Proposed Final Draft No. 1 2005).

124. *See supra* notes 118-119 and accompanying text.

125. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 38 reporters’ note, cmt. e (Proposed Final Draft No. 1 2005).

126. Green & Stewart, *supra* note 1, at 47.

intended beneficiary of the undertaking or other third parties.¹²⁷ An affirmative duty may also be imposed under these sections where an undertaking's intended beneficiary or a third party relies on the actor exercising reasonable care to reduce the risk of a given harm.¹²⁸ On the surface, these black letter rules appear to track their counterparts in the Second Restatement; however, the comments and Reporters' Note suggest a significantly expanded view of this affirmative duty that gives rise to tort liability.

The most significant change from the prior Restatement is the "threshold for an undertaking," which translates to the type of affirmative conduct that will give rise to an affirmative duty.¹²⁹ Section 42 of the new Restatement enlarges the scope of what conduct constitutes an undertaking to include any voluntary rendering of services.¹³⁰ Specifically, the comments to Section 42 recognize any contract or promise to act to reduce the risk of physical harm to another as sufficient to establish an "undertaking."¹³¹ In contrast, Section 323 of the Second Restatement, which the Third Restatement acknowledges has been "widely accepted" and applied by "[n]early every jurisdiction,"¹³² includes the explicit caveat that the ALI takes no position on whether a contract or a promise to act to reduce risk to another should be considered an undertaking giving rise to an affirmative duty.¹³³

At first blush, the decision to include contracts and promises as sufficient to trigger an affirmative duty of care may not seem very dramatic. After all, as the comments to Section 42 analogize, contract law has long provided a recovery for "mere promises."¹³⁴ The potential application in tort law, however, is very different,¹³⁵ and, if adopted, would likely to lead to liability in situations in which a duty has never before been recognized. At the same time, the restated rule proposes to frustrate the drafting and entering of

127. See *supra* notes 58-78 and accompanying text.

128. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 42(b) (Proposed Final Draft No. 1 2005).

129. *Id.* § 42 cmt. d.

130. *Id.*

131. *Id.*

132. *Id.* § 42 reporters' note, cmt. a.

133. RESTATEMENT (SECOND) OF TORTS § 323 caveat 1. Section 325 of the Second Restatement, titled "Failure To Perform Gratuitous Undertaking To Render Services," did address in greater detail a promise as an undertaking, but this section was omitted and subsumed by Section 323. *Id.* § 325.

134. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 42 cmt. e (Proposed Final Draft No. 1 2005).

135. See *eToll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10, 14 (Pa. Super. Ct. 2002) ("Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals" (quoting *Bash v. Bell Tel. Co.*, 601 A.2d 825, 829 (Pa. Super. Ct. 1992)).

certain types of contracts. For example, many businesses contract with independent contractors for the principal reason of limiting their potential liability, including tort liability.¹³⁶ If such a contract could be used to support an affirmative duty to render aid to the independent contractor or reduce its risk of harm, an essential purpose for entering the contract would be removed.

Similarly, most individuals routinely contract for services, such as cleaning the gutters on one's home. If such a service contract provided for a "safe work environment," a court applying Section 42 could impose an affirmative duty of care on the homeowner if the contracted worker slipped and fell off of the roof. While the new Restatement might additionally provide for an affirmative duty in such a hypothetical by virtue of the employer/employee relationship,¹³⁷ this separate avenue could be employed to find a duty in similar contractual relationships that do not implicate any "special relationship."

An additional consideration not addressed in the new Restatement is the intersection of implied contracts. Sections 42 and 43 use the term "contract" generally and do not appear to require a written, or even express, contract. The fact that these sections are designed for greater inclusiveness and specifically incorporate promises, which are also typically not reduced to writing, suggests that all contracts are fair game to rely upon to recognize an affirmative duty. As a result, courts would appear to be equipped with broad latitude to find a duty to act to reduce harm in new areas based upon almost any existing relationship in which a service is provided because a contract would either be express or implied.

The Restatement adds to this universe of agreements by recognizing that an affirmative duty may be found pursuant to any promise to reduce physical harm.¹³⁸ Like contracts, a promise without any other affirmative conduct is considered an undertaking under the new Restatement.¹³⁹ Because promises are commonly made in society, the inclusion of promises, as a practical matter, raises numerous new duty questions. This is compounded by the vagueness and imprecision of many promises, some of

136. See, e.g., Linda S. Calvert Hanson, *Employers Beware! Negligence in the Selection of an Independent Contractor Can Subject You to Legal Liability*, 5 U. MIAMI BUS. L.J. 129, 155 (1995) (advising employers to thoroughly pre-screen independent contractors to avoid any possible liability for torts committed by that independent contractor); Ellen S. Pryor, *Peculiar Risk in American Tort Law*, 38 PEPP. L. REV. 393, 416 (2011) (noting that independent contractors serve a "cost-spreading" function for employers, providing potential plaintiffs another party to sue).

137. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40(b)(4) (Proposed Final Draft No. 1 2005).

138. *Id.* § 42 cmt. e.

139. See *id.*

which may now give way to tort liability if jurisdictions choose to adopt Sections 42 and 43.

For example, spouses routinely promise to “love and provide care” for one another; does such a promise constitute an undertaking and impose an affirmative duty to reduce a risk of physical harm? A plain reading of the black letter rule and comments of Section 42 suggests that it could. The only remaining criteria are that the spouse acted with knowledge that the promise or vow (that is, undertaking) serves to reduce a risk of harm to the other spouse, or that the other spouse relied upon the promise.¹⁴⁰ Such reliance by one spouse may very well be satisfied, meaning that spouses would effectively owe each other a duty akin to a “special relationship” and be able to sue one another following *any* injury (for example, sickness, slip and fall, car accident) in which one spouse fails to exercise reasonable care under the circumstances.

Another example of the broad formulation of undertaking can be seen in the safety reduction efforts of many businesses, such as where a company promises to the public or other group of non-employees to reduce a risk of harm, and then fails to do so. For instance, if a utility company promised to implement safety features to reduce risks to the public in the event of an accident, and failed to exercise reasonable care in implementing those features, the result of which was an increased risk of physical harm, it could, under Section 42, be subject to tort liability. Importantly, this would be the case regardless of whether an accident occurs; the Restatement looks only to whether there is an increased risk of harm from the undertaking.¹⁴¹ Moreover, Section 42 does not distinguish between misfeasance and nonfeasance,¹⁴² so failing to follow through on a promise to reduce a risk of physical harm, for example, by missing a voluntarily stated implementation deadline, is no different from negligent performance of the risk-reducing task.

Similarly, if a pharmaceutical company established a safety and education program asking consumers to report any adverse drug side effects, it would appear to at least raise the “undertaking” issue. If consumers relied upon such a safety program, would that company then owe an affirmative duty to any reporting consumer? Would the company be responsible for immediately alleviating any harm from an alleged side effect endured by the reporting consumer?

A related area of great practical concern arises when a trade association sponsors programs designed to promote safety and

140. *Id.* § 42.

141. *Id.* § 42(a).

142. *Id.* § 42 cmt. c.

well-being of the public. For example, if a trade association set forth a new safety program to encourage persons to keep their tires properly inflated, would it then owe an affirmative duty for undertaking to reduce a risk of physical harm? Courts in states adopting Sections 42 and 43 of the new Restatement would likely be inundated with such questions; they might not all reach the same conclusions.¹⁴³ At the very least, the threat of such new tort liability will make companies and trade associations reconsider programs and initiatives aimed at reducing risks of harm to the public and others to whom no affirmative duty is traditionally owed.

The critical liability and public policy issues implicated by the expanded scope of an undertaking under Sections 42 and 43 also do not end there. Another area with profound implications—and an area that the Restatement directly addresses—is where an insurer or other outside party conducts a safety evaluation to assess the risk of harm at a facility or other location.¹⁴⁴ On the one hand, the insurer voluntarily renders services that reduce the risk of physical harm to others, which could be interpreted as technically satisfying the new Restatement’s rule. But on the other, the service, at least in the case of insurers, is the product of a business activity to properly value risk to competitively price insurance and limit business costs. To recognize an affirmative duty would be akin to authorizing tort liability where it does not exist for other companies based merely on the type of business being operated.

The comments to Section 42 expressly state that an affirmative duty should be imposed on an insurer or other party if it “engages in loss-prevention activities” or in any way communicates safety recommendations to others.¹⁴⁵ Put another way, if an insurer or other entity conducts a safety evaluation for the strict purpose of its business, it may not share its findings with others without opening itself up to new tort liability. In effect, the rule provided by Section 42 encourages insurers and other parties to closely guard information that could reduce risks of physical harm to others. This Restatement rule, therefore, could frustrate the free exchange of safety information, and ultimately increase risks of physical harm.

A similar situation also discussed in the Reporters’ Note to Section 42 is where an employer, insurer, or other party provides

143. *Cf.* Bauman, *supra* note 103, at 1244 (discussing the inconsistencies of state courts in finding the existence or prohibition of private rights of action in federal law).

144. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 42 reporters’ note, cmt. d (Proposed Final Draft No. 1 2005).

145. *Id.*

medical diagnoses or other medical services to another with the purpose of limiting liability, and not necessarily providing a benefit to the recipient of the services.¹⁴⁶ For example, if an employer sponsored health screenings for the sole purpose of demonstrating to shareholders the low risk of future occupational disease at a facility, that employer could expose itself to tort liability for any negligent screenings. Similarly, if an independent research group conducted medical diagnoses of employees at a plant for early detection of an occupational disease or illness for the purposes of an academic study, those researchers could be liable as well.

Two further considerations also compound the broad range of concerns created by the new Restatement's undertaking rule. The first is that Section 42 suggests that attempts by employers, insurers, or other parties to disclaim or otherwise limit their tort liability for their undertakings, a byproduct of which is reducing the risks of harm to others, are insufficient to actually do so. The Reporters' Note provides:

Statements denying an undertaking or about the limited purpose of the inspection must be read skeptically as they are not provisions that are bargained for by adversaries acting at arm's length and often are inserted only to diminish potential liability to third parties who are not parties to the contract. These provisions may, however, bear on reliance by the other, but they do not negate, by themselves, the existence of an undertaking.¹⁴⁷

By rejecting disclaimers of an undertaking for the purposes of finding an affirmative duty, the new Restatement moves the inquiry to how such disclaimers "bear on reliance." Here, an additional consideration from a plain reading of the black letter rules of Sections 42 and 43 with regard to reliance is particularly revealing; the rules require reliance, but not reasonable reliance. Accordingly, it would not appear to matter whether the person reading a disclaimer of an undertaking should reasonably be expected to have relied upon it. Rather, all a potential plaintiff would need to say is that he or she did not rely on the disclaimer for it to be regarded as completely ineffective.

As a practical matter, the ease with which a disclaimer of an undertaking can be invalidated under the new Restatement substantially limits its value. The predictable result for many employers, insurers, and other parties (for example, researchers) is that instead of trying to disclaim an undertaking that reduces a risk of physical harm to others, these entities will simply opt not to

146. See *id.* § 42 reporters' note, cmt. f (noting that "[c]ourts have inconsistently approached cases brought by employment or insurance applicants against the physician who conducted the employment physical.").

147. *Id.* § 42 reporters' note, cmt. d.

expose themselves to the risk of tort liability at all. Consequently, avenues for risk reduction, especially in the workplace where the risks of harm are often greatest,¹⁴⁸ would be curtailed in jurisdictions adopting sections 42 and 43 of the new Restatement.

Moreover, the new Restatement takes the rule of duty through undertaking in precisely the wrong direction. Public policy should encourage undertakings that help promote public safety and education, and not chill such action through an expansion of duty in tort law. If the Restatement Reporters needed an example of how such expansion of duties can lead to unsound results, they could look at what occurred in the medical profession. There, the fear of liability made many doctors afraid to “undertake” responsibility and help a non-patient.¹⁴⁹ State legislatures enacted “Good Samaritan” statutes in almost every state so doctors would be encouraged to rescue without fear of liability.¹⁵⁰ Will it now be necessary to expand such statutes to cover insurers, employers, corporations, research organizations, and trade associations? Courts understanding of these implications should reject these new expansions of duty based on undertakings, avoiding the need for such measures.

III. PUBLIC POLICY CONSEQUENCES OF EXPANDING AFFIRMATIVE DUTIES

Jurisdictions contemplating wholesale adoption of Chapter 7 of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* face a difficult choice. The new Restatement offers a newer, more streamlined approach to affirmative duties, but one that increases both the types of relationships giving rise to an affirmative duty and the scope of such duties. Some of these affirmative duties, such as the newly endorsed special relationship between a school and its students,¹⁵¹ are not highly controversial and reflect logical development from the Second Restatement, which provides for affirmative duties in analogous custodial relationships.¹⁵² Other duties, such as those discussed in the previous section, represent substantially new, unexplored, and

148. See generally Victor E. Schwartz & Christopher E. Appel, *Effective Communication of Warnings in the Workplace: Avoiding Injuries in Working with Industrial Materials*, 73 MO. L. REV. 1 (2008).

149. See Stewart R. Reuter, *Physicians As Good Samaritans*, 20 J. LEGAL MED. 157, 158 (1999) (noting that doctors feared liability as well as the costs of litigation prior to Good Samaritan statutes' enactment).

150. E.g., *id.* at 157 (noting that all states and the District of Columbia have Good Samaritan statutes, with some even having multiple “to give additional categories of potential Good Samaritan immunity”).

151. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40(b)(5) (Proposed Final Draft No. 1 2005).

152. *Id.* § 40 cmt. 1.

controversial territory.¹⁵³ Not surprisingly, these new areas lack the level of case law support that other Restatements, with some notable exceptions,¹⁵⁴ have traditionally relied. This consideration of relatively weak or even nonexistent case support is especially telling where more than forty years have passed since the prior Restatement's adoption by the ALI. Ultimately, however, the decision to adopt any or all of Chapter 7 should come down to whether the new rules and guidance represent sound, balanced public policy.

A. *Gradual Elimination of the "No Duty" Rule*

Beginning with a view of the forest, the new Restatement can be read as endorsing a unified duty of reasonable care under almost any circumstance.¹⁵⁵ This duty rule can and has co-existed with the traditional rule requiring no duty to act affirmatively for the benefit of another.¹⁵⁶ Nevertheless, the exceptions in Chapter 7 present very real potential for swallowing the "no duty" rule. Section 38's broad authorization of courts to find affirmative duties in any type of law or regulation, and with no discernable criteria or standard for making such a determination, threatens on its own to dramatically change how affirmative duties apply in American law. The reformulation of an "undertaking" under Sections 42 and 43 opens the door to potential liability for virtually any affirmative conduct that happens to reduce another's risk of harm or suggests harm reduction. Even Section 40, which literally invites courts to recognize new "special relationships" beyond the long-standing, finite list of such relationships, poses to significantly upset traditional duty rules and inject uncertainty into many commonly shared relationships between two or more people.¹⁵⁷ Taken together, courts are equipped with unprecedented ability to recognize new affirmative duties where no case law or other authority has suggested a duty might exist.

When viewed comprehensively, the true, radical nature of Chapter 7 of the new Restatement can be fully understood and appreciated. Chapter 7 offers courts authority to create tort liability in new ways, based on limited or nonexistent standards, and largely unbounded by judicial precedents. Judges are left primarily with their subjective views to guide them; a result that

153. See *supra* Section II.B.

154. See RESTATEMENT (SECOND) OF TORTS § 402A. Section 402A, which provides for strict products liability, had comparatively little case law support at the time of its adoption, yet over the last forty years has become part of the law of virtually every jurisdiction. See Schwartz, *supra* note 8, at 746-48.

155. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 (stating the general duty of reasonable care to others).

156. See sources cited *supra* note 82 (discussing general "no duty" rule).

157. See *supra* notes 40-51 and accompanying text.

promotes volatility as opposed to the uniformity in the law that is a traditional goal of Restatement projects. While many judges would rightly reject the invitation to reshape state tort law in their image and unfairly surprise defendants with new, unforeseen tort liability, others might jump at the opportunity. They would likely be accommodated by plaintiffs' lawyers eager to explain how a statute or regulation could be interpreted to impose a new tort duty, or how some action by a defendant functioned to reduce a risk of physical harm and satisfied a duty-creating undertaking. But even judges with such disposition can recognize that these expansions of duty are not in the traditional mode of objective Restatements. Reporter Professor Michael Green and former ATLA President Larry Stewart have made that clear in their article about the new Restatement's "Top Ten Tools" to help plaintiffs' lawyers.¹⁵⁸

The volume of statutes and regulations, and conduct that individuals and businesses regularly engage in that could be said to reduce risk of harm to another, or signal an intent to reduce such a risk, create a new universe of sources of tort duties giving rise to liability. As explained previously, Section 38 of the new Restatement states that any law is fair game, and Sections 42 and 43 include any contract or mere promise as a sufficient harm-reducing undertaking. The effect of this expanded universe, combined with the newly restated general duty of reasonable care to everyone and the other traditional affirmative duties of Chapter 7, is that there is increasingly limited area where a duty is not owed by someone where a physical injury occurs.

For example, even some of the classic and inviolable "no duty" scenarios of American law would no longer remain if states were to adopt the new Restatement. Although not the focus of this Article, one of the most controversial is the duty to trespassers, which appears in Chapter 9 of the new Restatement.¹⁵⁹ This duty is included among the affirmative duty sections of the Second Restatement,¹⁶⁰ but was amputated and given separate treatment in the new Restatement.¹⁶¹ The Second Restatement and the law of the vast majority of states provide that a premises owner owes no affirmative duty to a trespasser who has invaded the property without express or implied permission.¹⁶² The public policy

158. See generally Green & Stewart, *supra* note 1.

159. See, e.g., James A. Henderson, *The Status of Trespassers on Land*, 44 WAKE FOREST L. REV. 1071, 1078 (2009) (criticizing the new trespass rules for basing liability on the extent of a trespasser's invasion of the possessor's right to exclusive possession).

160. RESTATEMENT (SECOND) OF TORTS § 314A(3).

161. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM ch. 9 (Tentative Draft No. 6 2009).

162. The Second Restatement incorporates this rule by stating that an affirmative duty is owed where the premises owner opens the property to the

supporting this rule is that an owner should be entitled to the free use of the private property and should not bear responsibility or liability for injuries to those who would ignore such privacy interests, enter without authority, and proceed to injure themselves as a result.¹⁶³ The “no duty” rule discourages trespass and promotes personal responsibility; interests that would be severely undermined if an injured trespasser could later hold the property owner liable for any injuries.

Chapter 9 of the new Restatement, however, severely curbs this traditional rule, requiring a duty of reasonable care to all trespassers except the amorphously defined “flagrant trespasser.”¹⁶⁴ The term “flagrant trespasser” does not appear anywhere in the law, contravening the traditional requirement that black letter Restatement rules be supported by at least some case law.¹⁶⁵ It appears to cover a very narrow subset of trespassers who enter property for hostile purposes, such as the commission of criminal acts.¹⁶⁶ All other trespassers are owed a new affirmative tort duty by the land possessor to render aid or exercise whatever reasonable care entails.¹⁶⁷

What would remain of the basic “no duty” rule if a jurisdiction were to adopt this new Restatement is difficult to predict because so much would be left open to new interpretation. Even the other classic and sacrosanct “no duty” scenario where a person has no duty to render aid to another unless he or she “takes charge” of the

public. RESTATEMENT (SECOND) OF TORTS § 314A(3). If the property is not open to the public, the general default “no duty” rule of Section 314 applies. *Id.*

163. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 52 cmt. a (Tentative Draft No. 6 2009); *but see* Foster v. LaPlante, 244 A.2d 803, 804 (Me. 1968) (“The trespasser . . . is not denied the right to recover because his entry upon the [owner’s] premises is wrongful, but because his presence is not to be anticipated”); Mothershead v. Greenbriar Country Club, Inc., 994 S.W.2d 80, 86 (Mo. Ct. App. 1999) (stating that the general “no duty” rule for trespassers “is based not on the wrongful nature of the trespasser’s conduct, but on the possessor’s inability to foresee trespasser’s [sic] presence and guard against injury.”); 62 AM. JUR. 2D *Premises Liability* § 206 (2010) (“The basis of the rule denying a trespasser a right to recover for an injury is not the fact that the trespass is a wrongful act, but that if his or her presence is not to be anticipated, the property owner owes the trespasser no duty to take precautions for his or her safety.”).

164. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 52 (Tentative Draft No. 6 2009).

165. *See supra* note 8.

166. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 52 cmt. a (Tentative Draft No. 6 2009) (stating that the flagrant trespassers’ invasion on land is intended to convey a sense of “egregious or atrocious” conduct with a “malicious motive” or intent to commit crime).

167. *E.g., id.* § 51 (stating general rule that land possessors owe a duty of reasonable care to entrants).

rescue¹⁶⁸ could be challenged indirectly. For instance, a broadly drafted “Good Samaritan” statute might, under Section 38, be interpreted by a court as creating an affirmative duty where a would-be rescuer could accomplish the rescue without endangering himself or herself.¹⁶⁹ Similarly, a passerby’s question of “Are you all right?” or “Do you need help?” to an imperiled individual could, under Section 42, be twisted into an offer to render aid that the imperiled person relies upon.¹⁷⁰ The potential to use such broad duty rules to fashion tort liability whenever a court wants there to be tort liability is essentially boundless.

The question for jurisdictions contemplating adoption of the new Restatement, therefore, is whether this highly subjective, unpredictable, and transformative approach is superior to the long-standing duty rules of the Second Restatement, which, although imperfect, have resulted in consistent, balanced and clearly understood duty rules over the past half century. While states undoubtedly have an interest in developing tort law through judicial decisions, such as those involving affirmative duties, it is critical to understand and define a set of principles for how they might do so. The new Restatement conceives a far broader set of principles and a far less defined tether for courts; it is a trade-off unlikely to result in fair and consistent liability rules.

B. Liability and Litigation Impacts

While the potential exists under Chapter 7 of the new Restatement for courts to revisit, reshape, and create affirmative tort duties, a separate issue exists as to what this would actually mean from a liability and litigation perspective. A state’s decision to adopt Chapter 7, or parts thereof, in place of the Second Restatement would introduce tremendous uncertainty into litigation and expectations of liability exposure and produce a chaotic effect on the practices of many individuals and businesses. One example, discussed earlier, would be the impact of Sections 42 and 43 on those businesses that have traditionally sought to limit liability through the hiring of independent contractors.¹⁷¹ If such employment contracts could be interpreted to create new affirmative duties, businesses would generally be more reluctant to hire such contractors and an essential purpose behind these agreements could be lost. Similarly, the practice of a company, trade association, research organization, insurer, or other third party engaging in risk reduction initiatives could be curtailed over

168. *See supra* note 83.

169. *See, e.g.*, Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 282-83 (1980) (discussing the difficulties of applying a duty to rescue, as well as its negative effects on industriousness).

170. *See supra* Section II.B.

171. *See supra* note 138.

fears of a court finding that the practice constituted an undertaking giving rise to an affirmative duty.¹⁷² Again, the public policy implication here is that more physical injuries would result. These effects are also exacerbated by the difficulty under the new Restatement to disclaim an affirmative duty.¹⁷³

But this is still likely just the tip of the iceberg. The course of major litigations could be irrevocably altered by Chapter 7. For instance, asbestos litigation, which is in its fourth decade and represents “the longest running mass tort” in United States history,¹⁷⁴ could be vulnerable to attempts to expand duty in new ways. In recent years, plaintiffs’ lawyers have sought to continue the litigation by expanding the scope of the duty owed to workers exposed to asbestos to include “take home” exposures to family members and relatives.¹⁷⁵ Courts have almost uniformly rejected such an affirmative duty as outside the scope of the duty owed by manufacturers or premises owners and not supported by sound public policy.¹⁷⁶ The new Restatement would provide fertile ground for an activist court to revisit this settled law, and, using some of the avenues discussed throughout, impose new tort liability against asbestos defendants. Likewise, the Restatement could be employed to reinvigorate the “solvent bystander” strategy used in asbestos litigation,¹⁷⁷ whereby non-traditional defendants “far removed from the scene of any putative wrongdoing”¹⁷⁸ become ensnared in the litigation in place of traditional asbestos defendants,¹⁷⁹ many of whom have filed for bankruptcy.¹⁸⁰

172. See *supra* notes 143-150 and accompanying text.

173. See *supra* note 149.

174. Helen Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 SW. U. L. REV. 511, 511 (2008).

175. Mark A. Behrens & Frank Cruz-Alvarez, *Premises Owner Liability for Secondhand Asbestos Exposure: The Next Wave?*, 7 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 145, 145 (2006).

176. *E.g.*, *Riedel v. ICI Americas, Inc.*, 968 A.2d 17, 25-27 (Del. 2009); *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 209-10 (Ga. 2005); *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas*, 740 N.W.2d 206, 216-22 (Mich. 2007); *In re New York City Asbestos Litig.*, 840 N.E.2d 115, 199-22 (N.Y. 2005).

177. *Medical Monitoring and Asbestos Litigation—A Discussion with Richard Scruggs and Victor Schwartz*, 17 MEALEY’S LITIG. REP.: ASBESTOS 19 (2002) (quoting Mr. Scruggs).

178. Editorial, *Lawyers Torch the Economy*, WALL ST. J., Apr. 6, 2001, at A14.

179. See STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 94 (2005) (stating that “nontraditional” defendants account for more than half of asbestos expenditures).

180. *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 747-48 (E. & S.D.N.Y. 1991); see also Martha Neil, *Backing Away from the Abyss*, 92 A.B.A. J. 26, 29 (2006) (reporting that an estimated eighty-five companies have filed for bankruptcy due to asbestos related liability as of September 2006); Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt*

Plaintiffs' lawyers have sought to cast a wider net and draw in new defendants to keep the litigation going.

The duty of religious institutions presents another major area of litigation that could be impacted by the liability-expanding avenues discussed in this Article. An enterprising court could, for example, use Chapter 7 to recognize a common law affirmative duty from a custody statute or other law applicable to religious institutions. In addition, a court could potentially use the "not exclusive"¹⁸¹ list of "special relationships" under Section 40 of the Restatement to find a new duty. Although the relationship between religious institutions and parishioners has never been viewed as giving rise to a special relationship, and in fact religious organizations were historically afforded immunity along with other charitable organizations,¹⁸² the ambiguity of the term "special relationship" and authorization from the Restatement to find new "candidate[s]"¹⁸³ could lead courts to create new affirmative duties to act for the protection of others.

In practical terms, such findings could greatly expand liability for religious institutions relating to alleged instances of sexual abuse, conduct of church agents, and injuries sustained by church volunteers or other church members. This could occur without warning or any prior notice. It could also potentially impact past cases; when a court recognizes a new duty under common law, it may be treated as if the duty had always existed.¹⁸⁴ Importantly, the mere possibility of such a finding by a court would be enough to dramatically increase insurance premiums, and inflate settlement pressures.

Chapter 7 could also potentially be employed to dramatically upset and expand tort liability in environmental litigation. Presently, there are a myriad of state and federal environmental regulations that could be interpreted by a court to recognize an affirmative duty of care.¹⁸⁵ Many, if not all, of these laws are

Firms, 12 J. BANKR. L. & PRAC. 51, 52 (2003) (stating that bankruptcies due to asbestos litigation had led to a loss of 52,000 to 60,000, with each worker losing, on average, \$25,000 to \$50,000 in wages over the course of his or her career).

181. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, § 40 cmt. o (Proposed Final Draft No. 1 2005).

182. See Victor E. Schwartz & Leah Lorber, *Defining the Duty of Religious Institutions to Protect Others: Surgical Instruments, Not Machetes, Are Required*, 74 U. CIN. L. REV. 11, 13-17 (2005) (discussing the charitable immunity doctrine and its demise).

183. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, § 40 cmt. o (Proposed Final Draft No. 1 2005).

184. See Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 812 (2003) (noting that "the retroactive application of judicial decisions remains the norm").

185. See Kenneth S. Abraham, *The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview*, 41 WASHBURN L.J. 379,

designed to protect people from environmental harms; hence, they could be read to satisfy the loose criteria of Section 38.¹⁸⁶ Some of these laws may also directly implicate very controversial topics in environmental law, such as alleged global climate change.¹⁸⁷ If courts could take laws, such as regulatory standards, and turn them into state common law tort law duties as well, then regulatory violations could suddenly open the door to additional tort liability. The effect would be double punishment for a regulatory violation and the likely establishment of the tort system as the principal enforcement mechanism for alleged environmental harms. This could significantly impact specific litigations, such as climate change litigation in spite of unanimous federal district court rulings stating that the tort system, under the theory of public nuisance, is not an appropriate tool for regulating alleged global climate change¹⁸⁸ and a current disagreement among federal appellate courts over the issue.¹⁸⁹

392-95 (2002) (examining avenue of civil liability from environmental regulatory laws); Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 77-90 (2001) (discussing the expansion of environmental statutes beginning in the 1970s).

186. See *supra* Section II.A.

187. See 75 Fed. Reg. 25,324 EPA (2010) (joint final rule of EPA and Department of Transportation's National Highway Traffic Safety Administration reducing allowable greenhouse-gas emissions from light-duty vehicles); 74 Fed. Reg. 56,264 (2009) (EPA final rule requiring certain sources that annually emit more than 25,000 tons of greenhouse gases (and, in some instances, less) to report those emissions to EPA).

188. See *Comer v. Murphy Oil USA*, 585 F.3d 855, 859 (5th Cir. 2009) (class-action suit by Mississippi coastal residents and landowners against oil and electric-power companies, alleging that their emissions "contribut[ed] to global warming" and "added to the ferocity of Hurricane Katrina"), *rev'd* 585 F.3d 855 (2009) *vacated*, 598 F.3d 208, *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010); *Native Vill. of Kivalina v. Exxon-Mobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009) (suit by Eskimo village against twenty-four oil, energy, and utility companies, alleging that their emissions have, by contributing to global warming, caused Arctic sea ice to diminish), *appeal pending*, No. 09-17490 (9th Cir.); *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871, at *1 (N.D. Cal. Sept. 17, 2007) (suit by State of California against automobile manufacturers alleging that the vehicles they produce emit carbon dioxide, which causes global warming, which reduces snow pack and increases sea levels, resulting in reduced water supplies, increased risk of flooding, increased coastal erosion, and increased risk and intensity of wildfires); *Connecticut v. Amer. Elec. Power Co.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005) (suit brought by eight states, the city of New York, and several land trusts alleging electric and power companies were public nuisances because they caused global warming by emitting "greenhouse gasses"), *rev'd*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 131 S. Ct. 813 (2010).

189. *Compare* *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1055 (5th Cir. 2010) (dismissing appeal after court of appeals, en banc, vacated panel opinion, but then lost a quorum because of one judge's recusal, leaving trial

While global climate change litigation is presently a topic of great debate in the legal community,¹⁹⁰ the same concerns arise with any form of environmental regulation.

These litigation examples represent just a few of what would likely be many attempts to expand critical duty determinations if a jurisdiction adopted Chapter 7 and left lower court judges to run with it. In addition, there are an untold number of important new duty questions that would need to be addressed. For instance, in applying Section 42, what if “reasonable care under the circumstances” and the care expressly provided for by a contract or promise to render specific assistance conflict? Could liability still be imposed? An example of this issue might arise when a contract states that one party will come to the aid of another in an emergency (that is, reduce the risk of physical harm to the other) by calling 9-1-1. If an emergency occurs and the contractually bound party tries *reasonably* to render medical aid on his or her own, but is unsuccessful, does the failure to call for backup now give rise to tort liability? Or, conversely, what if the contractually bound party is an employer with an on-site medical staff? Would calling 9-1-1 and satisfying the contracted affirmative duty of care preclude tort liability if the employer instructed the medical staff not to intervene and render assistance even though it would be reasonable (and faster) to do so? In both situations, the contractually bound party is “taking charge” of the rescue; what is the scope of the duty owed? Are there now two separate affirmative duties?

These are the murky questions courts would have to wade through in adopting Chapter 7. It is a path riddled with potential landmines that could give way to substantial new tort liability. The uncertainty from these issues alone has the potential to augment existing litigations, drive up liability insurance costs, and otherwise adversely impact a state’s economy. These are not the sound public policy objectives that Restatement projects are intended to promote. Rather, the likely result would be sudden and unanticipated liability for individuals and businesses. It is also liability the full extent of which is unknown.

court’s initial dismissal of global warming suit as nonjusticiable political question to stand), *with* Connecticut v. Amer. Elec. Power Co., 582 F.3d 309, 323-32 (2d Cir. 2009) (finding that suit over increased carbon dioxide emissions was not a nonjusticiable political question), *cert. granted*, 131 S. Ct. 813 (2010).

190. See, e.g., Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Global Warming Lawsuits: Poised for Supreme Court Hot List?*, WASH. LEGAL FOUND. LEGAL OPINION LETTER, July 9, 2010, at 1-2, *available at* http://www.wlf.org/publishing/publication_detail.asp?id=2180 (discussing the increase in climate change regulation through litigation and the likelihood that the Supreme Court will take up the issue of its validity).

CONCLUSION

Professor Michael Green, Reporter to the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*, and former ATLA president Larry Stewart are correct when they said that this new Restatement is a “powerful new tool.”¹⁹¹ While many parts of the new Restatement provide clear and sound liability rules, there are others, such as those listed in Professor Green and Stewart’s “Top Ten” article, which fall far short of this goal and open the door to unprecedented expansions of liability. Among these, Chapter 7 poses to dramatically alter where and how affirmative tort duties are recognized under state common law. Chapter 7 would arm judges with broad authority to circumvent precedent and create new duties in tort law. As a result, civil defendants are at serious risk of substantial and unexpected liability in jurisdictions that choose to forsake the comparative consistency, predictability, and balance of the Second Restatement’s approach to affirmative duties and adopt this part of the new Restatement. The decision ultimately is in the hands of state high court judges. If sound public policy rules are to be preserved and legal chaos averted, these courts will reject the top plaintiffs’ tools and maintain the common law’s traditional balance and fairness.

191. Green & Stewart, *supra* note 1, at 44.