

CIVIL JUSTICE RESPONSE AND INSURANCE AND REINSURANCE

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Earlier this year, the American Law Institute (ALI) published the final version of the Restatement of the Law, Liability Insurance. This Restatement has generated unprecedented backlash, with five states adopting legislation to prevent courts from relying on any part of this ALI work product. Critics argue this Restatement departs from the ALI's traditional mission to promote clarity and uniformity in the law by recommending novel liability insurance law rules designed to increase insurers' liability and costs. Insurer and defense organizations have engaged in efforts around the country to educate stakeholders about the Restatement's novel, liability-enhancing provisions.

New ALI Restatement on Liability Insurance Draws Criticism

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ABOUT THE COMMITTEES

The **Civil Justice Response Committee** works to establish a nationwide information network that promotes the rapid dissemination of information about legislation, rulemaking, judicial selection, and key elections likely to affect civil litigation and liability laws, in order to give IADC members and their clients timely opportunities to participate in these processes armed with information that can affect the outcome of the debate or controversy. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The American Law Institute (ALI) published its first-ever Restatement on the subject of liability insurance in 2019. The final work product, called the Restatement of the Law, Liability Insurance (RLLI), has proven to be one of the most controversial Restatement's in the ALI's nearly 100-year history. The controversy stems from the RLLI's purported attempt to reshape the liability insurance law landscape through novel recommended rules for courts to adopt instead of faithfully "restating" existing law. Numerous stakeholders, including insurance law practitioners, state legislators and business groups, have criticized the RLLI for disadvantaging insurers and increasing their potential liability and costs.¹

The controversial nature of the RLLI is further underscored by the fact that at least five states have taken the unprecedented step of enacting legislation to prevent courts from relying on any part of this ALI work product. Notably, four states – Arkansas, Michigan, North Dakota and Ohio – adopted laws rejecting the RLLI before it was even published.² Texas adopted a law more broadly cautioning the judiciary against relying on ALI Restatements shortly after the RLLI's publication in 2019.³ Other states have adopted resolutions to discourage courts from following the RLLI.⁴

Groups such as the American Property Casualty Insurance Association (APCIA) are working to educate counsel for insurers and other affected individuals and entities about fundamental concerns with the RLLI. "Regional webinars" have taken place, and are upcoming, to explain how RLLI rules threaten to augment existing liability insurance law in specific states.

The ALI's Recent "Mission Drift"

The criticisms of the RLLI, and backlash from state legislatures, add to a trend of ALI Restatements incorporating aspirational rules.

The ALI is the most influential private organization in the development of American law. It was founded in 1923 to promote clarity and uniformity in the law, and has sought to accomplish this mission primarily through the development of educational resources for judges and policymakers. The ALI's membership is comprised of many of the nation's most distinguished judges, law professors and practitioners, and, for that reason, the organization's work products have traditionally wielded significant influence. Judges, in particular, often rely on ALI Restatements when deciding issues of state common law because of the ALI's reputation

¹ See, e.g., Laura Foggan, *ALI Restatement Should Not Reflect Aspirational Proposals*, Law360, May 17, 2018; A. Hugh Scott, *Why Criticism of ALI's Insurance Restatement Is Valid*, Law360, May 10, 2017.

² See Ohio S.B. 239 (2018) (codified at Ohio Code § 3901.82); Michigan H.B. 6520 (2018) (codified at Mich. Comp. Laws § 500.3032 (effective Jan. 1, 2020)); North Dakota H.B. 1142

(2019) (codified at N.D. Cent. Code § 26.1-02-34); Arkansas S.B. 565 (2019) (codified Ark. Code Ann. § 23-60-112).

³ See Texas H.B. 2757 (2019) (codified Tex. Civ. Prac. & Rem. § 5.001).

⁴ See Ind. H. Res. 62 (2019); La. Sen. Res. 149 (2019); Ky. H. Res. 222 (2018).

for “restating” the most thoughtful and balanced legal rules on a given issue.

Some recent Restatements have departed from the ALI’s core mission and have become vehicles for expanding liability. Instead of restating existing law, the ALI is recommending the adoption of novel rules that enhance the liability of civil defendants (e.g. insurers).

The late U.S. Supreme Court Justice Antonin Scalia recognized this trend in 2015, stating:

[M]odern Restatements . . . are of questionable value, and must be used with caution. The object of the original Restatements was ‘to present an orderly statement of the general common law.’ Over time, the Restatements’ authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be.⁵

The RLLI’s unique history and complex subject matter may also have contributed to the inclusion of aspirational provisions. The project began in 2010 as a “Principles of Law” project designed to offer recommendations of what liability insurance law “should be.” But, in an unprecedented move, the project was changed in 2014 and recast as a Restatement project. The fact that the ALI had never before restated a topic of insurance law, and that the vast

majority of ALI members lack specialized knowledge of insurance law, may also have frustrated the typical Restatement vetting process. Relatively few ALI members possess the requisite knowledge of liability insurance law to fully appreciate project nuances and push back against novel proposed rules.

Specific RLLI Concerns

The RLLI contains 50 sections of recommended “black letter” liability insurance rules that span hundreds of pages. Most of these sections have generated at least some concern from the perspective of insurers. The particularly troubling sections are those that do not “restate” the law of any jurisdiction.

For example, the RLLI recommends that courts subject an insurer to vicarious liability for the legal malpractice of selected defense counsel even though no court has adopted such a rule.⁶ The project also proposes a novel rule that would subject insurers to liability for the negligence of selected defense counsel whenever it can be shown the insurer exercised too much control over the selected counsel’s professional judgment.⁷ Either of these aspirational rules, which are both contained in just one of the RLLI’s sections, could dramatically expand an insurer’s potential liability if adopted by courts.

⁵ *Kansas v. Nebraska*, 135 S. Ct. 1042, 1064 (2015) (Scalia, J., concurring and dissenting in part) (citations omitted).

⁶ See Restatement of the Law, Liab. Ins. § 12(1) (2019).

⁷ See *id.* at § 12(2).

In addition, the RLLI narrows the circumstances in which an insurer may properly deny a duty to defend an insured and withdraw a defense that has been undertaken.⁸ Consequently, the RLLI's rules could subject an insurer to increased liability for failing to provide a defense when the insurer owed no duty to do so under the terms of its policy agreement, or for ending a defense in a manner not expressly prescribed by the RLLI.

The RLLI further endorses novel expansions of an insurer's liability for extra-contractual damages for breaching its settlement duties. Specifically, the RLLI proposes allowing an insured who has been punished by a court for his or her reprehensible behavior to shift any imposition of punitive damages to the insurer.⁹ The RLLI adopts this rule in spite of the fact it has been rejected by every court to consider it.

These are just a few examples of aspirational provisions included in the RLLI. There are numerous others – both large and small – that appear designed to systematically increase insurers' liability and costs.

Conclusion

Now that the RLLI is published, courts will consider whether to adopt its provisions. For that reason, and given the RLLI's length and complexity, it is important for insurance law practitioners and other stakeholders to understand how the Restatement departs

from existing law. Understanding these nuances is critical to blunting attempts by attorneys and others to use the RLLI as support for novel and unsound expansions of liability insurance law.

⁸ See *id.* at §§ 13, 18.

⁹ See *id.* at § 27 cmt. e.

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