A USER'S GUIDE TO THE RESTATEMENT OF THE LAW, LIABILITY INSURANCE

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At its 2018 Annual Meeting, The American Law Institute ("ALI") completed nearly a decade's worth of work on the Restatement of Torts Third: Liability for Economic Harm, marking the occasion with a celebratory breakfast. Following the same breakfast, marking a drafting process of equal duration, the ALI approved the Restatement of the Law, Liability Insurance ("RLLI"). However, the approval of the RLLI was a bit belated. The Restatement's approval was deferred for a year from the 2017 Annual Meeting, largely because of opposition from insurance industry interests.

Some Restatements, such as the Economic Harm portion of the Torts Restatement, receive little attention outside the ALI during their drafting and from anyone other than lawyers and courts following publication. The RLLI is among the smaller number of Restatements that attract unusual attention from interests outside the normal ALI process,[1] in a way that can be fairly characterized as political, in the non-pejorative sense that it involves the authoritative allocation of values.[2]

Most of the outside attention to the RLLI was spurred by insurance industry interests. For example, Eric Dinallo, former New York Superintendent of Insurance, and his colleague, Keith Slattery, of the Debevoise & Plimpton law firm, were retained by the National Association of Mutual Insurance Companies to prepare a white paper critiquing the Restatement.[3] The Property Casualty Insurers Association of America, the National Conference of Insurance Legislators, several insurance commissioners, and six governors weighed in, all in opposition to either elements of the Restatement or the entire project. The basis for opposition

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[1] *See* Jay M. Feinman, *The Restatement of the Law of Liability Insurance as a Restatement: An Introduction to the Issue*, 68 RUTGERS U. L. REV. 1, 9 (2015).

[2] For other examples *see id.* at 9, 24.

[3] ERIC J. DINALLO & KEITH J. SLATTERY, ALI'S RESTATEMENT OF THE LAW LIABILITY INSURANCE: EXECUTIVE SUMMARY OF REGULATORY CONSIDERATIONS (Feb. 17, 2017), https://www.namic.org/pdf/insbriefs/ali_execsum.pdf.

ranged from the lack of previous knowledge of the project,[4] to the claim that it represented a "departure from well-settled legal principles,"[5] to the fear that it would "negatively affect our states' economic development opportunities by creating uncertainty and instability in the liability insurance market."[6]

The U.S. Chamber of Commerce Institute for Legal Reform also attacked the Restatement, even though the Chamber's membership includes more corporate policyholders than insurers,[7] as did the Defense Research Institute,[8] most of whose members represent policyholders, though perhaps this is less odd given that they are selected and paid by insurers. And several state legislatures enacted statutes that either directly referenced the Restatement or were attempts to undercut its application.[9]

Lawyers and judges routinely look to the ALI's Restatements of the Law as reference works for the state of the law and for arguments and analysis about the direction the law should go. Yet the controversy reflected in the complex intellectual and political history of the RLLI is likely to continue following its final adoption, and the issues raised by the controversy about the RLLI frames its use by lawyers and judges in interesting ways. This article takes account of the issues raised in the drafting process to inform the use of the Restatement going forward. The criticisms of particular sections of the RLLI will be discussed as those

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[4] Letter from Dean L. Cameron, Dir., Idaho Dept. of Ins., to Richard Revesz, Dir., Am. Law. Inst. (Apr. 5, 2017) (on file with author). This is odd, given that one would have assumed that regulators would have become aware of the project sometime in its then six year history.

[5] Letter from Randi Cigelnik, Senior Vice President, Corp. Sec'y, and Gen. Couns., Prop. Cas. Insurers of Am. to Richard Revesz, Dir. Am. Law. Inst. 2 (May 1, 2017) (on file with author).

[6] Letter from Governors of S.C., Iowa, Me., Neb., Tex., and Utah, to Hon. David F. Levi, President, Am. Law. Inst. (Apr. 6, 2018) (on file with author).

[7] *E.g.*, *ALI Should Stick to Its Mission—Clarifying the Law, Not Changing It*, INST. FOR LEGAL REFORM (Jan. 18, 2018), https://www.instituteforlegalreform.com/resource/ali-should-stick-to-its-mission-clarifying-the-law-notchanging-it.

[8] Letter from John E. Cuttino, Def. Res. Inst. President, to Richard L. Revesz, Am. Law. Inst. Dir. (May 5, 2017) (on file with author).

[9] *See infra* notes 66-67and accompanying text.

sections are raised, argued, and applied in litigation. But the criticism suggests that two general points need to be taken into account in using the RLLI:

- What is a Restatement?
- Whose Restatement is this?

I. WHAT IS A RESTATEMENT?

The RLLI is, of course, a Restatement. But critics question whether it really is a Restatement—that is, whether it observes the strictures of what a Restatement is supposed to be and supposed to do. The core of the criticism is that the RLLI departs from settled law. The criticism manifests in several ways.

First, some critics outside the ALI argued that the Restatement is improper in that it usurps the legislative prerogative, particularly where its terms extend beyond decided or settled law in a jurisdiction. Senator Jason Rapert of Arkansas, president of the National Conference of Insurance Legislators, stated, "NCOIL will not allow the constitutionally protected legislative prerogatives in each state to be infringed upon by an unelected body. Legislative action includes both the passage as well as the consideration and non-passage of bill language."[10] Six governors signed a letter to the ALI expressing opposition to the RLLI, essentially tracking insurance industry arguments, asserting that the proposed Restatement constituted an "implicit usurpation of state authority [that] may require legislative or executive action."[11]

This criticism is as puzzling as it is wrong. As a private organization, the ALI—an "unelected body"—cannot make law, so it is hard to see how it infringes on the legislative prerogative. If the argument is about the judicial adoption of the elements of the Restatement, then it is empirically wrong. Most of the Restatement derives from common law

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[10] Press Release, Tom Considine, NCOIL CEO, NCOIL Statement on ALI 'Restatement' of Liability Insurance Law (May 25, 2018), http://ncoil.org/2018/05/25/ncoil-statement-on-ali-restatement-of-liability-insurance-law/. For formal action by the NCOIL in response to the RLLI, *see* MODEL ACT CONCERNING INTERPRETATION OF STATE INSURANCE LAWS (NCOIL 2019), http://ncoil.org/wp-content/uploads/2019/07/ALI-Restatement-Model-7-13-19.pdf.

[11] Letter from Governors to Judge David F. Levi, *supra* note 6.

principles that have neither been preempted nor considered by legislatures.[12] Of course, a legislature could make law on these topics if it chose to do so, but in the absence of legislative action, it is the courts' task to determine what the law is, guided by the Restatement to the extent that they choose

This is familiar. Restatements traditionally address areas long governed by common law. Over time, statutes are enacted to regulate portions of those areas. In torts, for example, states have enacted statutes on areas previously governed by judicial decision, including social host liability,[13] punitive damages,[14] comparative fault,[15] and sovereign immunity;[16] and, by federal law, limitations on the liability of gun manufacturers.[17] Statutes govern within their terms, and the common law and therefore the Restatements are residual, controlling the rest of the subject.

More serious was the criticism that the ALI produces two kinds of documents: Restatements and Principles. Because Restatements carry special weight in the courts, they should be restricted to concise expressions of well-settled law. Principles are less well established and less highly regarded and thereby less bound by settled law and may suggest changes in the law. For example, "[r]estatements are designed to contain clear formulations of common law and reflect the law as it currently stands or might appropriately be stated by a court. Principles, on the other hand,

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[12] The RLLI notes a few areas in which some states have adopted relevant statutes. RESTATEMENT OF THE LAW LIAB. INS., § 3 Reporters' note d (AM. LAW INST. 2018) ; *id.* § 7 Reporters' notes c, e, f, & g; *id.* § 9 Reporters' notes b, f; *id.* § 17 Reporters' note a; *id* § 24 Reporters' note k; *id.* § 35 cmt. f, Report ers' notes c, e, & f; *id.* § 41 Reporters' note c; *id.* § 42 Reporters' note b; *id.* § 47 cmt. h, Reporters' note c; *id.* § 50 Reporters' note b.

[13] *E.g.*, N.J. STAT. ANN. § 2A:15-5.6 (West 2019).

[14] *E.g.*, N.J. STAT. ANN. § 2A:15-5.9 (West 2019).

[15] *E.g.*, N.J. STAT. ANN. § 2A:15-5.1 (West 2019).

[16] *E.g.*, N.J. STAT. ANN. § 59 (West 2019).

[17] 15 U.S.C. §§ 7901-7903 (2012).

are aspirational, promoting changes that academics identify."[18]

From its founding in the 1920s, Restatements have been the bulk of the ALI's work. Beginning in the 1970s, and accelerating more recently, the Institute has also engaged in Principles projects. The consistent distinction between the two types of projects is that the former deals with common law and the latter deals with other forms of law and practice. For example, the first Principles project, "Principles of Corporate Governance: Analysis and Recommendations," included rules "to be implemented by the courts, some by legislatures, and some by corporations themselves."[19]

In 2014, following the appointment of Richard Revesz as Director, the ALI's Council formally distinguished the nature of its projects.[20] As clarified:

> Restatements are primarily addressed to courts and aim at clear formulations of common law and its statutory elements, and reflect the law as it presently stands or might appropriately be stated by a

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[18] Dinallo & Slattery, *supra* note 3, at 1; *see also ALI Should Stick to Its Mission – Clarifying the Law, Not Changing It*, U.S. CHAMBER INST. FOR LEGAL REFORM, https://www.instituteforlegalreform.com/resource/ali-should-stick-to-its-mission-clarifying-the-law-not-changing-it (last visited Aug. 27, 2019).

[19] PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, President's Foreword, at XXI (AM. LAW INST. 1994); *see also* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, Director's Foreword, at XV (AM. LAW INST. 2002) ("the Institute decided to write 'Principles,' rather than a 'Restatement,' because much of the relevant law is statutory, and what seemed to be needed was guidance to legislatures as well as to courts. Restatement provisions often reflect value choices, but 'Principles' seemed the right title for a project that starts with carefully considered assumptions about the best interests of children, fairness to divorcing wives and husbands, and the legitimate economic claims of unmarried partners.").

[20] AM. LAW INST., CAPTURING THE VOICE OF THE AM. LAW INST.: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK (rev. ed. 2015), https://www.ali.org/media/filer_public/08/f2/08f2f7c7-29c7-4de1-8c02-d66f5b05a6bb/ali-style-manual.pdf. [hereinafter CAPTURING THE VOICE].

> court. . . .
> Principles are primarily addressed to legislatures, administrative agencies, or private actors. They can, however, be addressed to courts when an area is so new that there is little established law.[21]

This distinction embodies the traditional role of Restatements. In its early years, the ALI addressed exclusively common law issues. The first series of Restatements included Agency, Contracts, Property, and Torts.[22] Early Principles projects included Corporate Governance, and Family Dissolution, and current Principles projects include Government Ethics, Policing, and Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities.[23]

The distinction between Restatements and Principles is structural. Critics of the RLLI also argued that even accepting the structural distinction between a Restatement and a Principles project, Restatements ought to observe a particular function and the RLLI failed to do so. As stated by the Defense Research Institute, "the voice of the defense bar,"

> Reporters are tasked to identify the majority rule and should only diverge from it if recent trends in the case law have shown the majority rule to be "outmoded or undesirable." Respectfully, in

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[21] *How the Institute Works*, AM. LAW INST., https://www.ali.org/about-ali/how-institute-works/ (last visited Sept. 8, 2019); *see also* CAPTURING THE VOICE, at ix ("Principles do not purport to restate but rather pull together the fundamentals underlying statutory, judicial, and administrative law in a particular legal field and point the way to a coherent (a principled, if you will) future.").

An example of a court-directed Principles project in an emerging area of law is Principles of the Law, Software Contracts. "In light of the many percolating legal issues that pertain to the formation and enforcement of software agreements, an attempt to 'restate' this law would be premature." PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, Introduction (AM. LAW INST. 2009).

[22] RESTATEMENT OF THE LAW OF AGENCY (AM. LAW. INST. 1933); RESTATEMENT OF THE LAW OF CONTRACTS (AM. LAW. INST. 1932); RESTATEMENT OF PROPERTY (1936); RESTATEMENT OF TORTS (AM. LAW. INST. 1934-39).

[23] *Past and Present ALI Projects*, AM. LAW INST., (last updated March 2019), https://www.ali.org/media/filer_public/c5/38/c5387be9-980a-4d69-af6d-ad4d4a067606/past-present-3-19.pdf.

> many instances, the black letter rules and Comments in this Restatement adopt rules that are entirely new, or have only been adopted in a handful of states, and are not in accordance with the majority rule. Furthermore, in many cases, the Reporters clearly diverge from the majority rule without demonstrating why or how the majority rule allegedly is "outmoded or undesirable."[24]

This criticism is misguided in at least three respects. First, it resembles a simplistic originalism in its confidence in the concept of a "majority rule." Second, it fails to accurately describe what the ALI has always attempted to do in its Restatements. Third, it misrepresents the extent to which the Reporters' drafts and the resulting Restatement actually track substantial bodies of case law.

Of course, on some legal issues there are clear majority rules, where a large number of courts have considered an issue and have written opinions that clearly state a consistent rule. For example, Section 27 of the RLLI permits the insured to assign to a tort claimant the insured's cause of action against an insurer for breach of the duty to make reasonable settlement decisions. This is a position that the Reporters note is the conclusion courts have reached in every state that has addressed the issue except for one.[25] But that amount of authority and degree of agreement is not always, or perhaps even often, the situation.

For example, in an article for a symposium on the RLLI sponsored by the Rutgers Center for Risk and Responsibility, Jeffrey Thomas described the difficulty of stating a majority rule on the issue the RLLI characterizes as the duty to make reasonable settlement decisions.[26] Thomas focuses on the thirty states that use one of the two principal rules for determining the scope of such a duty: one rule requires an insurer to disregard policy limits in making settlement decisions, and the other rule requires an insurer to give equal consideration to the insured's interests in

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[24] Letter from John E. Cuttino, *supra* note 8.

[25] RESTATEMENT OF THE LAW LIAB. INS. § 27, Reporters' note f. (AM. LAW. INST. 2018) (citing Dillingham v. Tri-State Ins. Co. Inc., 381 S.W.2d 914, 919 (Tenn. 1964)).

[26] Jeffrey E. Thomas, *The Standard for Breach of a Liability Insurer's Duty to Make Reasonable Settlement Decisions: Exploring the Alternatives*, 68 RUTGERS U. L. REV. 229 (2015).

settling as to its own.[27] He reports that thirteen states use the equal consideration rule without reference to the disregard the limits rule, and eight states use only the disregard the limits approach. From this, one might conclude, as some commentators do,[28] that the former is the majority rule. But nine, and perhaps eleven states, use a blended approach, supplementing equal consideration with disregard the limits. If those states are added to the eight jurisdictions that use the pure disregard the limits approach, one instead might conclude it is the majority rule.

Further complications arise. In determining a majority rule, do size, the extent of insurance activity, and reputation of courts matter? Equal consideration states include Connecticut, Illinois, and New York. California and Florida are blended states. Massachusetts, New Jersey, and Pennsylvania use disregard the limits. Does how the courts use the rule matter?

> However, stating a rule with approval is much different than applying that rule. Courts often make statements in dicta or for rhetorical purposes without those statements having much bearing on the outcome of the case. Sometimes those statements are picked up by later cases and become the law, but sometimes those statements are ignored and have no precedential impact.[29]

Finally, there is the issue of change over time. As the ALI notes in its style manual, "[i]f 30 jurisdictions have gone one way, but the 20 jurisdictions to look at the issue most recently went the other way, or refined their prior adherence to the majority rule, that is obviously important as well."[30]

In addition to the complexity of determining a majority rule, the function of a Restatement is and always has been broader; a Restatement is about weighing, not counting.[31] Restatements "aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court."[32] The "might appropriately be stated by a court" is captured in an admonition

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[27] Other states use other rules or more complex variations. *Id.* at 257-260.

[28] *See id.* at 257 n.163.

[29] *Id.* at 280-81.

[30] CAPTURING THE VOICE, s*upra* note 20, at 5.

[31] Feinman, *supra* note 1, at 16.

[32] CAPTURING THE VOICE, *supra* note 20*,* at 4. (emphasis added).

from former director Herbert Wechsler, prominent on the wall of the conference room in ALI headquarters in Philadelphia in which Restatements are debated: "We should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs."[33] The Restatement drafting process should consider four elements, and "the relative weighing of these considerations [is] art and not science."[34] The majority rule, when one can be determined, receives great weight. But also relevant are "trends in the law," "what specific rule fits best with the broader body of law and therefore leads to more coherence in the law," and "ascertain[ing] the relative desirability of competing rules."[35]

In its quest to "ascertain the relative desirability of competing rules," the RLLI almost always follows a clear majority rule where there is one.[36] The Comments and the Reporters' Notes document where this occurs. Sometimes the RLLI follows a majority rule and clarifies it; one notable innovation is to change the terminology from an insurer's "duty to settle" a claim against its policyholder where the policyholder is at risk of an excess judgment to a "duty to make reasonable settlement decisions."[37] The latter better describes the insurer's duty, which is not to settle automatically but only to act reasonably, considering the policyholder's interests as well as its own, in deciding or declining to do so. And where there is not a majority rule, the Restatement discusses alternatives and arrives at a considered judgment about a desirable rule.

There is nothing new in this process. One of the first Restatements, the original Restatement of Contracts, included Section 90 on enforcement of a promise on the basis of detrimental reliance rather than consideration.[38] That was an innovation that surely would not have been considered to be a majority rule, but was included because the drafters and the ALI, at the urging of Professor Corbin, recognized an emerging body of case law on

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[33] *Id.* at 6.

[34] *Id.*

[35] *Id.* at 5-6.

[36] Tom Baker & Kyle D. Logue, *In Defense of the Restatement of Liability Insurance Law*, 24 GEO. MASON L. REV. 767, 768 (2017).

[37] RESTATEMENT OF THE LAW LIAB. INS. § 24, Reporters' note b. (AM. LAW. INST. 2018).

[38] RESTATEMENT (FIRST) OF CONTRACTS § 90 (AM. LAW. INST. 1932).

detrimental reliance.[39] The key provisions on liability for a defective product in both the second and third Restatements of Torts arguably were not majority rules, but both were included and had enormous influence in the courts.[40]

The debate on particular provisions in the RLLI, both black letter and comments, included much discussion of whether the provisions were supported by majority rules. For example, from high-visibility, industry-supported attacks on the project:

- "The proposed Restatement sets forth a revision of insurance law that dramatically departs from the law."[41]
- "[The Reporters] view themselves as visionaries not bound by the common law method or its principles which has been the backbone of the ALI's Restatement projects over the many past decades."[42]

The Reporters responded:

> All of the rules adopted by the Restatement are grounded in existing case law. In that sense, none of them are new, and certainly none are radical. Most of the rules in the Restatement have in fact been adopted by a majority of the U.S. jurisdictions that have considered them. The Restatement follows a minority rule in only a few instances and only when the minority rule is better reasoned and will likely lead to better consequences than the alternatives. This is a common practice among ALI Restatement projects.[43]

In the drafting process, some sections raised more controversy than others, on both the issue of whether there was adequate case law support for the positions the Restatement took and on the ultimate policy question

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[39] GRANT GILMORE, THE DEATH OF CONTRACT 67–71 (Ronald K. L. Collins ed., 2d ed. 1995).

[40] *See* Feinman, *supra* note 1, at 22.

[41] DINALLO & SLATTERY, *supra* note 3, at 1.

[42] George L. Priest, *A Principled Approach Toward Insurance Law: The Economics of Insurance and the Current Restatement Project*, 24 GEO. MASON L. REV. 635, 652 (2017).

[43] Tom Baker & Kyle D. Logue, *In Defense of the Restatement of Liability Insurance Law,* 24 GEO. MASON L. REV. 767, 768 (2017).

about "the relative desirability of competing rules."[44] No doubt this type of controversy will continue, and the debate will be about the support for individual provisions more than the RLLI as a whole. Litigation, after all, is about the application of rules to facts, so the particular rules are key. But debate also is likely to continue about the process by which the Restatement was drafted. Figuring into that debate is an important issue: Whose Restatement is this?

II. WHOSE RESTATEMENT IS THIS?

The Restatement of the Law, Liability Insurance is, of course, a product of The American Law Institute. The RLLI stands as a product of its own, but a great deal of its influence and authority will be shaped by the fact that it is an ALI product.

The ALI was founded in 1923, following a report of a "Committee on the Establishment of a Permanent Organization for the Improvement of the Law."[45] The ALI aimed to resolve uncertainty in the law that "stemmed in part from a lack of agreement on fundamental principles" and complexity in the law that resulted from jurisdictional variation.[46] More ambitiously, it aimed "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice and to encourage and carry on scholarly and scientific legal work."[47]

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[44] *See supra* note 35.

[45] *About ALI,* AM. L. INST., https://www.ali.org/about-ali/.

[46] *Id.*

[47] *How the Institute Works*, AM. LAW INST., https://ali.org/about-ali/how-institute-works/.

What aspirations lay behind the organizational efforts of legal elites has been disputed. N.E.H. Hull argued that the driving force behind the creation of the ALI was "reformist progressive-pragmatists who viewed law as the means to achieving social ends, believers in the power of the legal profession to bring about positive change." N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55, 83 (1990). A more critical view casts the early ALI and its Restatements as "perhaps the high-water mark of conceptual jurisprudence …. They took fields of living law, scalded their

Today, the ALI aptly describes itself as "the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law."[48] Its regular membership is limited to 3,000 members, and it is governed by a self-perpetuating council of judges, practitioners, and academics.[49] At any time it has a dozen to twenty projects in process, some in its traditional areas of expertise in common law subjects, and others in areas of current interest in which the ALI sees itself as a useful forum for debate.

The American Law Institute's liability insurance project began as the Principles of the Law of Liability Insurance in 2010. When the ALI clarified the distinction between Restatements and Principles in 2014, the project was recharacterized as a Restatement.[50] The Principles-turned-Restatement went through the long-established ALI drafting process. Drafts are produced by the project reporters: leading insurance law scholars Professor Tom Baker of the University of Pennsylvania Law School was Reporter and Professor Kyle Logue of the University of Michigan Law School, Associate Reporter. The drafts are vetted by four groups: Advisers, the Members Consultative Group, the Council, and the membership present at the Annual Meeting.[51]

A project's Advisers are both members of the ALI and non-members, selected by the Institute's Director "for their particular knowledge and experience of the subject or the special perspective they are able to provide."[52] Those with "particular knowledge and experience" include academics who work in the field and lawyers and judges who may provide useful perspectives. Insurance law practice ordinarily divides into insurer-side and policyholder-advocates. Both groups were well

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flesh, drained off their blood, and reduced them to bones." LAWRENCE M. FREIDMAN, A HISTORY OF AMERICAN LAW 676 (2d ed. 1985).

[48] *About ALI*, AM. LAW INST., https://www.ali.org/about-ali/.

[49] *2017-2018 Annual Report*, AM. LAW. INST. 3, https://www.ali.org/media/filer_public/91/2e/912ed8da-ac5b-4763-806d-ff2b30b91ad3/2017-2018_annual_report.pdf.

[50] RESTATEMENT OF THE LAW LIABILITY INSURANCE intro. note, ix (AM. LAW INST., Discussion Draft 2015).

[51] *How the Institute Works*, AM. LAW. INST., https://www.ali.org/media/filer_public/91/2e/912ed8da-ac5b-4763-806d-ff2b30b91ad3/2017-2018_annual_report.pdf.

[52] *Project Life Cycle*, AM. LAW INST., https://www.ali.org/projects/project-life-cycle/.

represented, often by persons who were not ALI members. Thus, the American Insurance Association, Allstate, State Farm, Dentons, and Aon had seats at the table, as did the leading insurance consumer organization and practitioner policyholder advocates. Jeffrey Stempel characterizes the Advisers group as "evenly balanced" among insurer attorneys or executives, policyholder attorneys or advocates, professors, and judges.[53]

Advisers are invited to participate; the larger Members Consultative Group consists of ALI members who have a special interest in the subject. For the RLLI, the Members Consultative Group consisted of about 150 members, who had varying degrees of participation, again including those with a range of interests and perspectives on the subject. The Council is the governing body of the ALI. Upon its approval, drafts are sent to the Annual Meeting for approval. In addition to discussion at the various meetings, both members and non-members may submit written comments, which are then available to ALI members on its website. Stempel reports that from 2014 forward,[54] 300 formal comments were submitted, about 80 percent of which were from the insurer side.[55]

As one might expect with a process that extended for nine years and involved recurrent debate among four different groups and formal approval by two of them, the debate over the RLLI was extensive and intense. Portions of the RLLI went through thirty-four drafts, during which numerous changes were made, both large and small.[56] Perhaps the best illustration of the detailed and often contentious nature of the drafting process is the section on insurance policy interpretation. In early drafts, the Reporters aimed "to strike a middle ground between what are commonly referred to as the 'liberal' Corbin and 'conservative' Williston approaches to contract interpretation."[57] They defined objectives of interpretation,

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[53] Jeffrey W. Stempel, Hard Battles over Soft Law: The Substantive and Political Implications of Controversy Surrounding the American Law Institute Restatement of the Law of Liability Insurance (2018) (unpublished draft) (on file with author).

[54] Earlier comments were not retained.

[55] Stempel, *supra* note 53 (draft at 46, 28 n.64).

[56] In addition to the drafts posted on the ALI website, the Reporters prepared nineteen comparison documents, showing changes from one draft to the next, each of which includes substantial redlining.

[57] PRINCIPLES OF THE LAW LIABILITY INSURANCE (AM. LAW. INST. Preliminary Draft No. 1, 2011).

including "[e]ncouraging the accurate marketing of insurance policies, especially in the consumer market" and "promoting the financial responsibility of insured parties."[58] Until quite late in the process, the Reporters offered a complex interpretation principle that established a presumption in favor of plain meaning, which would apply "unless the court determines that a reasonable person would clearly give the term a different meaning in light of extrinsic evidence."[59] Insurer advocates strongly objected to this approach, arguing, for example, that it allowed "the insured to disregard unambiguous policy terms" in a way that could cause "market disruption."[60] In the end, the Restatement incorporates a vanilla plain meaning rule, with the Comments and the Reporters' Notes ambiguously suggesting modest expansion of the concept.[61]

The ALI process stands as its own response to many of the criticisms of the RLLI. Surely not every judgment made by the Reporters or the bodies that review, modify, and ultimately approve their work is correct. But the process is unique in debates about American law. The ALI is a unique institution in which different approaches are represented, views are heard, and documents are drafted and redrafted in an attempt to "ascertain the desirability of competing rules."[62]

And, as every lawyer knows, the process has been recognized. Restatements have been cited by courts tens of thousands of times. Often during the drafting process critics cited Justice Scalia's recent critique of Restatements in *Kansas v. Nebraska*: "[M]odern Restatements . . . are of questionable value, and must be used with caution. . . . Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be."[63] Yet during the three terms, ending with the one in which he made the statement, the justice authored nine opinions citing Restatements, including citing newer Restatements seven times in five cases.[64]

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[58] *Id.* § 1.08.

[59] RESTATEMENT OF THE LAW LIABILITY INSURANCE § 3 (AM. LAW. INST., Preliminary Draft No. 1, 2015).

[60] DINALLO & SLATTERY, *supra* note 3, at 1-2.

[61] RESTATEMENT OF THE LAW LIAB. INS. § 3 (AM. LAW INST. 2018).

[62] *Supra note.* 36.

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

[64] Richard L. Revesz, *The Director's Letter: The American Law Institute & the U.S. Supreme Court*, THE ALI REPORTER 3

Indeed, the controversy over the RLLI demonstrates the importance of the ALI's work.[65] Business interests tend to make rational investments in time and money. The investment in criticizing the RLLI must be worthwhile because a Restatement matters.

III. HOW TO USE THE RESTATEMENT OF THE LAW, LIABILITY INSURANCE

Critics of the Restatement of the Law, Liability Insurance, argue that it is not properly a Restatement, does not observe existing law as a Restatement should, and is the product of an ALI that has lost its way. Those charges are misguided. But the controversy raises issues about what lawyers and judges should do with the RLLI now that it has been adopted.

In some jurisdictions lawyers and judges will have to deal with statutes that have been or may be enacted in response to the RLLI. So far there are at least two kinds of such statute; both are poorly drafted and likely to sow disputes.

One type of statute is directed at the Restatement itself, as in Ohio: "The 'Restatement of the Law, Liability Insurance' that was approved at the 2018 annual meeting of the American Law Institute does not constitute the public policy of this state and is not an appropriate subject of notice."[66]

Here, the legislature declares the public policy of the state, which it has the constitutional authority to do. But what is that policy? Surely it cannot be that every principle included in the Restatement is void as against public policy. The RLLI itself cites numerous instances in which its provisions are consistent with Ohio law. Instead, the statute seems to prohibit citation to the RLLI, effectively making it "not an appropriate subject of notice." Whether the legislature can direct the courts as to what

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(2016), http://www.law.nyu.edu/sites/default/files/2016--ALI-Winter_Quarterly_Letter_0.pdf.

[65] As ALI President David Levi noted, "The occasional controversies over project drafts only highlight the continuing influence and importance of the ALI." AM. LAW INST., ANNUAL REPORT 4 (2016-2017).

[66] OHIO REV. CODE ANN. § 3901.82 (West 2018); *see also* MODEL ACT CONCERNING INTERPRETATION OF STATE INSURANCE LAWS (NCOIL 2019), http://ncoil.org/wp-content/uploads/2019/07/ALI-Restatement-Model-7-13-19.pdf.; H.B. 1142, 66th Leg. Assemb., Reg. Sess. (N.D. 2019).

materials the courts may consider is an issue of Ohio constitutional law. But assuming the statute is constitutional in Ohio, the RLLI becomes a treatise to be used in most of the ways described below, although one that must not be cited.

A second kind of statute aims to reverse what are presumed to be the most problematic provisions of the RLLI. For example, the Tennessee legislature has focused on interpretation and the duty to defend:

> a) A policy of insurance is a contract and the rules of construction used to interpret a policy of insurance are the same as any other contract.
> (b) A policy of insurance must be interpreted fairly and reasonably, giving the language of the policy of insurance its ordinary meaning.
> (c) A policy of insurance must be construed reasonably and logically as a whole.
> (d) An insurance company's duty to defend depends solely on the allegations contained in the underlying complaint describing acts or events covered by the policy of insurance. This subsection (d) does not impose a duty to defend on an insurance company that has no duty to defend pursuant to this Act or that has an express exclusion of the duty to defend in the policy of insurance.[67]

This Tennessee statute tracks early criticism of the RLLI before it adopted a simpler version of the plain meaning rule for insurance policy interpretation. Essentially, the statute restates maxims of interpretation aiming at plain meaning. But like many such maxims, and like the concept of plain meaning itself, the statute is open-ended and somewhat contradictory. For example, what is ordinary meaning? Whose ordinary meaning – general dictionary, actual policyholder, reasonable policyholder, insurer, reasonable insurer, or someone else? Similarly, what does "reasonably" mean? According to what standard – economic rationality, common sense, consumer knowledge of insurance, specialized knowledge of insurance – or whose standard – reasonable person, reasonable policyholder, reasonable insurer? Ditto as to fairness. And what if the ordinary meaning of the policy leads to a reading that is unreasonable or unfair? The only sure consequence of such statutes is that confusion will ensue.

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[67] TENN. CODE ANN. § 56-7-102 (2019).

There will likely be few explicit statutes targeting the RLLI, and lawyers and judges will have to consider the use of the Restatement in the ordinary common law process. Given the RLLI's political history, there may be a temptation to treat all or part of it differently than an ordinary Restatement. Part of the project of criticism, especially in its late stages, seemed to aim at delegitimizing the RLLI project as a whole, so advocates could argue that its provisions ought to be given less weight as a general matter than is ordinarily accorded a Restatement. Lawyers disadvantaged by a particular section might focus on the criticism that some sections fail to represent majority rules. Lawyers arguing for expansive views of insurance policy interpretation could suggest that the plain meaning rule in section 3 represents as much a capitulation to industry interests as a considered judgment of the ALI.

Or the RLLI could just be regarded as an ordinary Restatement and used by lawyers and courts the way other Restatements are used.

Beginning law students confronted with Restatement rules in casebooks often regard the black letter as authoritative embodiments of the law. Of course it is not that, in part because the Restatement is not itself law, and in part because the black letter is only part of a Restatement. The black-letter rule is a concise and simple rule, principle, or statement of law by the ALI.[68] The accompanying Comment, also officially adopted by the ALI, explains "the background and rationale of the black letter and the details of its application" and identifies "the competing considerations encapsulated in the black-letter provision."[69] The Reporters' Notes, although reviewed by the ALI, are the province of the Reporters and "set forth and discuss the legal and other sources relied upon by the Reporter in formulating the black letter and Comment and enable the reader better to evaluate these formulations, [ ] provide avenues for additional research, [and] furnish a vehicle for the Reporter to convey views not necessarily those of the Institute and to suggest related areas for investigation that may be too peripheral for treatment in the black letter or Comment."[70]

As the controversy over the RLLI demonstrates, there can be dispute about whether the ALI adopted the correct rules. When the black letter, Comments, and Reporters' Notes are read together, however, each section provides a fair account of the rules, authority, and rationale.

Consider as an example Section 24, on the insurer's duty to make

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[68] CAPTURING THE VOICE, s*upra* note 20, at 36.

[69] *Id*. at 42.

[70] *Id.* at 45.

reasonable settlement decisions. The general principle is almost universally accepted, but throughout the drafting process there was considerable debate about the precise formulation of the black letter and comment. Some of the criticism of the Reporters' earlier drafts was incorporated. The section as adopted provides a twenty-four-page treatise on the issue. The black letter provides a rule of reasonableness and defines reasonableness.[71] The comment begins by relating the rule to the broader question of the duty of good faith, referring to different approaches and explaining the Restatement's reframing of the rule from bad faith or a duty to settle to a duty to make reasonable settlement decisions.[72] It refers to the common competing descriptions of the duty as giving equal considerations to the insured's interests and disregarding the policy limits and explains how its rule fits with those descriptions.[73] Then it explores the concept of reasonableness, including factors that a reasonable insurer would consider and the relevance of whether an insurer failed to make an offer or counter-offer, as distinguished from failing to accept a settlement offer.[74] The comment concludes by exploring subsidiary issues, such as the lack of duty to excess insurers or third parties.[75] Then the Reporters' Note provides extensive discussion, sources, and case-law examples for each part of the previous discussion, including noting alternative approaches that the RLLI did not adopt.[76] Particularly on issues where there is a split of authority, which often were the subject of debate during the drafting process, the note recognizes and cites sources.[77]

For a lawyer in a case in which this rule is relevant, the RLLI provides both authority and a roadmap. Suppose in the course of defending its insured in a personal injury case under a policy with a $100,000 policy limit, the insurer estimates a reasonable value of the case to be $35,000-$45,000. The plaintiff does not offer to settle, but the insurer offers to settle for $5,000. The plaintiff rejects the offer, and at trial the plaintiff receives a judgment of $150,000. Is the insurer liable for the $50,000 excess

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[71] RESTATEMENT OF THE LAW LIAB. INS. § 24 (AM. LAW. INST. 2018).

[72] *Id.* at cmt. a.

[73] *Id.* at cmt. c.

[74] *Id.* at cmts. d-f.

[75] *Id.* at cmts. j-k.

[76] *E.g.*, a strict-liability standard rather than reasonableness. *Id*. at Reporters' Note b.

[77] *E.g.*, on the insurer's failure to make offers or counter-offers, *Id*. at Reporters' Note f.

judgment?[78]

The Restatement applies a rule of reasonableness here. The black letter sets the standard: "a reasonable insurer that bears the sole financial responsibility for the full amount of the potential judgment."[79] The comment[80] spells out the concept of reasonableness in general, and comment f. speaks specifically to the insurer's failure to make reasonable settlement offers. That comment describes a variety of relevant circumstances making it unreasonable to fail to make an offer, including the strength of the plaintiff's case and the size of the potential damages. It also suggests when it is reasonable to fail to make an offer, as when an insurer does so for strategic reasons such as forcing the plaintiff to reveal more about its case. And it lays out reasons that are impermissible for the reasonable insurer to consider, such as its interest in managing its portfolio of cases, as in developing a reputation as a tough bargainer. Then the Reporters' Note describes the split of authority on this issue, giving ample citations.[81]

The lawyer (either lawyer, actually) can thus use the Restatement as a roadmap to analyze their case, including providing relevant authority and policy arguments. So, in one sense, the Restatement is a treatise. But some treatises have more weight than others. Today, as legal subjects have both expanded and fragmented, and the statutes and judicial decisions have proliferated, some treatises address narrower legal topics. Those treatises that aim to cover whole fields of law tend to be directed by publishers and written by groups. Once, though, author and treatise were linked in a way that conferred almost magisterial authority: Williston on Contracts; Wigmore on Evidence; Prosser on Torts. The authors of those treatises collected, sifted, analyzed, reported, synthesized, proposed, formulated, and reformulated the law.[82] One could find fault with the treatise and disagree with its conclusions or even its entire approach, but the treatise demanded respect because the author was respected for his careful and deliberate approach to the law.

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[78] *Id.* § 24 cmt. g, illus. 5.

[79] *Id.* § 24(2).

[80] *Id*. § 24 cmt. f.

[81] *Id.* § 24 Reporters' Note f.

[82] Prosser provides the best example. *See* G. EDWARD WHITE, TORT LAW IN AMERICA 155-63 (1985).

The Restatements of the Law, including the RLLI, are at least treatises that reflect the old form. They are uniquely collective products – the Reporters' work in part, but also the product of the deliberative process of the ALI. Like the classic treatises, Restatements command respect because of the careful and deliberate approach that produced them. And like the classic treatise authors, with over nearly a century of commentary the American Law Institute has earned its stature in the legal community. The Restatements, including the RLLI, have weight not just because of the work behind them, but also because of who is behind them. The American Law Institute and its process have gained respect and while its views do not command agreement they do merit consideration.