

# THE AMERICAN LAW INSTITUTE’S RESTATEMENT OF THE LAW, LIABILITY INSURANCE: SCHOLARSHIP AND CONTROVERSY

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The views expressed in this article are the authors’ own and should not be attributed to clients, the ALI, or others. No client, organization, or other party contributed any funds to pay for the writing of this article.

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## I. INTRODUCTION

The Restatement of the Law, Liability Insurance (Restatement or RLLI), carries on the traditions of the American Law Institute (ALI) in presenting rigorous scholarship and a synthesis of the views of the law from leaders across the legal profession. Begun in 2010,<sup>1</sup> the Restatement represents eight years of work by reporters Tom Baker and Kyle Logue,<sup>2</sup> and the Restatement’s advisers, members consultative group (MCG), council, and (later) the ALI general membership. As a result of the ALI’s dialectical process, the Restatement reflects the diverse perspectives of lawyers and advocates for both insurers and insureds, judges, professors, scholars, insurance brokers, and others.

Despite this rigorous work, the insurance industry has mounted a coordinated campaign to discredit not only the Restatement but also the ALI, first in motions made in the ALI to delay the Restatement’s adoption or to revise numerous sections of the Proposed Final Draft and later in other venues, including the press and state legislatures, as well. Since the RLLI was adopted in May 2018 (and even before the final version was completed), insurers and insurance-industry organizations, with insurance defense and coverage counsel whose practices derive from insurance companies, have pursued an organized effort to oppose the RLLI by publishing articles in insurance industry, legal, and other publications; speaking at seminars organized by bar associations and similar legal organizations; and developing proposed legislation stating a “public policy” against the RLLI or otherwise seeking to direct how or whether courts may cite or even consult it.<sup>3</sup> A working group of insurance industry organizations, insurers, and their counsel have

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<sup>1</sup> See Tom Baker & Kyle D. Logue, *In Defense of the Restatement of Liability Insurance*, 24 Geo. Mason L. Rev. 767, 771 (2017) [hereinafter Baker and Logue]. The Council of the ALI in 2014 voted to convert the project, begun as a Principles project, to a Restatement. See *infra* 40. See also AM. L. INST., THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK, at 13 (rev. 2015), [https://www.ali.org/media/filer\\_public/08/f2/08f2f7c7-29c7-4de1-8c02-d66f5b05a6bb/ali-style-manual.pdf](https://www.ali.org/media/filer_public/08/f2/08f2f7c7-29c7-4de1-8c02-d66f5b05a6bb/ali-style-manual.pdf) (last visited Feb. 20, 2021) [hereinafter ALI HANDBOOK AND STYLE MANUAL].

<sup>2</sup> Professor Tom Baker of the University of Pennsylvania Law School and Professor Kyle D. Logue of the University of Michigan Law School served as Reporter and Associate Reporter, respectively, throughout the project.

<sup>3</sup> See discussion of legislation *infra* § IV.B.

coordinated, working to “fund opposition to ALI’s representation of minority positions as established law”<sup>4</sup> and otherwise oppose the Restatement, even when it states (as it does in most instances) the majority rule.

This effort has extended to the legislative arena. The National Association of Mutual Insurance Companies (NAMIC) and the National Council of Insurance Legislators (NCOIL) have published statements, press releases, and reports attacking the Restatement.<sup>5</sup> Other groups and individual counsel, some as retained counsel for the industry, have also published such pieces.<sup>6</sup> Many of the articles, seminars, and hearings held on the RLLI have included little or no input from policyholder representatives, consumers, or the ALI. In some cases, these discussions have included little analysis of the 100-plus principles of law stated (in 50 sections) in the RLLI or made little attempt to separate positions favored by and sought by insurers and their representatives from those they deplore. Proposed legislation, discussed below, often makes little effort to distinguish between rules insurers favor and those they do not, or to compare provisions of the Restatement to the law of the state. As pointed out in a letter submitted to the Arizona state legislature by former Chief Justices of the Arizona Supreme Court,<sup>7</sup> legislation adopted and proposed in many states may increase, and not—as proponents tend to argue—reduce uncertainty. Those statutes clearly would distort the process used to develop the common law—that body of law that courts have developed when faced with specific controversies and disputed facts, and with regard to which courts around the country have consulted Restatements, and many other secondary sources, for decades.

A faithful recounting of the eight years of work that created the *Restatement* and the various drafts of the project over the years confirms the participation throughout the process by insurance company representatives (from insurance

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<sup>4</sup> *Our Positions American Law Institute (ALI)*, NAMIC, <https://www.namic.org/Issues/american-law-institute> (last visited Feb. 20, 2021).

<sup>5</sup> *Id.* (“The end result of this ALI project could seriously harm all property casualty insurance companies. NAMIC and AIA have enlisted a working group of insurance companies to coordinate and fund the opposition to ALI’s improper representation of minority positions as established law.”). See also *infra* notes 71–72 and associated text.

<sup>6</sup> See *infra* notes 74–80 and associated text.

<sup>7</sup> Letter from former Arizona Supreme Court Chief Justices, Hon. Ruth V. McGregor (ret.), Hon. Rebecca White Berch (ret.) & Hon. Scott Bales (ret.), *Opposing House Bill 2644 [hereinafter Letter of Former Arizona Supreme Court Chief Justices]* (copy on file with author), see discussion *infra* § IV.B.(2).

companies and from insurance industry defense firms) and an insurance industry “liaison” from the American Insurance Association (AIA). While policyholder lawyers and United Policyholders, a small, nonprofit dedicated to serving consumers, participated in the process, they do not (and throughout the process did not) have the power or size to counter positions taken by insurance industry trade groups or counsel who obtain a stream of business from insurance companies.<sup>8</sup> There really is no comparable “industry group” that represents policyholders in the way industry trade groups represent the insurance industry.

The Restatement throughout its drafting sought to state “the efficient and fair rules that should govern the insurer/insured relationship.”<sup>9</sup> Of course, debates among the Restatement’s advisers, MCG, and others were often intense, reflecting the viewpoints of the many constituencies interested in the development of the law governing liability insurance, and it continues to be a subject of intense interest and controversy. This article surveys the background of the ALI and ALI process, the development of the RLLI, insurance industry commentary on the RLLI, legislation promoted by insurers, and cases citing the RLLI. It discusses the organized effort by the insurance industry to undermine not just the Restatement but also the ALI itself. Finally, this article discusses issues in the RLLI that remain the subject of controversy<sup>10</sup> and seeks to provide context and counter-balance to commentaries provided to date (mostly by insurers).

## II. BACKGROUND OF THE ALI

To understand the full story of the Restatement, it is necessary to have an understanding of both the ALI history and process, developed over the almost 100 years of the ALI’s existence<sup>11</sup> and the eight-year history of the Restatement. To quote the Bard, “past is prologue.”<sup>12</sup> This section gives a thumbnail sketch of ALI history, its process, and the development of the Restatement from 2010 to 2018. It also outlines the topics addressed in the Restatement, to show that general attacks stating that the RLLI “got the law wrong” present a gross oversimplification.

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<sup>8</sup> At some point, a representative from the Risk & Insurance Management Society (RIMS) was involved but was never active.

<sup>9</sup> RESTATEMENT OF THE L. OF LIAB. INS. (AM. L. INST. Draft Jul. 2014) (quoted in Masters, Bach, & Wade, *infra* note 41, at 2).

<sup>10</sup> With some exceptions like nuclear insurance and terrorism insurance, insurance is regulated, of course, at the state level, and on many issues is determined as a matter of judge-made or common law.

<sup>11</sup> Founded in 1923, the ALI will celebrate its centennial in 2023.

<sup>12</sup> WILLIAM SHAKESPEARE, THE TEMPEST, act 2, sc. 1, l. 217.

Lawyerly analysis and good public policy depend on fact and an informed understanding of the nuances of complex topics. This article submits that critique and proposed legislation addressing the Restatement should be based on a reading of the Restatement, its 50 sections, 100-plus principles of law, and comments, not based on past grievances about the drafting process as seems to be the focus in at least some insurer commentaries.<sup>13</sup>

#### A. A SHORT HISTORY OF THE ALI

Prominent American judges, lawyers, and legal scholars came together in the early 1920s to create a “Committee on the Establishment of a Permanent Organization for the Improvement of the Law” (the “Committee”), led by icons of the American legal profession, Elihu Root, George Wickersham, and William Draper Lewis.<sup>14</sup> The Committee convened to consider ways to address a “general dissatisfaction with the administration of justice,” in part arising from the belief that “the law is unnecessarily uncertain and complex.”<sup>15</sup> Based on the Committee’s recommendations, the ALI was incorporated in 1923, and work that year began on

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<sup>13</sup> See, e.g., point-counterpoint discussion: George L. Priest, *A Principled Approach Toward Insurance Law: The Economics of Insurance Law and the Current Restatement Project*, 24 GEO. MASON L. REV. 635 (2017); and Tom Baker & Kyle D. Logue, *In Defense of the Restatement of Liability Insurance Law*, 24 GEO. MASON L. REV. 767 (2017). See also Kim V. Markkand, *How a Broken Process, Broken Promises, and Reimagined Rules Justify the Bench and Bar’s Skepticism Regarding the Reliability of the Restatement of the Law, Liability Insurance*, 50 THE BRIEF, No. 1 (Journal of American Bar Association Tort Trial and Insurance Law Section, Fall 2020) (insurer side counsel). This issue of THE BRIEF includes other articles on the RLLI. For other perspectives that will be beneficial, in the authors’ views, and bring balance to consideration of the topic, see Elizabeth C. Sackett & Jeffrey Thomas, *Perspectives on the Restatement of the Law, Liability Insurance: What’s all the Hoopla About?* (at 9) (editor of THE BRIEF); Jeffrey W. Stempel, *From Quiet to Confrontational to (Potentially) Quiescent: The Path of the ALI Liability Insurance Restatement* (at 10) (Professor of Law, UNLV); Laura A. Foggan & Rachel Padgett, *Rules of Policy Interpretation Reflect Lingered Policyholder Bias in the ALI’s Restatement of the Law, Liability Insurance* (at 26) (insurer side counsel); Lorelie S. Masters, *“Plain Meaning” and the Meaning of “Plain”: Section 3 of the Restatement of the Law, Liability Insurance* (at 36) (policyholder side counsel).

<sup>14</sup> *The Story of ALI*, ALI, <https://www.ali.org/about-ali/story-line/> (1923: *Founding of the American Law Institute*) (last visited Feb. 20, 2021).

<sup>15</sup> See *id.* for a discussion, decade by decade, of the history of the ALI, its leaders, projects, and contributions since the Institute’s founding in 1923.

its first Restatements, on the law of agency, conflict of laws, contracts, and torts.<sup>16</sup> Since then, the ALI has grown to include more than 4,000 members from all disciplines in the legal profession—judges from all corners of the judiciary; scholars from law schools; think-tanks and non-profits; practicing lawyers; and others, largely from the United States but also from abroad.<sup>17</sup>

Reading about the founders of the ALI is a humbling experience. Secretary Root, for example, was an American lawyer and statesman who served as Secretary of State under President Theodore Roosevelt and Secretary of War under Presidents Theodore Roosevelt and William McKinley. He served one term as a United States Senator from the State of New York. For his work in international arbitration, he won the Nobel Peace Prize in 1912. He led the Carnegie Endowment for International Peace, the Carnegie Institution of Washington, and the Carnegie Corporation of New York. He is credited with modernizing the United States Department of War and “transforming the army into a military machine comparable to the best in Europe.”<sup>18</sup> Other early leaders included President and Chief Justice William Howard Taft, Justice Charles Evan Hughes, Judge Learned Hand, and Judge Benjamin Cardozo.<sup>19</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> The ALI elects lawyers to membership through a confidential nomination process. *Election*, ALI, <https://www.ali.org/members/membership-proposal-process/election/> (last visited Feb. 20, 2021), [United States Supreme Court Justices, Chief Judges of the United States Courts of Appeals, and Chief Justices and Chief Judges of the highest courts in each state and U.S. jurisdiction, deans of law schools in the Association of American Law Schools (AALS), and Presidents of the ABA, National Bar Association, and Federal Bar Association among others, are ex officio members of the ALI. *Membership*, ALI, <https://www.ali.org/members/> (last visited Feb 20, 2021). One commentary posits: “Absent the implied imprimatur of the ex officio members, one can fairly ask if a Restatement would be treated any differently than any other law review quality article.” Kim Marrkand, *Why Ohio Nixed the New Liability Insurance Law Restatement*, LAW360 n. 8 (Aug. 10, 2018), <https://www.law360.com/articles/1071830>. These comments appear to misapprehend the in-depth work and thinking from across the legal profession that is apparent from a review of ALI Restatements and other projects and is contrary to author Lorelie Masters’ experience in attending and participating in discussions of ALI projects at the ALI annual and other meetings.

<sup>18</sup> *Supra* note 14 (click “Elihu Root” hyperlink within the “Founding of the American Law Institute” section).

<sup>19</sup> *Id.*

Restatements “are primarily addressed to Courts,”<sup>20</sup> and typically address the common law, “the law developed and articulated by judges in the course of specific cases.”<sup>21</sup> In addition to Restatements, the ALI has played a key role in the creation of other significant contributions to the law, including the Uniform Commercial Code (UCC) and the Model Penal Code, and through its “Principles” projects.<sup>22</sup> As defined in the *ALI Handbook and Style Manual*, Principles “are primarily addressed to legislatures, administrative agencies, or private actors.”<sup>23</sup>

In one of its very significant contributions, during World War II, the ALI helped organize a committee that researched the constitutions of different countries in the world and other foundational documents relating to individual rights.<sup>24</sup> This work, conducted over the years of the War, resulted in the ALI’s Statement of Essential Human Rights, one of the texts used to create the Universal Declaration of Human Rights.<sup>25</sup> Adopted by the United Nations in 1948, the Declaration has become the best-known and most-cited document on human rights in the world. It

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<sup>20</sup> ALI, *Frequently Asked Questions*, <https://www.ali.org/publications/frequently-asked-questions/#differ> (last visited Feb. 20, 2021).

<sup>21</sup> AM. LAW INST., *CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK* 4 (rev. 2015), [www.ali.org/publications/style-manual/](http://www.ali.org/publications/style-manual/) (last visited Feb. 20, 2021).

<sup>22</sup> *Supra* note 14.

<sup>23</sup> *Supra* note 20. Principles can “be addressed to Courts when the area is so new that there is little established law. Principles may suggest best practices for these institutions.” ALI HANDBOOK AND STYLE MANUAL, *supra* note 1, at 13. The ALI’s concept of the Principles projects has evolved over time since the ALI first tackled such a project (with the ALI’s Corporate Governance Project). The concept of Principles has been refined over the years as discussed in the *ALI Handbook. Id.* at 13–15.

<sup>24</sup> *See, e.g.,* ALI, *The Statement of Essential Human Rights* (Dec. 10, 2018) <https://www.ali.org/news/articles/statement-essential-human-rights>; JOHN P. HUMPHREY, *HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE* (1984). Mr. Humphrey was the first Director of Human Rights of the U.S., in 1946. These comments appear to refer to First Lady and world-renowned humanitarian Eleanor Roosevelt who led this effort and fought for its adoption. The ABA celebrated the 70th Anniversary of the Declaration in 2018. UNITED NATIONS, *UNIVERSAL DECLARATION OF HUMAN RIGHTS* iii (rev. 2015).

<sup>25</sup> *Id.*

has been translated into more than 500 languages and, showing the power of an idea and vision, incorporated into the constitutions of many countries.<sup>26</sup>

## B. THE ALI GUIDELINES AND PROCESS

**ALI Guidelines.** First set forth in 1923 in the ALI's Certificate of Incorporation, the Institute's goals and purposes set forth below have remained consistent throughout its history: "[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."<sup>27</sup>

As provided in the ALI's Bylaws, "[p]ublication of any work as representing the Institute's position requires approval by both the membership and the Council."<sup>28</sup> As known by the Council members identified in every ALI publication, the Council includes jurists, professors, and other recognized leaders from across the legal profession.

**Restatements and Principles Include Black-Letter Statements of Law, Comments and Reporters' Notes.** As the *ALI Handbook and Style Manual* explains:

Each [ALI project] addresses a particular area of the law and seeks to clarify and synthesize it in such a way as to contribute to the "better administration of justice." Each consists of a series of concise "black-letter" legal formulations, elucidated by extended commentary and illustrations, and supported by scholarly annotation of the sources considered.<sup>29</sup>

The black-letter statements of law and Comments are considered the official position of the ALI.<sup>30</sup> The Reporters' Notes are that—notes on the authorities the Reporters reviewed in creating the black-letter comments. They are not the official position of the ALI.<sup>31</sup>

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<sup>26</sup> *About the Universal Declaration of Human Rights Translation Project*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/EN/UDHR/Pages/INtroduction.aspx> (last visited Feb. 20, 2021).

<sup>27</sup> ALI HANDBOOK AND STYLE MANUAL, *supra* note 1, at 1.

<sup>28</sup> *Id.* (quoting the ALI Bylaws).

<sup>29</sup> *Id.* at 3.

<sup>30</sup> *How the Institute Works*, ALI, <https://www.ali.org/about-ali/how-institutue-works/> (last visited Feb. 20, 2021).

<sup>31</sup> ALI HANDBOOK AND STYLE MANUAL, *supra* note 1, at 35–36; 45 (Ch. II.B.); and extended discussion at 33–46 (Ch. II.B.).

The *ALI Handbook and Style Manual*<sup>32</sup> describes how a project is selected and begun:

The nature, content, and scope of each Institute project are initially developed by its Reporter in consultation with the Institute's Director, generally on the basis of a prospectus or memorandum prepared by the Reporter at the invitation of the Director and subsequently reviewed by the Projects Committee and either by the Council as a whole or its Executive Committee. The Director's Recommendations that particular projects be undertaken and designations of specific Reporters are subject to the approval of the Council or Executive Committee. Once a project begins, its character and scope maybe further refined in the course of the drafting process.<sup>33</sup>

Recognizing that case law could be and "had become obscured by the ever-growing mass of decisions in the many jurisdictions"<sup>34</sup> in the United States, founders of the ALI in creating Restatements sought to "assume [] the perspective of a common-law court, attentive to and respectful of precedent, but not bound by precedent that is inappropriate or inconsistent with law as a whole."<sup>35</sup>

As noted by one commentator decades ago, a Restatement is "a product of highly competent group scholarship subjected to a searching criticism of learned and experienced members of the bench and bar."<sup>36</sup> As stated in the *ALI Handbook and Style Manual*, Restatements provide "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."<sup>37</sup> While a Restatement aims to "recapitulate the law as it presently exists," it also reflects an "impulse to reformulate it, thereby rendering it clearer and more coherent while subtly transforming it in the process."<sup>38</sup>

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<sup>32</sup> *See id.*, *supra* note 1.

<sup>33</sup> *Id.* at 3 (Ch. I.B.).

<sup>34</sup> ALI HANDBOOK AND STYLE MANUAL, *supra* note 1, at 4.

<sup>35</sup> *Id.* at 4, 5 (Ch. I.B.1.a.).

<sup>36</sup> Herbert F. Goodrich, *The Story of the American Law Institute*, 1951 WASH. L.Q. 283, 285 (1951).

<sup>37</sup> ALI HANDBOOK AND STYLE MANUAL, *supra* note 1, at 1 (Ch. I. A.).

<sup>38</sup> *Id.* (Ch. I. A.).

Commentaries that decry the RLLI in articles or at conferences, which often are from people with little background in the ALI, have argued that the ALI somehow has lost its way. Ah, for the good ol' days when Restatements stated only majority rules! These critiques, however, ignore history. In creating Restatements, the ALI has focused on majority rules, but has always focused on the larger body of law. It has always sought, as shown in its Certificate of Incorporation, among other things, the "better adaptation [of the law] to social needs"; and, as shown in the *ALI Handbook and Style Manual*, to ascertain trends in the law.<sup>39</sup> ALI Restatements on more than one occasion have stated legal principles that were not majority rules when the Restatement first was published but since have become the majority rule.<sup>40</sup>

**The ALI Process:** The ALI follows a rigorous, dialectical process in creating any of its projects, whether a Restatement, Principles of the Law, or a Model Act.<sup>41</sup> The process includes as participants active practitioners on all sides of the issues in the practice area in question: judges, professors, and other interested parties. Reporters, usually law school professors, are appointed to write the drafts and manage the process of reviewing and revising the text under the supervision of the ALI's Council and Officers.

The following description of the Restatement process from the *ALI Handbook and Style Manual* provides additional context:

The Restatement process contains four principal elements. The first is to ascertain the nature of the majority rule. If most courts faced with an issue have resolved it in a particular way that is obviously important to the inquiry. The second step is to ascertain trends in the law. If 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. Perhaps the majority rule is now widely regarded as outmoded or undesirable. If *Restatements* were

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<sup>39</sup> *Certificate of Incorporation*, ALI, [https://www.ali.org/media/filer\\_public/10/62/106284da-ddfe-4ff4-a698-0a47f268ee4c/certificate-of-incorporation.pdf](https://www.ali.org/media/filer_public/10/62/106284da-ddfe-4ff4-a698-0a47f268ee4c/certificate-of-incorporation.pdf) (last visited Feb. 20, 2021).

<sup>40</sup> The best-known example of course is § 402A of the Restatement (Second) of the Law, Torts, which set forth a then-minority rule on strict liability in tort. Strict liability in tort is now the widely accepted majority rule.

<sup>41</sup> ALI HANDBOOK AND STYLE MANUAL, *supra* note 1, at 1–20; *see also* Lorelie S. Masters, Amy R. Bach, & Daniel R. Wade, *The American Law Institute Principles/Restatement of the Law of Liability Insurance: Part III-Selected Comments from a Policyholder Perspective*, NEW APPLEMAN ON INS.: CURRENT CRITICAL ISSUES IN INS. L. (Summer 2015) at 1–5, [hereinafter MASTERS ET AL.].

not to pay attention to trends, the ALI would be a roadblock to change, rather than a “law reform” organization. A third step is to determine what specific rule fits best with the broader body of law and therefore leads to more coherence in the law. And the fourth step is to ascertain the relative desirability of competing rules. Here social-science evidence and empirical analysis can be helpful.<sup>42</sup>

The Reporters outline the project at the outset and revise that outline often through the drafting and revision process.<sup>43</sup> The drafts of the black-letter Comments, and Reporters’ Notes are circulated for input by both advisers appointed by the ALI Council and ALI members of a MCG. As with any significant work, the drafts are revised and honed over a course of time (in this case, years) based on the many rounds of comments from the advisers and MCG at meetings held to debate the current draft. Throughout, the Reporters also typically accept written comments from interested parties outside the advisers, MCG, and ALI. When a significant part or parts of the project are completed, the draft is submitted for comment by both the ALI Council, and the ALI general membership at ALI Annual Meetings.

### III. CREATING THE RESTATEMENT

#### A. DRAFTING THE RLLI

As far as the authors are aware, no one involved in the Restatement has questioned whether the ALI and Reporters followed the ALI’s usual, rigorous dialectical process, incorporating input from a wide variety of sources. Indeed, they did follow that process from author Lorelie Masters’ view as an adviser active throughout the eight years of the project.<sup>44</sup>

Constituencies commenting on the drafts of this Restatement included:

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<sup>42</sup> ALI HANDBOOK AND STYLE MANUAL, *supra* note 1, at 5.

<sup>43</sup> *How the Institute Works*, ALI, <https://www.ali.org/about-ali/how-institute-works/> (last visited Feb. 20 2021).

<sup>44</sup> The ALI Reporter, *Restatement of the Law, Liability Insurance: Practitioners’ Perspectives* (Oct. 10, 2019) (<https://thealiadviser.org/liability-insurance/restatement-of-the-law-liability-insurance-practitioners-perspectives/> (last visited Feb. 20, 2021)) [hereafter *The ALI Reporter*].

- Advisers, appointed by the ALI's Council. The advisers included practicing lawyers from both sides of the aisle (insurer and policyholder), in-house counsel and executives from insurance companies, an in-house counsel from a policyholder company, judges, academics, an insurance broker, and others with an interest in the subject area. Advisers need not be members of the ALI (although most were).
- Members of the MCG for the Restatement. Consistent with the ALI's standard process, the MCG included ALI members who (like the advisers) volunteered their time to the project. Like the advisers, the MCG here included practicing lawyers from outside law firms on both sides of the aisle, in-house counsel from insurance companies and other companies, judges, academics, and others with an interest in liability insurance.
- A liaison from the American Insurance Association.
- The ALI's Council.
- The ALI's membership.

Thus, a wide range of interested constituencies, including parties not members of the ALI, submitted comments and attended the annual meetings (on invitation) at which the RLLI was debated. From observation and experience, the Reporters considered, and responded to, all comments.<sup>45</sup> In directing the process, the Reporters, in the authors' view, sought to encourage efficiency and fairness to both insurers and policyholders, as well as to serve the interests of the public, including individual consumers and small businesses.

As with all Restatements, the Reporters' drafts for this Restatement were discussed at meetings of the advisers, the MCG, and the ALI Council that took place over eight years and involved 30 different drafts. Drafts also were presented to the ALI general membership at seven Annual Meetings of the ALI (which are held once a year).<sup>46</sup>

It is also important to note, especially in the face of insurance-industry opposition to the Restatement, that policyholder representatives objected to, commented on, and made motions at ALI Annual Meetings opposing many provisions during the drafting (although many fewer than were presented by insurer representatives).<sup>47</sup> A fair reporting on the RLLI should note that the Restatement,

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<sup>45</sup> ALI HANDBOOK AND STYLE MANUAL, *supra* note 1, at IX.

<sup>46</sup> RESTATEMENT OF THE L. OF LIAB. INS., FOREWORD at XIV (AM. LAW. INST. 2019).

<sup>47</sup> A collection of such motions is available from the authors; at the 2017 ALI meeting, insurer representatives made at least 35 motions. Seven of those motions were to the entirety

throughout its drafting and in the final book, includes provisions that policyholder counsel do not like and that do not state the typical policyholder position.<sup>48</sup> However, in part because policyholders lack the unified mindset and industry trade groups dedicated to advancing interests of the insurance industry, policyholders have no organized effort to undercut (or bolster) the Restatement.<sup>49</sup>

#### B. THE PROCESS AND GOALS FOR THE RESTATEMENT

The entire project was approved at the May 2017 Annual Meeting.<sup>50</sup> However, after significant insurer opposition, comment on many provisions and numerous motions to recommit (extend—or derail—the process) the ALI membership, on the recommendation of leadership, voted to extend the RLLI

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of the RLLI. Other motions targeted at 23 of the separate sections of the Restatement. *See also The ALI Reporter, supra* note 44, at 7 (discussing author Lorelie Masters' views of controversies about the RLLI in ALI interview); *see also, generally*, Baker and Logue, *supra* note 1, 24 GEO. MASON L. REV. 767. The controversy about the standard applicable to the issue of allocation of long-tail liability (“all sums” vs. “pro rata”) is discussed in the ALI interview, ALI Practitioners' Perspectives, *supra* note 44, at 7; and at length in Lorelie S. Masters, “The ‘A-C-P’s’ of Liability Insurance: Allocation, Contribution, and Proration in the Restatement of the Law, Liability Insurance,” NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW (Lexis-Nexis 2015) [hereafter Masters A-C-P's].

<sup>48</sup> Examples include the policy interpretation sections, which did not adopt doctrines like reasonable expectations. The most prominent example is § 41, titled “Allocation in Long-Tail Claims Covered by Occurrence-Based Policies,” adopting pro-rata allocation of long-tail liabilities. *See The ALI Reporter Fall 2019, supra* note 44, at 7; *see generally* Masters A-C-P's, *supra* note 47.

<sup>49</sup> At one point in early 2018, before final approval of the RLLI, a group of general counsel from major U.S. policyholder companies submitted a letter to the ALI supporting the insurance industry's anti-RLLI position. Letter of General Counsels of Tamko Building, Brunswick Corp., Eli Lilly, Novartis, RPM, Shell, Glaxo Smith Kline, Johnson & Johnson, submitted to ALI as comments to RLLI Proposed Final Draft No. 1 (Mar. 28, 2017) (copy on file with authors). The submission of that letter was mystifying to policyholder advocates involved in the RLLI, and we assumed it was solicited by and submitted at the behest of the insurance industry. There has been no further similar, organized push-back on the RLLI from policyholder companies since then, perhaps because further reflection and knowledge of the RLLI has caused a rethinking of the wisdom of such an effort.

<sup>50</sup> RESTATEMENT OF THE L. OF LIAB. INS., FOREWORD at XIV (AM. LAW. INST. 2019) (“After the sixth of [the ALI Annual Meetings at which the Restatement was considered], in May 2017, all of the Sections had been approved.”).

process for another year, to allow for additional revision and debate. As ALI Director Revesz recounts in his Foreword to the published Restatement, “the Reporters took another year to consider feedback, particularly from stakeholders, before submitting a final draft for [final] approval in May 2018.”<sup>51</sup> During that additional year, the advisers, MCG, Council, and others held additional meetings and made further comments, and the Reporters “made large numbers of changes, most importantly in Sections dealing with policy interpretation [ §§ 2–4], liability of insurers for the conduct of the defense [ § 12], consequences of the breach of the duty to defend [ § 19], and remedies [ §§ 47, 50].”<sup>52</sup>

Throughout the drafting process, the goals of the project were stated throughout to be uniformity, predictability, and reduction of disputes and litigation of disputes. These are laudable goals upon which, we assume, all involved can agree. Because homeowners’ liability, automobile liability, and commercial general liability (CGL) insurance policies are standardized and many forms of liability insurance use standard-form policy language, drafted by insurance industry groups and approved by state insurance commissions, it is also reasonable to support the Restatement’s objectives of seeking to promote consistency and predictability in the rules applicable to all policyholders and insureds on the one hand, and insurers on the other, under similar standardized policy terms. This, of course, promotes not just fairness but the ability of the insurance industry to mass-market insurance by allowing for an “apples to apples” actuarial analysis.<sup>53</sup> These objectives also promote confidence in the public and by the millions of insurance consumers who want to know what they are buying<sup>54</sup> in these boilerplate contracts and that the insurance purchased will provide the protection promised. We see very little discussion of the interests of consumers who buy insurance—which of course includes almost all of us—in the industry commentaries about the RLLI.

The Restatement was adopted on May 21, 2018, by the General Membership of the ALI in accordance with ALI rules, subject to conformance pursuant to the “Boskey Motion” made at the meeting.<sup>55</sup> The final Restatement was published in 2019.

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<sup>51</sup> RESTATEMENT OF THE L. OF LIAB. INS., FOREWORD at X (AM. LAW. INST. 2002).

<sup>52</sup> *Id.*

<sup>53</sup> MASTERS, ET AL., *supra* note 41, at §§ 1.02-1.03.

<sup>54</sup> INSURANCE SERVICES OFFICE (ISO), [www.verisk.com/insurance/brands](http://www.verisk.com/insurance/brands) (last visited Jan. 25, 2021).

<sup>55</sup> Under ALI rules, a Boskey Motion, named after long-time ALI Council member Bennett Boskey, allows for approval of a Proposed Final Draft subject to revisions by the

## C. PUBLIC DISCUSSION OF THE RESTATEMENT

The project that ultimately became the Restatement was discussed for years in insurance circles. As one prominent insurer-side commentator put it, “[t]he ALI Insurance Restatement has been the Kardashians of insurance coverage.”<sup>56</sup> At one point, the AIA pulled its liaison from the project; later, the AIA returned with another liaison.<sup>57</sup> In the two years before it was finally approved and was nearing completion, insurance industry focus intensified.

In publicizing a May 15, 2017 conference on the RLLI, the NAMIC stated that it “has spent years and vast resources to correct this injustice,” characterizing the Restatement as having “errantly and purposely adopted numerous minority rules . . . .”<sup>58</sup> By agreement with the ALI, the AIA’s liaison attended the meetings discussing the RLLI, and the advisers since 2010 including then-current or former general counsels and in-house counsel of State Farm, ACE, and Allstate Insurance Company. Outside counsel to insurers participated as advisers and members of the RLLI MCG. NAMIC actively monitored the project (at least in its final years), and insurers AIG and Liberty Mutual, among others, submitted comments.

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Reporters that capture comments made at the last Council and ALI general membership meetings and “subject to the usual editorial prerogatives.” See video found at <https://www.ali.org/about-ali/how-institute-works/> featuring U.S. District Judge and ALI Council member, Lee Rosenthal (accessed Jan. 20, 2020). That video quotes Mr. Boskey in defining the ALI as “the solid alliance of a wisely selected group of practicing lawyers, judges, and academics working together to produce major reforms that will facilitate adjusting the law to the changing needs of Society as one generation gives way to the next.”

American Law Institute, *Bennet Boskey and the Boskey Motion*, <https://www.ali.org/about-ali/how-institute-works/>.

<sup>56</sup> Randy Maniloff, *A Curious Letter Is Sent to the ALI About Its Liability Insurance Restatement*, COVERAGE OPINIONS (May 17, 2017), <http://coverageopinions.info/Vol6Issue5/ACuriousLetter.html>.

<sup>57</sup> See, e.g., Preliminary Draft No. 6, PRINCIPLES OF THE L. OF LIAB. INS. (Mar. 10, 2014) (listing Craig A. Berrington as Liaison for the American Insurance Association (AIA)); Preliminary Draft No. 7, PRINCIPLES OF THE LAW, LIABILITY INSURANCE (Aug. 15, 2014) (showing no liaison); Discussion Draft No. 1, RESTATEMENT OF THE L. OF LIAB. INS. (Mar. 2, 2015) (listing Laura A. Foggan as liaison for the AIA) (copies on file with authors).

<sup>58</sup> NAT’L ASS’N OF MUTUAL INSURANCE COMPANIES, <https://www.namic.org/Home/DisplayContentById/11866ddc-402c-412a-bb54-5cacf238c549#about> (last visited Jan. 25, 2021).

The Restatement was discussed at seven ALI Annual Meetings, and the reporters, advisers, and MCG members began speaking in public about the RLLI starting no later than June 2011, when a public presentation was made to none other than the Law and Regulation Committee of the AIA. Author Lorelie Masters first spoke about the RLLI on a panel at the December 2012 Annual Insurance Coverage and CLE Conference of the Defense Research Institute (DRI) in New York City.

The Restatement received substantial coverage in legal and insurance press and publications over the years since 2010.<sup>59</sup> In 2014, Rutgers Law School held a nationally publicized symposium on the RLLI and, in 2015, devoted an issue of its Law Review to the RLLI, publishing articles from both policyholder and insurer-side lawyers.<sup>60</sup> The American College of Coverage Counsel (ACCC) discussed the Restatement at its annual meetings beginning around 2015.<sup>61</sup> Publications read regularly by insurance practitioners have addressed the Principles/Restatement including Law 360: Insurance. The ALI quarterly newsletter, *The ALI Reporter*, published commentaries about the Restatement beginning no later than mid-2016.<sup>62</sup> Lexis Nexis in 2015 published point-counterpoint analyses of key issues in the RLLI by insurer-side lawyer William Barker on the one hand; and by Ms. Masters and her co-authors on the other.<sup>63</sup> Statements that the project was unknown are belied by these public discussions of its progress.

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<sup>59</sup> The RLLI was analyzed at many seminars, including annual meetings of the American College of Coverage Counsel, the ABA TIPS Insurance Coverage Litigation Committee (ICLC), the ABA Section of Litigation ICLC, DRI's Annual Insurance Coverage and CLE Seminar (in addition to the first one in 2012). NAMIC, Rutgers Law School, and George Mason Law School also sponsored webinars and presentations on the RLLI. [Remove italics on RLLI.]

<sup>60</sup> Symposium, *The Restatement of the Law of Liability Insurance as a Restatement: An Introduction to the Issue*, 68 RUTGERS U.L. REV 1 (Fall 2015).

<sup>61</sup> The ACCC is dedicated to advancing collegiality and professionalism in the national insurance-coverage bar and includes members representing both policyholders and insurers. The Presidency alternates between an insurer representative and a policyholder representative. The author was a co-founder and the second President of the College. See [www.americancollegecoverage.org](http://www.americancollegecoverage.org).

<sup>62</sup> *The ALI Reporter Fall 2019*, AM. L. INST., (Oct. 9, 2019).

<sup>63</sup> Masters, Bach, & Wade, NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW, *supra* note 41; William T. Barker, "The American Law Institute Principles of the Law of Liability Insurance Part II: Selected Comments from an Insurer Perspective," NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW (Lexis Nexis Spring 2015) (hereinafter Barker). The Masters, Bach, & Wade article has been posted on the publicly available website of United Policyholders since

## D. STRUCTURE OF THE RESTATEMENT AND AREAS OF CONTROVERSY

## 1. Structure

The Restatement contains the following four chapters, which contain 50 sections of black-letter principles and by rough count 110 points of law.<sup>64</sup>

## Chapter 1, Basic Liability Insurance Contract Rules:

- § 1—Definitions,
- §§ 2-4—Topic 1: Interpretation,
- §§ 5-6—Topic 2: Waiver and Estoppel, and
- §§ 7-9—Topic 3: Misrepresentation.

## Chapter 2, Management of Potentially Insured Liability Claims:

- §§ 10-23—Topic 1: Defense,
- §§ 24-28—Topic 2: Settlement, and
- §§ 29-30—Topic 3: Cooperation.

## Chapter 3, General Principles Regarding the Risks Insured:

- §§ 31-33—Topic 1: Coverage,
- §§ 34-36—Topic 2: Conditions, and
- §§ 37-43—Topic 3: Application of Limits, Retentions, and Deductibles.

## Chapter 4, Enforceability and Remedies:

- §§ 44-46—Topic 1: Enforceability, and

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the Fall of 2015 ([www.uphelp.org](http://www.uphelp.org)). See also Masters, A-C-P's NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW.

This article was noted in the Fall 2015 edition of *The ALI Reporter* (<https://www.ali.org/news/articles/ali-reporter-fall-2015/>).

<sup>64</sup> The Restatement uses the terms “insured” to refer to any entity or person insured under a liability insurance policy and “policyholder” to refer to the party that purchased the insurance. Restatement §§ 1(4) and (10).

- §§ 47-50—Topic 2: Remedies.<sup>65</sup>

## 2. Controversies

Many sections of the Restatement remain the subject of controversy. This article focuses on several that continue to be the source of significant insurance-industry critique:

- §§ 2-4 on principles of insurance policy interpretation, and specifically on § 3.
- § 8 on the standard for materiality applicable to the defense of misrepresentation in the policy application.
- § 12 on insurer liability for the conduct of lawyers appointed by insurers as defense counsel.

This article also briefly addresses controversy generated by the following RLLI sections:

- § 13(3) on the duty to defend and the Restatement's "one-way rule" (specifically the relevance of facts outside the complaint against the insured to the determination of whether the duty to defend applies).
- § 19 on the consequences for breach of the duty to defend (with references to §§ 15 and 50).
- §§ 24 and 27 on liability insurers' "duty to settle."  
§§ 47 and 50 on damages for breach of the insurance policy and for bad faith.

## IV. REACTIONS TO THE RESTATEMENT

The Restatement has excited many reactions. Most of the commentary since the Restatement was adopted has come from insurance-industry commentators, repeating variations on the themes favored by insurers. Another significant effort has focused on getting legislation enacted to try to limit the ability of courts to consider the Restatement. Although few courts have addressed the Restatement substantively, one court arguably has relied on Restatement provisions while others, following existing state law on this issue at hand, have rejected the Restatement's treatment of the issue.

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<sup>65</sup> See RESTATEMENT OF THE L. OF LIAB. INS. (AM. LAW INST. 2019).

Insurance legislation, of course, plays an important role in the regulation of insurance and setting the standards that apply as a general rule (e.g., on claims-handling and settlement standards). However, legislation is not designed to address and resolve disputes about how a specific insurance policy applies to a specific claim or set of facts. In addition, many of the principles used regularly in insurance-coverage practice have developed (and will continue to develop) in the common law, and not from legislation. Indeed, state legislatures have never addressed or resolved all aspects of insurance law—and given the need to consider the facts of individual cases—they could not and, in the future will not, resolve all disputes over insurance. These differences are not, as many insurer representatives argue, a reason that the ALI should never have set out to create the Restatement. Indeed, given the ALI's mission, those differences are the very reason to do so.<sup>66</sup> To preclude development of law that serves the citizens and businesses of a state through a narrow perception of one secondary source like the Restatement seems misguided at the very least. Limiting courts' ability to consider relevant sources also is inconsistent with the bedrock principles in the United States of judicial independence and separation of powers.

Negative consequences could, over time, result from this organized effort to undermine the ALI and the Restatement. As one example, it is useful to consider the effect these efforts could have on the marketability of insurance. As noted above, insurance is a mass-marketed product that can be sold on a mass basis only because it uses standardized policy terms,<sup>67</sup> and, thus, allows for “apples to apples” comparisons among insureds and actuarial analysis.<sup>68</sup> The insurance-buying public, companies and individuals alike, want to know that it will provide needed protection.

Courts have recognized the public's interest in a well-functioning insurance system as it facilitates commerce by spreading risk; by protecting infrastructure and providing resources for people and businesses to recover from disaster and other loss; and by controlling and preventing loss by encouraging “best practices” on

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<sup>66</sup> Many Restatements, like the RLLI, in truth, address topics involving this same mix of statute and common law, with variations from state to state exist. Examples include the Restatements of Contracts and Torts.

<sup>67</sup> For the Restatement's definition of insurance policy “term,” *see* RESTATEMENT OF THE L. OF LIAB. INS. § 1(14) (AM. LAW. INST. 2019).

<sup>68</sup> *See* MASTERS ET AL., *supra* note 41, at Ch. 1, for further examination of the drafting of standardized policy language and its role in the creation of modern insurance markets, with citations to insurance industry analyses and related sources.

disaster recovery and rebuilding and construction.<sup>69</sup> Consistency in application of liability insurance policies promotes the confidence of insurance purchasers, ordinary consumers and businesses alike, in the purchase of liability insurance. In the long-term, that is a positive for insurance purchasers, insurers, and, given the public purpose of insurance of spreading risk and encouraging innovation, Society as a whole.

#### A. ARTICLES AND PUBLISHED CRITIQUES

Internet searches reveal a plethora of articles from insurer industry groups, insurer spokespeople, and insurer counsel attacking the Restatement,<sup>70</sup> and assailing the ALI's purported efforts to "invade" the prerogative of insurance legislation.<sup>71</sup> Few present or acknowledge countervailing perspectives. Legislators belonging to NCOIL referred to "overreach" by the ALI and asserted the need for legislation that would "accurately state" the law applicable to liability insurance. As reflected in minutes of NCOIL's Property and Casualty Insurance Committee, a NAMIC representative stated at one of the Committee's meetings that assignment of its

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<sup>69</sup> For example, insurance underwriting helps encourage companies to invest in systems that prevent and mitigate loss. Insurance incentivizes purchasers to put in place beneficial processes and systems by offering lower rates to purchasers who meet best practices and construction and security standards. In the context of liability insurance, lower rates are often offered to companies with robust cyber security systems and practices.

<sup>70</sup> E.g., Patricia McHugh Lambert, *How Will States Respond to The Restatement of the Law, Liability Insurance?*, JDSUPRA (July 8, 2019) <https://www.jdsupra.com/legalnews/how-will-states-respond-to-the-96410/>; O'MEARA LEER WAGNER KOHL, SEVERAL MORE STATES RESPOND TO THE ALI'S RESTATEMENT OF LIABILITY INSURANCE (2019) (as shown on the firm website, although not in articles published in other venues, O'Meara Leer Wagner Kohl represents insurance carriers on insurance coverage issues); Alan Smith, *As an Unelected Legal Organization Attempts to Rewrite Insurance Law, Indiana Legislators are Pushing Back*, RSTREET (Apr. 22, 2019), <https://www.rstreet.org/2019/04/22/as-an-unelected-legal-organization-attempts-to-rewrite-insurance-law-indiana-legislators-are-pushing-back/>; Kim Markkand, *ALI Shouldn't 'Teach' Insurance Restatement in a Courthouse*, LAW360 (Feb. 11, 2019, 12:44 PM), <https://www.law360.com/articles/1127838/ali-shouldn-t-teach-insurance-restatement-in-a-courthouse>; *Why Ohio*, *supra* note 17.

<sup>71</sup> See, e.g., Press Release, Thomas B. Considine, Nat'l Council Ins. Legislators, *NCOIL CEO Statement on ALI Restatement of Liability Insurance Law* (May 25, 2018) (opening by stating that NCOIL had "been working with the ALI to ensure that legislative prerogatives were respected," and calling the Restatement the "NEWstatement" and "a drafters' wish list," ignoring the extensive participation by insurance company in-house and outside counsel and an AIA liaison in the Restatement's eight-year drafting process).

proposed legislation to a legislature's Judiciary Committee, rather than the Insurance Committee, would undermine the "intent" of the legislation.<sup>72</sup>

These arguments and efforts ignore that much of the law on insurance is common law, made by courts tasked with resolving disputes over coverage for specific claims. As a Minnesota appellate court explained years before the RLLI began, "Restatements of the Law are persuasive authority only and not binding unless specifically adopted in Minnesota by statute or case law."<sup>73</sup> The court's observation, of course, states a universal truth—courts do not rely on secondary authority when binding law, in court decisions or statutes, exists in the jurisdiction.

Many of the recent critiques of the RLLI published since approval of the RLLI in May 2018 do not acknowledge the many changes made over the years of its drafting, or that many were made at the behest of and based on comments from insurance industry proponents. These critiques sometimes do not disclose the authors' ties to the insurance industry or whether insurance industry clients or groups have paid them for their time in writing such articles.<sup>74</sup> Transparency, of course, is ideal. Further, publications publishing such critiques should insist on disclosure of whether the commentator represents insurers or policyholders, and whether the author is being paid for writing such critiques and by whom. Finally, it is important to note that many criticisms of the RLLI complain about provisions that appeared in Drafts of the RLLI and not the final Restatement. As anyone who has written a brief

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<sup>72</sup> Minutes of NCOIL's Property and Casualty Committee (Mar. 17, 2019), <http://ncoil.org/wp-content/uploads/2019/04/Nashville-PC-Minutes.pdf> (referring to the remarks of Erin Collins, Assistant Vice President, State Affairs, NAMIC).

<sup>73</sup> *Williamson v. Guentzel*, 584 N.W. 2d 20, 24-25 (Minn. Ct. App. 1998) (citing *Mahowald v. Minnesota Gas Co.*, 344 N.W.2d 856, 860 (Minn. 1984)). Other court decisions of course make the same point. *E.g.*, *Cramer v. Starr*, 375 P.3d 69, 74-75 (2016) (highlighting that the court refused to adopt § 475 of RESTATEMENT (SECOND), TORTS, because it was contrary to Arizona statutes and case law).

<sup>74</sup> Some prime movers in the insurance industry have hired law firms to address and make the insurer's or insurance industry's arguments about the RLLI. *See, e.g.*, Mintz Levin Cohn Ferris Glovsky Poppeo, *The Restatement of the Law, Liability Insurance*, <https://www.employmentmattersblog.com/industries-practices/case-studies/restatement-law-liability-insurance> (last accessed Feb. 5, 2020) ("We were retained by Liberty Mutual to respond to the ALI's effort to remake the existing law of liability insurance . . . . We have provided extensive legal authority, published articles, and spoken at the ALI Annual Meeting in 2018 in response to draft provisions of the four chapters of the Restatement.").

can appreciate the final product often bears little resemblance to the early drafts. As Yogi said, “it’s ain’t over ‘til it’s over.”

## B. LEGISLATIVE MEASURES RAISED IN REACTION TO THE RESTATEMENT

### 1. Model Acts or Legislation

Certain insurance industry and legislative groups have focused intently on the RLLI, especially from 2017 to the present.<sup>75</sup> For example, a packet of materials distributed at the March 2019 NCOIL meeting included proposed legislation, drafted by NAMIC, that legislators could introduce in their state legislatures.<sup>76</sup> Interestingly, as shown below, the model legislation evolved and has gone through multiple revisions, in the same way that the RLLI drafts evolved and were revised in response to comments and from further research and work.

#### *a) First Proposed Model Act on the Restatement*

On March 17, 2019, NCOIL circulated a “Model Act Regarding Interpretation of an Insurance Policy,” patterned after legislation passed in Tennessee in 2018 (before the final *Restatement* was published) to require application of the “plain meaning rule” to interpretation of insurance policies. NCOIL’s Preface to the model language encouraged States to work with “stakeholders and the insurance department to amend the appropriate portion[s] of

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<sup>75</sup> Some motions made by insurer representatives in the Spring of 2017 asked that the ALI recommit or “defer” approval of the RLLI, stating in part that insurers were unaware before early 2017 of the effort to create the RLLI. *See* Letter from Thomas B. Considine, CEO, Nat’l Council Ins. Legislators, to Honorable Thomas V. Balmer, Chief Justice, Oregon Supreme Court (Feb. 27, 2018), <http://ncoil.org/2018/02/28/ncoil-writes-to-state-chief-judges-urging-action-on-alis-proposed-liability-insurance-restatement/>. Another adviser to the RLLI, John G. Buchanan III, submitted a response, identifying the many conferences and articles that had addressed the RLLI before 2017. The argument also ignored the many insurer representatives involved since 2010 in the RLLI (including, as noted above, outside and in-house insurer counsel and the liaison from the AIA). The comments submitted by RLLI adviser John G. Buchanan III on RLLI Proposed Final Draft (Mar. 28, 2017), are on file with the authors.

<sup>76</sup> Letter from Erin Collins, Assistant Vice President of State Affairs, Nat’l Ass’n Mut. Ins. Cos., to Chairman and Members of the Nat’l Council Ins. Legislators (Mar. 14, 2019), <http://ncoil.org/wp-content/uploads/2019/03/NAMIC-ALI-testimony-Nashville-EMC-002.pdf>.

[the] insurance code . . . in order to avoid the ‘*Restatement of the Law, Liability Insurance*’ . . . being construed as the state’s settled law on this issue.”<sup>77</sup>

Most other bills introduced in state legislatures to date are addressed to the RLLI as a whole—all 50 sections and 100-plus individual principles of law. Some of these bills and pieces of legislation state that courts may not consider the RLLI as “an authoritative source.” These and similar bills raise the question of whether the legislation serves a reasonable purpose as a fair reaction to them is that they potentially undermine the independence of the courts and the judicial process that creates common law.

This provision also did not acknowledge the Restatement’s treatment of the contextual rule of contract interpretation in the Restatement (Second) of Contracts. Indeed, the final version of the Restatement specifically declined to follow the modern, contextual approach to contract interpretation on the ground that “a substantial majority of courts in insurance cases have adopted a plain-meaning rule,”<sup>78</sup> a point that insurer advocates had fought to obtain for years in the RLLI process. Thus, the approach adopted in the Restatement uses an approach that harkens back more to the Restatement (First) of Contracts.

The ALI engaged with NCOIL in a dialogue about their concerns. For example, the ALI’s Deputy Director Stephanie Middleton sent a letter to NCOIL’s CEO and General Counsel in early April 2019, asking that the letter be shared with NCOIL’s Property and Casualty Insurance Committee and the entire NCOIL membership. The letter explained that the ALI had posted NCOIL letters commenting on various provisions of the Restatement on the ALI website “so all ALI members could read them,” and brought those comments to the attention of the ALI Council, before the Restatement was approved. The ALI stated that, “in response to many comments, including NCOIL’s, ALI decided in May 2017 to take an extra year to review the entire project.”<sup>79</sup> The letter set forth the ALI’s observation

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<sup>77</sup> MODEL ACT REGARDING INTERPRETATION OF AN INS. POL’Y drafting note (NAT’L COUNCIL INS. LEGISLATORS 2019).

<sup>78</sup> RESTATEMENT OF THE L. OF LIAB. INS. § 3, cmt. a (AM. L. INST. 2019).

<sup>79</sup> Letter from Stephanie A. Middleton, Deputy Director, Am. L. Inst., to Thomas B. Considine, CEO, Nat’l Council Ins. Legislators, and William Melofchik, General Counsel, Nat’l Council Ins. Legislators (Apr. 3, 2019), <http://ncoil.org/wp-content/uploads/2019/04/Ltr-to-NCOIL-Apr2019-1.pdf>. Motions were made in opposition to this delay but were voted down by a clear majority of the membership present. This decision was made not simply as NCOIL documents indicate “because NCOIL requested it.”

that many of the provisions in the final Restatement conformed to changes the insurance industry sought to the Proposed Final Draft of the RLLI, as presented at the 2017 ALI Annual Meeting:

In that final year [after the May 2017 ALI annual meeting] the draft adopted some significant changes that your letters urged: a simple plain-meaning rule; greatly limited insurer liability for negligent selection of counsel; an added catch-all exception to the complaint allegation rules; revised language to make it even clearer that an insurer may discontinue the defense without seeking a declaratory judgment; removal of language that would prevent insurers from asserting coverage defenses in cases of non-bad-faith breach; and removal of language that would require insurers to pay the attorneys' fees of the insured when the insured prevails in a suit against the insurer for non-bad-faith breach.<sup>80</sup>

In addition, as noted above, courts are highly unlikely to consider any secondary source, including a Restatement, authoritative when a state legislature or appellate court (or even trial courts) have spoken on the issue.

*b) Second Proposed Model Act on the Restatement*

These messages evidently were received at NCOIL. On July 25, 2019, NCOIL approved the following text for a "Model Act Concerning Interpretation of [State] Insurance Laws," (hereafter called the NCOIL 2019 Model Statute):

**Section 2. Interpretation of [State] Insurance Laws**

A statement of the law in the American Law Institute's *Restatement of the Law, Liability Insurance* does not constitute the law or public policy of this state if the statement of the law is inconsistent or in conflict with:

1. The constitution of the United States or of this State;
2. A statute of this State;

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<sup>80</sup> *Id.*

3. This State's case law precedent; or
4. Other common law that may have been adopted by this State.<sup>81</sup>

The accompanying Press Release by NCOIL President, Louisiana Senator Dan “Blade” Morrish, stated that NCOIL had been involved with “ALI and their scholars” at multiple NCOIL meetings since May 2017 and thanked ALI for a “consistent and constructive dialogue” over that period of time. The Press Release stated that NCOIL “appreciate[s] the changes made from the initial draft [of the RLLI].”<sup>82</sup> It stressed NCOIL’s concern with protecting “legislative prerogatives” and, in a twist exalting practicing lawyers like me, categorized us with academics and seemed to ascribe to us powers from which legislators fear they need “protection.” Thus, the Press Release stated that NCOIL will “ensure our legislative work is protected from academics that interpret the law into something it is not”<sup>83</sup>; and that “[c]ertain select portions [of the RLLI] remain more of an ALI wish list than a statement of the majority rule of current law.” Especially given the Restatement’s reliance in all but a handful of instances on majority rules, it is fair in the authors’ views to say that the in-depth work of the Restatement is not a “wish list.” Indeed, as noted above, most provisions in the RLLI are majority rules,<sup>84</sup> and

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<sup>81</sup> Press Release, Nat’l Council Ins. Legislation, NCOIL Adopts Model Act Concerning Interpretation of State Insurance Laws 3 (July 25, 2019), <http://ncoil.org/2019/07/25/ncoil-adopts-model-act-concerning-interpretation-of-state-insurance-laws/> (noting that the Property & Casualty Insurance Committee adopted the act in on July 12, 2019 and the Executive Committee on July 13, 2019).

<sup>82</sup> *Id.* See also *supra* Section III (noting that the drafting process took place over eight years and involved thirty different drafts, which involved a wide range of interested constituencies).

<sup>83</sup> See Press Release, Nat’l Council Ins. Legislation, *supra* note 71, at 2.

<sup>84</sup> See, e.g., BAKER AND LOGUE, 24 GEO. MASON L. REV. at 768. As Professors Baker and Logue, the Reporters for the RLLI, state in that article, “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 in ALI Restatement projects.” *Id.*

it includes or did not accept many provisions that policyholder representatives do not like.<sup>85</sup>

## 2. Legislative Efforts in Various States

A number of states as of this writing have adopted legislation, either by statute or resolution, on the Restatement. Governors of some states (Iowa, Maine, Nebraska, South Carolina, Texas, and Utah) in 2018 sent letters of disapproval to the ALI.<sup>86</sup> Numerous bills and resolutions on the Restatement were introduced in legislatures sessions for the period 2018–2020. At least one such measure was introduced in the legislative session which began in January 2021.

**The Tally:** Some of the legislative efforts passed before the RLLI was approved<sup>87</sup> and provided guidelines for legislation introduced in other states. Other states, particularly since approval of the RLLI in May 2018, have taken the July 2019 Model Act drafted by NCOIL as a base. Some are statutes while others are

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<sup>85</sup> See, e.g., RESTATEMENT OF THE L. OF LIAB. INS.: Allocation in Long-Tail Harm Claims Covered by Occurrence-Based Policies § 41 (AM. L. INST. 2019) (ruling that occurrence-based liability insurance policies were subjected to time-on-the-risk pro-rata allocation rather than all sums allocation). Policyholder representatives made motions to revise this Section from “time-on-the-risk pro rata allocation” in 2016 and 2017, and also moved to add the “unavailability exception” to the black letter. Those motions failed. While early drafts of the Restatement set forth “all sums allocation” for long-tail liability, insurers objected vociferously on the ground that pro rata is the majority rule. Policyholders made the point that, in those states that have adopted a rule on allocation in the context of long-tail liability, pro rata has been adopted in a scant majority and then only if one counts all of the different formulations of pro rata. By itself, the form of proration adopted in § 41, time-on-the-risk pro rata allocation, is not a “majority rule.” See Masters A-C-Ps, *supra* note 47. As other examples, policyholders did not favor the insurance-policy interpretation structure set forth in §§ 3–4 of the Restatement, or certain provisions relating to misrepresentation in §§ 7–9 (e.g., regarding innocent misrepresentations (§ 7, cmt. j); objective standard set forth in § 8; rejection of contribute-to-the-loss approach (§ 9, cmt. b)).

<sup>86</sup> Letter from Governors of South Carolina, Iowa, Maine, Nebraska, Texas, and Utah, to Hon. David F. Levi, President, Am. Law. Inst. (Apr. 6, 2018) (on file with author); see also Marrkand, *supra* note 13. It seems fair to assume that these Governors had encouragement from the insurance industry.

<sup>87</sup> Ohio was the first State to adopt provisions on the RLLI, enacting them before the final version of the RLLI was available. Tennessee also adopted a statute addressing standards applicable to insurance-policy interpretation, prompted by the advent of the Restatement, but the statute does not reference the RLLI.

resolutions. Acts of course are binding statutory law, while resolutions express “the sentiment or intent of the legislature” or govern the business of the legislature.<sup>88</sup>

Below is a summary of legislative efforts on the Restatement as of this writing (in early-February 2021).

- The codes in the following states now include provisions regarding the Restatement: Ohio, Michigan, Arkansas, North Dakota, Texas, and Utah.<sup>89</sup>
- The following states have adopted resolutions about the Restatement: Kentucky, Indiana, and Louisiana.<sup>90</sup>
- Legislators introduced legislation similar to the bills and resolutions adopted by the states above. Some measures were not enacted before legislative sessions from 2018–2020 expired.<sup>91</sup> Oklahoma now is entertaining bills introduced in the current (2021) legislative session.

Earlier versions of such legislation sometimes used pejorative or intemperate language in referring to the Restatement and the ALI or use language that reflected ignorance of the history of the ALI and the scholarship that went into the RLLI. “Cooler heads,” in such circumstances, appear sometimes to have prevailed. For

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<sup>88</sup> See e.g., *Glossary of Legislative Terms*, NAT’L CONF. ST. LEGISLATURES, <https://www.ncsl.org/research/about-state-legislatures/glossary-of-legislative-terms.aspx> (last visited Nov. 6, 2020).

<sup>89</sup> OHIO REV. CODE ANN. § 3901.82 (West 2018); TENN. CODE ANN. § 56-7-102 (West 2018); MICH. COMP. L. ANN. § 500.3032 (West 2018); ARK. CODE ANN. § 23-60-112 (West 2019); N.D. CENT. CODE ANN. § 26.1-02-34 (West 2019); TEX. CIV. PRAC. & REM. CODE § 5.001. (West 2019).

<sup>90</sup> H.R. Res. 222 (Ky. 2018) (enacted); H.R. Con. Res. 62, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019) (enacted); H.R. Res. 86 (Ind. 2019) (enacted); S. Res. 149, Reg. Sess. (La. 2019) (enacted); UTAH CODE ANN. § 31A-22-205.

<sup>91</sup> S.B. 260, 123d Gen. Assembly, 1st Reg. Sess. (S.C. 2018) (introduced); S.B. 368, 84th Leg., Reg. Sess. (W. Va. 2019) (introduced); S.B. 1176, 65th Leg., 1st Reg. Sess. (Idaho 2019) (introduced); S.B. 2303 (Tex. 2019); H.R. Con. Res. No. 58 (Tex. 2019) (Comm. Rept.); H.B. 2106 (Mo. 2020) (refer to Comm.); S.B. 939 (Mo. 2020) (refer to Comm.); S.B. 1692 (Okla. 2020) (passed Sen., withdrawn from Comm.); H.B. 4436 (W. Va. 2020) (refer to Comm.); S.B. 772 (W. Va. 2020) (passed Sen., refer to Comm. in house).

example, one resolution proposed in Texas that “condemn[ed]” the Restatement did not pass.<sup>92</sup>

A number of these states adopted this legislation in 2018 and 2019, including Arkansas (by statute),<sup>93</sup> Indiana (by resolution),<sup>94</sup> Louisiana (by resolution),<sup>95</sup> Michigan (by statute),<sup>96</sup> North Dakota (by statute),<sup>97</sup> and Texas (by statute).<sup>98</sup> Kentucky introduced a bill in early 2020 (pre-filed in 2019). A bill on the RLLI introduced in the Idaho legislature in 2019 did not advance.<sup>99</sup> Neither did house and senate bills in Missouri, which expired when the legislature adjourned in Spring 2020.<sup>100</sup> Bills on the RLLI were introduced in ten states in early 2020.<sup>101</sup> Amidst the coronavirus pandemic, many bills introduced in 2020 did not progress and expired at the conclusion of the 2020 legislation session. Oklahoma has reintroduced an identical bill, which pending in the state senate.<sup>102</sup> Other states with prior legislative efforts may follow suit in 2021.

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<sup>92</sup> Tex. Concurrent Res., H.C.R. No.58 (RLLI “is not worth of recognition by the courts as an authoritative source; no, therefore be it RESOLVED That the 86th Legislature of the State of Texas hereby condemn the American Law Institute’s 2018 Restatement of the Law of Liability Insurance and discourage courts from relying on the Restatement as an authoritative reference . . .”).

<sup>93</sup> 2019 Ark. Act 742, S.B. 565, 92nd Gen Assemb., Reg. Sess. (Ark. 2019) (codified as amended at ARK. CODE ANN. § 23-60-112 (West 2019) (effective July 24, 2019)).

<sup>94</sup> H.R. Cong. Res. 62, 121st Gen. Assemb., Reg. Sess. (Ind. 2019); H.R. Res. 86, 121st Gen. Assemb., Reg. Sess. (Ind. 2019) (the text of both being virtually identical).

<sup>95</sup> S. Res. 149, 2019 Reg. Sess. (La. 2019) (adopted May 30, 2019).

<sup>96</sup> MICH. COMP. LAWS ANN. § 500.3032 (West) (passed Dec. 2018; effective Jan. 1, 2020).

<sup>97</sup> H.B. 1142, 66 Leg. Assemb., Reg. Sess. (N.D. 2019) adopted as N.D. CENTURY CODE ANN. § 26.1-02-34 (enacted Mar. 21, 2019).

<sup>98</sup> H.R. Cong. Res. 58, 116th Cong. (2019), adopted as Tex. Cir. Prac. & Rem. Code § 5.001. Texas has entertained other bills relating to the RLLI, including the following bills which did not advance: Tex. S.B. 2303 and Tex. House Con. Res. 2303.

<sup>99</sup> S.B. 1176, 65th Leg., Reg. Sess. (Idaho 2019).

<sup>100</sup> H.B. 2106 98th Gen. Assemb., Reg. Sess. (Mo. 2018); S.B. 939 99th Gen. Assemb., Reg. Sess. (Mo. 2018) (refer. to Comm. Feb. 27, 2020).

<sup>101</sup> H.B. 2644, 2020 44th Leg., 2d Leg. Sess. (Ariz. 2020); H.B. 359, (Fla. 2020); S. Study B. 3014, 88th Gen. Assemb., (Iowa, 2020); Iowa H.B. 513; H.B. 150, Reg. Sess. (Ky. 2020); H. B. 2106, 100th Gen. Assemb., 2nd Reg. Sess. (Mo. 2020) & S.B. 939, 99th Gen. Assemb. 2nd Reg. Sess. (Mo. 2020); Leg. B. 884, 106th Leg., 2d. Sess. (Neb. 2020); S.B. 1692, Reg. Sess. (Okla. 2020); S.B. 1036, 123d Gen. Assemb. (S.C. 2020); H.B. 37, Gen. Assemb. (Utah 2020); H.B. 4436, 116th Cong., (W. Va. 2020); S.B. 772, Reg. Sess. (W.Va. 2020).

<sup>102</sup> S.B. 137 (Okla. 2021) (refer to Comm.).

**The Substance:** Statutes, resolutions, and bills addressing the Restatement break into the following rough categories<sup>103</sup>:

- *“Early Adopter” Statutes:* One of the first statutes to be passed about the RLLI, a statute in Ohio takes a broad approach, evidently seeking to limit Ohio courts’ consideration of the Restatement on any issue. It does not appear that the legislature engaged in any analysis of the myriad principles of law and comments included in the RLLI; certainly, the one-sentence statute does not address any specific issue. In contrast, a Tennessee statute, also passed in 2018, surgically addresses one issue, policy interpretation, setting the applicable standard on policy interpretation under Tennessee law by statute.
- *Legislation Following the 2019 NCOIL Model Statute:* Statutes, resolutions, and bills following the 2019 NCOIL Model Statute state that the *Restatement* does not comport with the public policy of the state to the extent that the principle is “inconsistent with” or “in conflict with” the law of the state.<sup>104</sup> These statutes seem to state a truism: that Restatements are “not controlling [law],” or that they cannot be applied if there is contrary law (either by statute or common law) in the state.<sup>105</sup>
- *Legislation Expanding on the NCOIL Model Statute, and Potentially Intruding on Judicial Authority or Separation of Powers:* These statutes, resolutions, or bills include several formulations. Some say that courts in the state “shall not apply a principle”<sup>106</sup> from the RLLI; may not take judicial notice of the RLLI; or even seek to ban use of the RLLI as any kind of

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<sup>103</sup> This categorization is based on our reading and consideration of legislation passed or pending as of the date of this writing (early-February 2021). Others may categorize the various proposals differently.

<sup>104</sup> S. Study B. 3014 (Iowa 2019) and Iowa H. Study B. 513; S. Res. 149, Reg. Sess. (La. 2019); Leg. B. 884, 106th Leg., 2nd Sess. (Neb. 2020); OHIO REV. CODE ANN. § 3901.82; S. Res. 149, Reg. Sess. (La. 2019); S.B. 1692, 57th Leg., 2d Sess. (Okla. 2020); S.B. 137 58th Leg., 1st Sess. (Okla. 2021); S.B. 1036, 123rd Sess. Gen. Assemb. (S.C. 2020); H.B. No. 37 (Utah 2020); H.B. 4436, Reg. Sess. (W.Va. 2020) and S.B. 772, Reg. Sess. (W.Va. 2020).

<sup>105</sup> See, e.g., Tex. Civ. Prac. & Rem. Code § 5.001.

<sup>106</sup> MICH. COMP. L. § 500.3032 (eff. Jan. 1, 2020).

“authoritative reference.”<sup>107</sup> In a formulation that this article calls “NCOIL+,” some say that courts may not rely on the RLLI if the principle at issue is “not otherwise addressed” in state law.<sup>108</sup> These formulations likely will retard the development of the common law. They also threaten to intrude on judicial independence and violate separation of powers concepts.

- *Hybrids*: Hybrids that adopt some or all of the above approaches.<sup>109</sup>

Some legislation discussed below falls into more than one category and is cited then in two or more categories.

***The “Early Adopter” Statutes:*** As noted above, the legislation passed in Tennessee in 2018 was very specific<sup>110</sup> and consistent with examples of state legislation adopted on other topics addressed in other Restatements.<sup>111</sup> The Tennessee statute specifically defines how courts are to address insurance policy interpretation under Tennessee law, stating that an insurance policy must be interpreted “fairly and reasonably,” giving the policy language its “ordinary meaning.” It also states that an insurance policy must be construed “reasonably and logically as a whole,” and that rules governing interpretation of insurance policies “are the same as [those applying to] any other contract.” This of course is a principle of not just insurance-policy interpretation but general contract interpretation and is supported in the Restatement.<sup>112</sup>

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<sup>107</sup> H.B. 2106, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2018) and S.B. 939, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2018); N.D. CENTURY CODE § 26.1-02-34 (eff. Aug. 1, 2019); H. Res. 222 (Ky. 2018) (passed Mar. 27, 2018).

<sup>108</sup> See, e.g., ARK. CODE ANN. § 23-60-112 (2020).

<sup>109</sup> H.R. Cong. Res. 62, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019); H.R. Res. 86, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019).

<sup>110</sup> TENN. CODE ANN. § 56-7-102 (2020).

<sup>111</sup> As one example where a state legislature has passed legislation in response to a specific Restatement provision unrelated to the RLLI, Arizona passed legislation to confirm the state’s law on four distinct issues of trust law. That legislation was enacted to conform to the principles set forth in the Restatement (Second) of Trusts but not the Restatement (Third) of Trusts with respect to four specific issues (e.g., “The rights and powers of creditors of beneficiaries” and “The duties of trustees to distribute to those to whom a beneficiary owes any duties”). ARIZ. REV. STAT. ANN. § 14-10106 (2020). This “surgical approach” on those issues of trusts law is in contrast to most of the legislation on the RLLI that seeks to reject the entire Restatement without analyzing or addresses any specific issues.

<sup>112</sup> *Id.* For comparison, the text of the RLLI’s “black-letter” principle on this point, however, specifically states that very principle: “Except as this Restatement or applicable

The Ohio statute on the RLLI passed the Ohio legislature and was signed by Ohio Governor Kasich in 2018. It was included as a rider, buried in an 11-page statute discussing political subdivisions and regional councils of government. The pertinent sentence in this otherwise irrelevant and lengthy statute states that the RLLI is not “the public policy” of the state and is not subject to judicial notice: “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.”<sup>113</sup>

It does not attempt to address any single issue in the RLLI or distinguish in any way among those of the 100-plus principles in the Restatement. Indeed, it is possible that some of the provisions in the RLLI do accord with Ohio public policy (or certainly do not contradict it). As with other RLLI legislation discussed in this section of the article, this broad-brush approach could create confusion and intrude on judicial authority to resolve issues that are unsettled or not addressed in Ohio law.

For one insurance defense firm, the Ohio statute “likely does not go far enough.” In what a cynic might consider the insurance-law version of book burning, the firm’s commentary worries that the Ohio statute might “not prevent Ohio’s appellate courts from looking to or adopting rules set forth in the RLLI as the common law of Ohio.”<sup>114</sup>

***Legislation Following the NCOIL 2019 Model Statute:*** After Ohio adopted its statute on the RLLI, NCOIL revised its Model Act, and a number of states have adopted or are considering legislation stating that courts may consult the Restatement unless it is contrary to existing law in the state on the issue.<sup>115</sup> Stated affirmatively, under such legislation, courts may consult or cite the Restatement

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law otherwise provides, the *ordinary rules of contract interpretation apply* to the interpretation of liability insurance policies.” RESTATEMENT OF THE L. OF LIAB. INS. § 2(3) (AM. L. INST. 2019) (emphasis added).

<sup>113</sup> OHIO REV. CODE ANN. § 3901.82 (2020).

<sup>114</sup> O’Meara, *supra* note 70. The article also does not disclose the firm’s insurance defense work or who pays for it.

<sup>115</sup> For statutes or resolutions that have passed, see: ARK. CODE ANN. § 23-60-112 (2020); OHIO REV. CODE ANN. § 3901.82 (2020); TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (2019); H.R. Res. 222, Reg. Sess. (Ky. 2018); S. Res. 149, Reg. Sess. (La. 2019). For pending or previously-introduced legislation following this model, see H.B. 2644, 54th Leg., 2d Reg. Sess. (Ariz. 2020); H.B. 150, Reg. Sess. (Ky. 2020); Legis. B. 884, 106th Leg., 2d Reg. Sess. (Neb. 2020); S.B. 1692, 57th Leg., 2d Reg. Sess. (Okla. 2020); S.B. 137 58th Leg., 1st Sess. (Okla. 2021); S.B. 1036, 123d Gen. Assemb., 2d Reg. Sess. (S.C. 2020).

when the state does have existing law (by constitution, statute, or case law) on the issue. While it does not seem necessary to pass such legislation, it states an otherwise harmless truism, as courts typically do not look to Restatements on an issue when the legislature or the court of last resort in that state has spoken on an issue.<sup>116</sup>

***Legislation Expanding on the NCOIL Model Statute, and Potentially Intruding on Judicial Authority or Separation of Powers:*** In contrast, other legislation states that the RLLI *is* “not authoritative,” or takes the NCOIL 2019 Model Statute and expands its reach to preclude a court from considering the RLLI not only when the law in the state is “inconsistent” with the RLLI but also when the state has no law on the topic or the state has “not otherwise” addressed the principle in question.<sup>117</sup>

For example, the North Dakota legislation states that the *Restatement* should not be used “as an authoritative reference regarding interpretation of North Dakota laws, rules, and principles of insurance law.”<sup>118</sup> Other states have adopted similar provisions. For example, Michigan’s Code now states:

In an action brought in a court in the state, the court shall not apply a principle from the American Law Institute’s “*Restatement of the Law, Liability Insurance*” in ruling on an issue in the case unless the principle is clearly expressed in a statute of the state, the common law, or case law precedent of the state.<sup>119</sup>

It is unclear what the reference to the “common law” in the Michigan statute means. Does it mean common law generally? Does it mean common law only in Michigan? How does “common law” differ from “case law precedent” in this context? This legislation also raises another interesting question: How does the common law

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<sup>116</sup> For authority or commentary making this point, see *Williamson v. Guentzel*, 584 N.W.2d 20, 24-25 (Minn. Ct. App. 1998); Letter of former Arizona Supreme Court Chief Justices, opposing Ariz. House Bill 2644.

<sup>117</sup> For statutes and resolutions that have passed, see H.R. Cong. Res. 62, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019); H.R. Res. 86, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019) (identical to H.R. Con. Res. 62); H.R. Res. 222, Reg. Sess. (Ky. 2018); MICH. COMP. LAWS § 500.3032 (2020); N.D. CENT. CODE ANN. § 26.1-02-34 (2020). For previously-introduced legislation following this model, see S. Stud. B. 3014, 88th Gen. Assemb., 2020 Sess. (Iowa 2020); H. Stud. B. 513, 88th Gen. Assemb., 2020 Sess. (Iowa 2020); H.B. 2016, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020); S.B. 939, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020); H.B. 4436, 84th Leg., Reg. Sess. (W. Va. 2020); S.B. 772, 84th Leg., Reg. Sess. (W. Va. 2020).

<sup>118</sup> N.D. CENTURY CODE § 26.1-02-34 (2019).

<sup>119</sup> MICH. COMP. LAWS ANN. § 500.3032 (2020).

advance when the legislature puts this kind of heavy hand on the scale? On the plus side, this statute refers to “an issue in the case” rather than all principles in the RLLI.

The Arkansas statute provides an example of the “NCOIL+ Model,” going beyond the NCOIL 2019 formulation that a court may not cite the RLLI when state law is “inconsistent” with it. The Arkansas statute allows a “statement of the law” in the Restatement to be used if it is consistent with or “otherwise is not addressed by” other Arkansas law (or, interestingly, “the common law and statute law of England as adopted” by an Arkansas statute):

A statement of the law in the American Law Institute’s *Restatement of the Law, Liability Insurance* does not constitute the public policy of this state if the statement of the law is not consistent or in conflict with, or otherwise not addressed by:

- (1) A statute of the State of Arkansas;
- (2) The common law and statute law of England as adopted in Arkansas under § 1-2-119; or
- (3) Arkansas case law precedent.<sup>120</sup>

It seems obvious that these provisions could retard the development of case law and its application to the particular sets of facts that come up in litigated insurance-coverage disputes. These statutes potentially violate separation of powers by prohibiting judges from looking to the RLLI on issues where that state has no law on-point. In such cases, courts typically consult other relevant law, as well as secondary sources. Legislation on the RLLI potentially precludes courts from consulting a respected secondary source, possibly leading to less optimal results in the development of the common law.

These provisions, given their blunderbuss approach, also may create confusion in the courts, causing a potential for delay in resolution of cases. It also must be asked: Does a legislature in proposing such legislation mean to stop the judicial branch from citing a secondary source that supports an established principle of state law just because it is discussed in the Restatement?

***Legislation Referring Not Only Restatements – But Also Other Secondary Authority:*** A bill introduced in early 2020 in Florida states that not only is the

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<sup>120</sup> ARK. CODE ANN. § 23-60-112 (2019).

Restatement off-limits to courts but also any secondary source relating to liability insurance as well:

(10) A secondary legal authority does not constitute the law or public policy of this state if its statement of the law relating to liability insurance is in conflict with: . . . [to be inserted]<sup>121</sup>

Again, this provision states the truism that courts do not adopt a secondary source as law or use it to override the law adopted by the jurisdiction's legislature or, with common law, the jurisdiction's highest or other authoritative courts. However, courts of all levels, up to the United States Supreme Court, routinely consult and cite secondary sources in an area where relevant law, either by case law or statute, does not exist or is unsettled. What lawyer or judge has not cited or consulted secondary authority, including learned treatises, law review articles (often written by law students and not lawyers), and, yes, Restatements, when faced with an issue where the law is not developed?

**Hybrids:** The “hybrids” adopt a variety of the approaches discussed above.<sup>122</sup> A resolution passed by the Indiana House of Representatives in 2019 stated a version of the “public policy prohibition” and also adopted guidance to the courts that they should not consider the RLLI authoritative:

[RESOLVED] that the *Restatement of the Law, Liability Insurance* that was approved that the 2018 annual meeting of the American Law Institute does not reflect the determination of the state of Indiana's public policy, is not a faithful statement of existing law of the state of Indiana, is not an appropriate subject of notice, and should not be afforded recognition by courts as an authoritative reference regarding established rules and principles of insurance law.<sup>123</sup>

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<sup>121</sup> Fla. B. No. PCS for H.B. 359, Amendment No. 2a (offered by Rep. Diamond). *See also* Ky. Res. 150 (pending), as discussed below.

<sup>122</sup> For a “hybrid” legislation that passed, see H.R. Con. Res. 62, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019) and H. Res. 86 (which are identical). For pending “hybrid legislation,” see H.B. 150 (Ky.); H.B. 2106, 100th Gen. Assemb., 2d Reg. Sess. (Mo.), and S.B. 939, 100th Gen. Assemb., 2d Reg. Sess.; H.B. 4436, Reg. Sess. (W. Va. 2020) and S.B. 772, Reg. Sess. (W. Va. 2020).

<sup>123</sup> H. Cong. Res. No. 62 (Ind. 2019). The O’Meara article, published in April 2019, notes that this resolution was introduced by Representative Matt Lehman, a member of NCOIL and its Property and Casualty Insurance Committee “which is currently exploring

The Indiana resolution does not preclude reliance on the RLLI with regard to issues on which Indiana state courts have not spoken. It also does not, however, make any distinction between or among any of the more than 100 legal principles discussed in the RLLI or try to analyze whether the Restatement includes principles that accord with existing Indiana law. In such situations, courts commonly cite secondary authority that further supports existing law or the principle handed down in the instant case. Is it sensible to preclude use of the RLLI in such a situation?

A bill currently pending in Kentucky includes the “not authoritative” language, but after consultation, was amended to allow courts to refer to the RLLI to the extent that it may be “informative” or “persuasive.” As amended and reported out to the House of Representatives, the bill stated: A statement or restatement of the law in any legal treatise, scholarly publication, textbook, or other explanatory text shall not constitute the law or public policy of the Commonwealth of Kentucky. No Kentucky court shall treat any such publication or text as controlling authority.<sup>124</sup>

However, the bill was amended on the floor of the House to state that courts may “use” secondary sources when there is no controlling state authority:

A statement or restatement of the law in any legal treatise, scholarly publication, textbook, or other explanatory text shall not constitute the law or public policy of the Commonwealth of Kentucky. No Kentucky court shall treat any such publication or text as controlling authority, *however a court may use such publication or text as an informative or persuasive source.*<sup>125</sup>

**Commentary:** Policyholders and other stakeholders, either generally or as a group, generally have not been consulted about these legislative efforts. It is not apparent that efforts have been generally made for the legislatures or other government officials to obtain a balanced perspective on the ALI and its process, the Restatement; the effect of such legislation on insurance markets; or judicial independence and separation of powers.

These bills tend to be submitted to the legislatures’ committees overseeing insurance and not to the legislatures’ Judiciary Committees where they might have

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ways to respond to the *RLLI*, including through the development of guidance and model legislation.” O’Meara, *supra* note 70.

<sup>124</sup> H. B. 150 (Ky. 2020) (as reported out of the Judiciary Committee).

<sup>125</sup> H. Res. 150 (Ky. 2020) (as passed by the House) (emphasis added to show addition made during debate).

been vetted by lawyers (as at least one interested and experienced constituency). Indeed, as noted above, NAMIC cautioned that submission of the legislation to the legislature's Judiciary Committee would kill the "intent" of such bills.

As these efforts have come to light and attracted attention outside of legislatures considering the measures, other interested constituencies have expressed concerns and opposition to passage. For example, three former Chief Justices of the Arizona Supreme Court submitted a statement opposing Arizona House Bill 2644, calling it "unnecessary, confusing, and misguided":

- The Justices argue it is unnecessary, pointing out that, consistent with the practice of courts generally, Arizona courts consult Restatements only when "there is no Arizona statute or case law" on the issue at hand. At that point, they "may consult a Restatement to see whether it describes a sound and sensible approach or rule and to see what courts in other states" may have ruled.
- They argue that passage of the proposed legislation risks "causing confusion in litigation because it is unclear whether a court may apply a rule that comports with the Restatement, so long as it does not cite the book."
- They explain that the legislation is misguided because, "[w]here the legislature has not enacted substantive law to address certain matters, in the realm of insurance and other matters, courts of necessity resolve the issues through the common law process."<sup>126</sup>

The letter concludes by stating a point made earlier in this article: that such legislation runs afoul of a key doctrine undergirding our system of government, the separation of powers:

[T]he bill, by singling out one legal resource and directing courts not to refer to it, or to disregard it and not cite it, flouts the separation of powers between the judicial and legislative branches. Where Arizona law has not already settled an issue, we should want our

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<sup>126</sup> *Letter of former Arizona Supreme Court Justices, supra note 7* (arguing that the proposed legislation is unnecessary and cites to *Cramer v. Starr*, 375 P.3d 69, 75 (Ariz. 2016), in which the Arizona Supreme Court refused to apply a section of the Restatement (Second), Torts finding it to be contrary to Arizona law).

courts to inform themselves by consulting pertinent legal resources.<sup>127</sup>

Can that logic be assailed?

Testimony to the Nebraska legislature during its consideration of legislation about the RLLI argues, in addition to points raised in the letter by the former Arizona Supreme Court Chief Justices, that the legislation sweeps too broadly. That testimony argued that the legislation failed to undertake meaningful analysis of, or make any distinction among, the many principles addressed in the Restatement:

There are some 10–110 different statements of law governing liability insurance in the restatement. Does [Nebraska bill] LB 884 mean that this Legislature has carefully considered each one, compared it to existing Nebraska law, and rejected each of those that are inconsistent? And what of the restatement rules that are not inconsistent or in conflict with current Nebraska law[?] Has the legislature, by implication, adopted all of these as Nebraska law even where Nebraska has not yet addressed the issue?<sup>128</sup>

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<sup>127</sup> *Id.* See Letter from David F. Levi, President, ALI, to Hon. Roger Hanshaw, Speaker, W. Va. House of Delegates, and Hon. John Shott, Chair, Judiciary Committee, W. Va. House of Delegates (Jan. 20, 2020) (“[I]n singling out the work of The American Law Institute—and, most specifically, in prohibiting West Virginia judge from using the Insurance *Restatement* as a resource, even when faced with a legal issue on which there is an absence of West Virginia statute or precedent—House Bill 4436 does a disservice to the judges and people of West Virginia by depriving them of a resource that represents the time and effort of many lawyers, judges, and academics from our membership, which includes West Virginia members.”).

<sup>128</sup> *Hearing on LB 884 Before the Judiciary Committee*, 106th Leg., 2nd Sess. 28 (Neb. 2020) (statement of Harvey S. Perlman, Professor of Law). The Minutes of the December 7, 2018 meeting of NCOIL’s Property & Casualty Insurance Committee do identify certain provisions that NCOIL staff believe “deviate[] from certain statutory law.” Such provisions included the “plain meaning rule” (RLLI § 3), § 12 on insurer liability, and a “provision relat[ing] to interpretations of an insurance policy that involves principles of contract law.” The Minutes refer to “8 remaining issues within the *Restatement* that were problematic,” making a total, by this author’s addition, of 11 that NCOIL found “problematic.” The reference to the plain meaning rule as being a subject of statutory law, at

## C. COURT CASES IN WHICH THE RESTATEMENT HAS BEEN CITED

Few courts to date have cited the Restatement, and fewer can be said to have adopted the position explicated in the RLLI or specifically followed its reasoning. Contrary to the fears expressed by legislators and insurance-industry representatives, the sky is not falling: Courts citing the Restatement have refused to blindly follow the RLLI provisions cited to them, engaging (as frankly one would expect) in an analysis of applicable case law and other authorities in the state. Most decisions thus far citing the Restatement acknowledge its status as a secondary source and not law itself. Some courts cite it as additional support for a principle supported by governing law; or for a general, but not dispositive, point.<sup>129</sup> Thus, a reading of such decisions shows that, thus far at least, the insurance industry's fears that the Restatement will somehow distort the common law, in blind support for policyholders and unfairly to their detriment, are overblown.

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least without more explanation, is odd given that these rules, like general rules of contract interpretation often are common law. They also point out that, using NCOIL's own count on provisions in controversy, 99 provisions in the RLLI did not raise concern for insurers.

<sup>129</sup> See, e.g., *Travelers Indem. Co. v. Mitchell*, 925 F.3d 236, 241 (5th Cir. 2019) (citing RLLI § 33, cmt. b, as one of many sources of support on the concept of harm-based of triggers of coverage); *OTRA, LLC v. Am. Safety Indem. Co.*, No. 3:20-CV-01063-SB, 2020 WL 6828738, at \*1 n.1 (D. Or. Nov. 20, 2020) (citing RLLI § 13, cmt. a); *Stepney, LLC v. Nautilus Ins. Co.*, No. 3:19CV720 (AWT), 2020 WL 7630791, at \*3 (D. Conn. Dec. 22, 2020) (citing RLLI § 1); *Century Sur. Co. v. Andrew*, 432 P.3d 180, 184 n.4, 186 (Nev. 2018) (quoting § 13 cmt. c and citing § 48); *Cannon Elec. v. Ace Prop. & Cas. Co.*, No. BC 290354, slip op. at 17 (Cal. Super. Ct. Jan. 9, 2019) (citing RLLI § 23(1)(a)); *Marcus v. Allied World Ins. Co.*, 384 F. Supp. 3d 115, 122–23, 126 n.22 (D. Me. 2019) (citing § 32, cmt. e and § 21, cmt. a); *Country Mut. Ins. Co. v. Martinez*, No. CV-17-02974-PHX-ROS, 2019 WL 1787313, at \*13 n.15 (D. Ariz. Apr. 24, 2019) (citing § 12); *Akorn, Inc. v. Fresenius Kabi AG*, No. 2018-0300-JTL, 2018 WL 4719347, at \*59 n.619 (Del. Ch. Oct. 1, 2018) (quoting RLLI § 32, cmt. e); *Bedivere Ins. Co. v. Blue Cross and Blue Shield of Kan., Inc.*, No. 18-2371-DDC-JPO, 2020 WL 5819612, at \*8 (D. Kan. Sept. 30, 2020) (citing § 20 & cmt. b); *Montrose Chem. Corp. v. Superior Ct. of L.A. Cty.*, 460 P.3d 1201, 1204 (Cal. 2020) (quoting § 39, cmt. d), *modified*, 2020 Cal. LEXIS 3442 (Cal. 2020). In a series of cases in 2019, one judge cited § 13 on the basic rules on the duty to defend, finding no dispute in the law: *Webcor Constr. LP v. Zurich Am. Ins. Co.*, 372 F. Supp. 3d 1061, 1070 (N.D. Cal. 2019) (Gonzalez Rogers, J.); *Conway v. Northfield Ins. Co.*, 399 F. Supp. 3d 950, 959 (N.D. Cal. 2019) (Gonzalez Rogers, J.); *Mesa Underwriters Spec. Ins. Co. v. Blackboard Ins. Spec. Co.*, 400 F. Supp. 3d 928, 936 (N.D. Cal. 2019) (Gonzalez Rogers, J.) (insurer vs. insurer dispute); *Scottsdale Ins. Co. v. Darke*, No. 19-cv-02225-YGR, 2019 WL 6251241, at \*3 (N.D. Cal. Nov. 22, 2019) (Gonzalez Rogers, J.).

In a twist odd to these lawyers at least, it is generally understood and our experience confirms that a number of major insurers, including AIG and, not surprisingly, Liberty Mutual, have instructed the lawyers they retain not to cite the Restatement—even on issues where the Restatement supports the insurer's position.<sup>130</sup>

***Decisions Relying on or Citing the RLLI with Approval:*** A number of cases decided since the final approval of the RLLI have cited the Restatement as part of a larger analysis of applicable law.

Only one case to this point can be said to have followed the *Restatement* although the decision also analyzes multiple other authorities, cases, and secondary authorities to support the result. In *Sapienza v. Liberty Mutual Insurance Co.*,<sup>131</sup> a federal court in South Dakota reaffirmed the reasoning in an earlier decision which had adopted § 12(2) of the RLLI, the provision stating that a liability insurer “is subject to liability for the harm caused by the negligent act or omission” of counsel hired by the insurer to defend its policyholder.<sup>132</sup>

In the initial suit, the Sapienzas alleged that defense counsel hired by Liberty Mutual had provided an inadequate defense. Finding no South Dakota law on the issue, the federal court considering the issue decided that it had to “attempt to predict” how the Supreme Court of South Dakota would decide that the issue. The court referred to “a draft of the *Restatement*”<sup>133</sup> and concluded:

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<sup>130</sup> For example, insurers in *Sapienza* (discussed below) did not affirmatively cite favorable Restatement provisions. 389 F. Supp. 3d 648 (D.S.D. 2019). In a case pending in the Montana Supreme Court, the insurer brief challenging rulings below did not cite § 41 of the RLLI even though that section supports the position of the insurer, National Indemnity, on allocation. *See* Appellant/Cross-Appellee National Indemnity Company's Opening Brief, Nat'l Indem. Co. v. Montana, No. DA 19-0533 (Mont. Mar. 2, 2020).

<sup>131</sup> *Sapienza v. Liberty Mut. Fire Ins. Co.*, 389 F. Supp. 3d 648 (D.S.D. 2019); *Sapienza v. Liberty Mut. Fire Ins. Co.*, No. 3:18-CV-03015-RAL, 2019 WL 5206289 (D.S.D. Oct. 16, 2019).

<sup>132</sup> This provision states in full: “An insurer is subject to liability for the harm caused by the negligent act or omission of counsel provided by the insurer to defend a legal action when the insurer directs to the conduct of the counsel with respect to the negligent act or omission in a manner that overrides the duty of the counsel to exercise independent judgment.” RESTATEMENT OF THE L. OF LIAB. INS. § 12(2) (AM. L. INST. Draft Apr. 13, 2018).

<sup>133</sup> RESTATEMENT OF L. LIAB. INS. (AM. L. INST. Proposed Final Draft Apr. 13, 2018) ((this reference is to Proposed Final Draft No. 2 of the RLLI, approved in May 2018, and,

Because the draft *Restatement* follows the well-reasoned majority rule and because the Supreme Court of South Dakota has found the *Restatements* “persuasive in many instances,” this court predicts that the Supreme Court of South Dakota would adopt the *Restatement’s* position on insurer liability for an improper defense.<sup>134</sup>

After quoting § 12 from Proposed Final Draft No. 2 of the RLLI presented at the 2018 ALI Annual Meeting, the court continued to analyze law on the issue.<sup>135</sup> The court noted that the Restatement had rejected “the rule applied by a minority of states that insurers are vicariously liable for all malpractice by defense counsel they hire.”<sup>136</sup> The court surveyed case law in other states, discussing both the majority and the minority rules on the issue and noted that, “to be liable under section 12, then, the insurer itself must have engaged in some misconduct.”<sup>137</sup> The court concluded that Liberty Mutual could be liable for alleged malpractice by the defense counsel it hired to the extent that the insurer had affirmatively directed the defense, overriding the defense counsel’s independent professional judgment.<sup>138</sup>

In applying those principles to the facts at bar, the court specifically rejected the plaintiffs’ argument that the insurer could be vicariously liable for errors by defense counsel. The court noted that, although earlier drafts of the RLLI had accepted this theory, the final version of the Restatement had rejected that minority rule, opting instead to follow the majority rule which would place liability on an insurer only to the extent that it had explicitly directed actions taken by the lawyers

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given passage of a “Boskey Motion,” thus subject to final revisions “of a conforming nature” and to address comments and changes agreed to at the 2018 Annual Meeting).

<sup>134</sup> *Sapienza I*, 389 F. Supp. 3d at 653–54 (citing *Chem-Age Indus., Inc. v. Glover*, 652 N.W.2d 756, 770 (S.D. 2002); *Hendrix v. Schulte*, 736 N.W.2d 845, 848–49 (S.D. 2007) (applying Restatement); *Wildeboer v. S.D. Junior Chamber of Commerce*, 561 N.W.2d 666, 674 n.10 (S.D. 1997) (dissent, stating “This court frequently consults and employs the *Restatements*.”); *Beau Townsend Ford Lincoln, Inc. v. Don Hinds Ford, Inc.*, 759 F. Appx. 348, 353 (6th Cir. 2018) (“we may look to an applicable *Restatement* . . . for guidance when there is no controlling state law on point [and] the state has indicated that it considers the *Restatements* to be persuasive authority.” (brackets in original))).

<sup>135</sup> *Sapienza I*, 389 F. Supp. 3d at 654 (citing Revised Proposed Final Draft No. 2 of *Restatement* (dated Sept. 8, 2018); George M. Cohen, *Liability of Insurers for Defense Counsel Malpractice*, 68 RUTGERS L. REV. 119, 125 n.37 (2015)).

<sup>136</sup> *Sapienza I*, 389 F. Supp. 3d at 655–56.

<sup>137</sup> *Id.* at 654. Some commentators discussing the decisions in *Sapienza* fail to mention the court’s extensive analysis of case law on the issue.

<sup>138</sup> 389 F. Supp. 3d at 654.

it hired. However, the court in *Sapienza I* denied the insurer's motion to dismiss on this issue, giving the plaintiffs leave to amend their complaint to allege additional facts in support of a claim that Liberty Mutual had directed the counsel's actions, in large part because the plaintiffs "may not have contemplated in the absence of settled South Dakota precedent" that the court would apply "the most recent draft of § 12 of the *Restatement* to dismiss their breach of the duty to defend claim."<sup>139</sup>

In *Sapienza II*, addressing Liberty Mutual's opposition to the plaintiffs' motion to amend their complaint, the court noted that the Restatement had been finalized. Quoting Restatement § 12 in full, given the absence of South Dakota law on the issue, the court concluded that, "[t]o be liable under § 12, then, the insurer itself must have engaged in some misconduct."<sup>140</sup> This was the position that insurers argued for, vigorously, during adviser and MCG meetings, in comments and motions, and on the floor of the ALI at its Annual Meetings.

Perversely it seems, Liberty Mutual in *Sapienza II* argued "that the Supreme Court of South Dakota would not adopt § 12(2) because the American Law Institute created the section 'out of a complete absence of precedent.'"<sup>141</sup> The court, however, concluded "that is simply not true," citing numerous cases from around the country that have applied the principles adopted in the black letter of RLLI § 12.<sup>142</sup> The court therefore predicted, after analyzing the law from other states and secondary

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<sup>139</sup> *Id.* at 656.

<sup>140</sup> 2019 WL 5206289, at \*4. As in *Sapienza I*, the court in *Sapienza II* explained, "§ 12 rejected the rule applied by a minority of states that insurers are vicariously liable for all malpractice by defense counsel they hire." *Id.*

<sup>141</sup> *Id.* (quoting Liberty Mutual's brief). Liberty Mutual made this argument despite the fact that the RLLI supported its position.

<sup>142</sup> 2019 WL 5206289, at \*4. The cases cited include one case decided after the RLLI was adopted, and four that were decided years before its adoption (some resolved before the RLLI was even a "twinkle in anyone's eye"): *Progressive N.W. Ins. Co. v. Gant*, No. 15-9267-JAR-KGG, 2016 WL 4430669, at \*4 (D. Kan. Aug. 22, 2016) ("*Gant I*"); *Hackman v. W. Agric. Ins. Co.*, 275 P.3d 73 (Table), 2012 WL 1524060, at \*16 (Kan. Ct. App. Apr. 27, 2012) (per curiam); *Ingersoll-Rand Equip. Corp. v. Transp. Ins. Co.*, 963 F. Supp. 452, 455 (M.D. Pa. 1997); *Gibson v. Casto*, 504 S.E.2d 705, 708 (Ga. Ct. App. 1998); *Mentor Chiropractic Ctr., Inc. v. State Farm Fire & Cas. Co.*, 744 N.E.2d 207, 211 n.3 (Ohio Ct. App. 2000); *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 697 (Tenn. 2002). The *Sapienza* court also cited another secondary authority on point: Robert E. Keeton, Alan Widiss & James M. Fischer, *Insurance Law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* § 8.7 (2d ed. 2016) (discussing case law on insurer liability for defense counsel misconduct).

authorities (in addition to the RLLI), that the South Dakota Supreme Court would follow the “majority rule” on this issue, as set forth in § 12:

[RLLI] Section 12(2) follows the majority rule that insurers are not vicariously liable for defense counsel’s errors while at the same time recognizing that insurers can be liable for their own misconduct. Liberty Mutual has not made a convincing argument for why the Supreme Court of South Dakota would protect an insurer from liability in the rare instance when the insurer is able to override counsel’s independent professional judgment and thereby harm the insured.<sup>143</sup>

Applying this standard, the court concluded that the Sapienzas’ amended complaint pleaded facts sufficient to survive a motion to dismiss.<sup>144</sup>

Some courts have cited the RLLI as one of many sources on the issue at bar.<sup>145</sup> For example, a federal court in late 2018 quoted, but did not rely on, § 39 of the RLLI to support its application of a “cause test,” not the “effects test,” on the issue of number of occurrences.<sup>146</sup> Applying Oklahoma law, the court concluded that Oklahoma state courts had adopted the cause test; and cited the RLLI as additional support for the application of the cause test—which of course is the majority rule<sup>147</sup>—on this issue.

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<sup>143</sup> 2019 WL 5206289, at \*4 (citing ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES & INSURED § 4.42 (6th ed. rev. Apr. 2019) (“If counsel breaches a duty to the insured, either at the company’s request or with the company’s knowledge and consent, the insurer should be held accountable . . . .” (footnotes omitted))).

<sup>144</sup> 2019 WL 5206289, at \*5. Another federal court opinion, decided in April 2019 and now on appeal, appears to endorse the majority rule in § 12(1) on insurer liability for the acts of defense counsel in those situations where the insurer, not counsel, is directing the defense. *Country Mut. Ins. Co. v. Martinez*, No. CV-17-02794-PHX-ROS, 2019 WL 1787313, at \*13 (D. Ariz. Apr. 24 2019), *appeal docketed*, No. 19-16095 (9th Cir. May 28, 2019).

<sup>145</sup> Some courts have cited the RLLI, noting that it accords with governing law. *See, e.g., Twin City Fire Ins. Co. v. Hartman, Simons & Wood, LLP*, No. 1:13-CV-1608-SCI, 2017 WL 11497779, at \*6 (N.D. Ga. Feb. 28, 2017) (citing RLLI § 25, Tentative Draft No. 1 (2016), noting that the RLLI rule accords with Georgia’s voluntary-payment doctrine).

<sup>146</sup> *Nat’l Cas. Co. v. W. Express Ins.*, 356 F. Supp. 3d 1288, 1299 (W.D. Okla. 2018).

<sup>147</sup> *See, e.g., RESTATEMENT OF THE L. OF LIAB. INS. § 38, cmt. c. (AM. L. INST. 2019)*; *See also* the in-depth discussion of the cause test, and other tests, that courts apply to this highly fact-intensive issue, in *MASTERS ET AL.*, *supra* note 41, § 9.03[A].

Several cases as of this writing in early-February 2021 also have cited the RLLI. The Tenth Circuit in *Progressive Northwestern Insurance Co. v. Gant*<sup>148</sup> cited § 12 on numerous occasions, recognizing the “general rule,” in Kansas and otherwise, that an insurer is not subject to direct vicarious liability for the professional malpractice of defense counsel; and noting that a Kansas appellate court had ruled “consistent with [the] view” in § 12 in declining to impose vicarious liability in this manner.<sup>149</sup> *Port Authority of N.Y. & N.J. v. Brickman Group*<sup>150</sup> cited RLLI § 22(2)(a) as one of a number of sources showing a trend toward applying duty-to-defend rules in order to determine whether an insurer may obtain reimbursement of defense costs. The United States District Court for the District of Hawaii, citing RLLI § 21, acknowledged a split in the relevant case law. After analyzing relevant court opinions, the court concluded that § 21 and decisions addressing the insurer’s right to recoup defense costs “had little bearing on the question before the court.”<sup>151</sup> In ruling for insurers, a California state court noted that their seemingly nonsensical antipathy toward the Restatement (and, it seems, the ALI generally): “[a]lthough Defendant Insurers see fit to denigrate the integrity of the American Law Institute’s modern Restatements, the final draft of the [RLLI] supports Defendant Insurers’ position.”<sup>152</sup> One dissent relied on the Restatement.<sup>153</sup>

***Decisions Refusing to Rely Upon the Restatement:*** Some cases have dismissed citations to the Restatement on the ground that the final version of the Restatement had not been published at the time of decision.<sup>154</sup> Others—consistent with the practice by courts over the course of the authors’ careers—have refused to

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<sup>148</sup> *Progressive Northwestern Ins. Co. v. Gant*, 957 F.3d 1144 (10th Cir. 2020).

<sup>149</sup> *Id.* at 155 (citing *Hackman v. W. Agr. Ins. Co.*, No. 104786, 2012 WL 1524060 (Kan. Ct. App. Apr. 27, 2012)).

<sup>150</sup> *Port Authority of N.Y. & N.J. v. Brickman Group*, Index No. 451213/17, 2019 WL 6749520, at \*21–22 (N.Y. App. Div. Dec. 12, 2019) (citing RLLI § 22(2)(a)); *see also* *Evanston Ins. Co. v. Desert State Life Mgt.*, No. CIV-18-0654 JB/KK, 2020 WL 249023, at \*1098 (D.N.M. Jan. 16, 2020) (citing RLLI §§ 32, 34).

<sup>151</sup> *GGA, Inc. v. Kiewit Infrastructure W. Co.*, No. 18-00110-JMS-WRP, 2020 WL 369643, at \*26 (D. Haw. Jan. 22, 2020).

<sup>152</sup> *City of L.A. v. Certain Underwriters at Lloyds, London*, Case No. BC588876 (Cal. Super. Ct. Jan. 2020) (Kuhl, J.) (citing § 20) (*L.A. v. Lloyds*).

<sup>153</sup> *Nadkos, Inc. v. Preferred Contractors Ins. Co. Risk Retention Group, LLC*, 132 N.E.2d 568, 580, 584 (N.Y. 2019) (Wilson, J. dissenting).

<sup>154</sup> *Progressive Nw. Ins. Co. v. Gant*, No. 15-9267-JAR-KGG, 2018 WL 4600716 (D. Kan. Sept. 24, 2018) (*Gant II*); *Catlin Spec. Ins. Co. v. CBL & Assoc. Prop., Inc.*, No. N16C-07-166 PRW CCLD, 2018 WL 3805868 (Del. Super. Ct. Oct. 17, 2017).

follow the Restatement when governing law is contrary to the principle for which the Restatement is cited.

For example, a decision by a federal court in Kansas refused to follow Restatement provisions on insurer liability for the negligence of insurer defense counsel for both of these reasons.<sup>155</sup> First, the court found, in the fall of 2018 before the Restatement volume was released, that, though approved, the final version of the Restatement had not yet been published.<sup>156</sup> More significantly, the court refused to rely on a substantive Restatement provision that the policyholder cited because Kansas courts had not adopted the principles proposed in that section.<sup>157</sup> More recently, a federal court in Wisconsin cited the RLLI § 21 as evidence of “the controversy” surrounding the question of insurer recoupment of defense costs for uncovered claims.<sup>158</sup> The court ultimately rejected the insurer’s views, however, based on governing Wisconsin law (and federal precedent within the state), notwithstanding the fact that the cited RLLI provision supported the court’s conclusion.<sup>159</sup>

***Decisions Using the Restatement to Support the Insurer Positions:*** Some decisions have used the Restatement to support the positions favored by insurers. A Delaware trial court in *Catlin Specialty Insurance Co. v. CBL Associates Properties, Inc.*,<sup>160</sup> agreed with an earlier federal court’s predictions on how the Tennessee Supreme Court would decide the issue of whether a liability insurer has the right to seek “recoupment” of defense costs paid to insured. Concluding that the Tennessee

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<sup>155</sup> Gant II, 2018 WL 4600716, at \*12.

<sup>156</sup> *Id.* at \*12–13. The Restatement was published in late September 2019.

<sup>157</sup> *Id.* at \*12 (“[T]his Court is not . . . inclined to use a nonbinding *Restatement* as a means to overturn . . . or expand Kansas law.”) (citing RLLI § 12).

<sup>158</sup> *Hayes v. Wisconsin & S. R.R., LLC*, No. 18-CV-923, 2021 WL 199343, at \*3 (E.D. Wis. Jan. 20, 2021) (comparing RLLI § 21 (default rule is not recoupment of defense costs) with RESTATEMENT OF THE L. 3D, RESTITUTION AND UNJUST ENRICHMENT § 35 (favoring reimbursement)).

<sup>159</sup> *Id.* at \*6 (“[T]he court concludes that, if presented with the question, the Wisconsin Supreme Court would likely hold that under Wisconsin law an insurer may not, by way of a claim of unjust enrichment, seek to recover from its insured the costs it expended defending a claim for which the insurance policy did not provide coverage.”); *accord* RLLI § 21 (“Unless otherwise stated in the insurance policy or otherwise agreed to by the insured, an insurer may not obtain recoupment of defense costs from the insured, even when it is subsequently determined that the insurer did not have a duty to defend or pay defense costs.”).

<sup>160</sup> No. N16C-07-166 PRW CCLD, 2018 WL 3805868 (Del. Super. Ct. Aug. 9, 2018) (Catlin).

high court would not follow the black-letter rule stated in the RLLI on this issue, the court refused to follow § 21.<sup>161</sup>

As stated above, a California trial court noted the insurers' interesting advocacy tactic in "denigrat[ing]" the RLLI even though the relevant section actually supported their position.<sup>162</sup>

***Decisions Citing but Not Relying Upon the Restatement:*** Most of the decisions citing the Restatement to date have used the Restatement to explain an insurance policy term or concept; or as one of many authorities, but not as the primary authority for the court's ultimate decision.<sup>163</sup> In a case reflecting a concern raised in the testimony in January 2020 to the Nebraska legislature and discussed above, the Nevada Supreme Court adopted a rule stated in the RLLI, citing but relying on the Restatement in reaching that result. The court in *Century Surety Co. v. Andrew*<sup>164</sup> held that an "insured may recover any damages consequential to the insurer's breach of its duty to defend," concluding that the insurer's liability was not capped at the policy limits even in the absence of bad faith.<sup>165</sup>

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<sup>161</sup> *Id.* at \*2–3.

<sup>162</sup> *L.A. v. Lloyds*, slip op. at 23.

<sup>163</sup> See cases cited *supra* note 129. Several decisions cited to drafts of the RLLI in years before it was approved. See, e.g., *Outdoor Venture Corp. v. Phila. Indem. Co.*, No. 6:16-cv-182-KKC, 2018 WL 4656400, at \*18 (E.D. Ky. Sept. 27, 2018) (noting insured's citation of RESTATEMENT OF THE L. OF LIAB. INS. § 16 (AM. L. INST., Tentative Draft No. 1, 2016)); *Selective Ins. Co. of Am. v. Smiley Body Shop, Inc.*, 260 F. Supp. 3d 1023, 1033 (S.D. Ind. 2017) (citing favorably and quoting from RESTATEMENT OF THE L. OF LIAB. INS. § 21 (AM. L. INST., Discussion Draft, 2015)); *Nooter Corp. v. Allianz Underwriters Ins. Co.*, 536 S.W.3d 251, 272 (Mo. Ct. App. 2017) (quoting RESTATEMENT OF THE L. OF LIAB. INS. § 44 cmt. j (AM. L. INST., Tentative Draft No. 1, 2016)); *Mid-Continent Cas. Co. v. Petrol. Sols., Inc.* No. 4:09-0422, 2017 WL 2964933, at \*6 (S.D. Tex. July 12, 2017) (Atlas, J.) (citing and quoting RESTATEMENT OF THE L. OF LIAB. INS. § 29 cmt. b (AM. L. INST., Tentative Draft No. 1, 2016).

<sup>164</sup> 432 P.3d 180 (Nev. 2018).

<sup>165</sup> *Id.* at 186. This case is also cited in RESTATEMENT OF THE L. OF LIAB. INS. § 48 cmt. d (AM. LAW INST. 2019).

## V. SECTIONS OF THE RESTATEMENT GENERATING CONTROVERSY

## A. OVERVIEW

As with any work of such depth and scholarship, the Restatement was revised extensively during the eight years of drafting. Of course, that is the nature of the ALI's 90+ year-old dialectical process. Many of the changes were made in response to comments from insurance industry advocates. As with any project of this scope, including input from so many different stakeholders, everyone has provisions with which they disagree. This reaction reflects the myriad, complex issues that arise in insurance-coverage disputes. In fact, it would be surprising if there were no controversy with the RLLI. This section discusses issues that generated, and seem now to continue to generate, the most controversy.

In opposing these rules, insurer advocates have argued that the Restatement rules will increase costs that will be passed onto other policyholders in the form of higher premiums.<sup>166</sup> Despite repeated requests for support during the RLLI drafting process, no empirical evidence was introduced to support such assertions. We have seen little evidence of this alleged correlation between liberal interpretation rules and premium costs. Indeed, one could say that ensuring that the insurance protection promised at the point of purchase is available at the point of claim could increase confidence and maintain or improve sales of insurance. Even assuming that such rules increase costs, it is reasonable to presume that insurers factored the effect of those rules—which have been around for decades—into premiums years ago.

## B. MANDATORY VERSUS DEFAULT RULES

Most of the rules in the Restatement are mandatory rules, i.e., rules that cannot be changed by agreement of the parties. Despite the common-sense nature of this distinction and the fact that many kinds of liability insurance (especially homeowners liability, automobile liability, and CGL insurance) are standard-form or boilerplate contracts, typically sold without any review or negotiation of substantive contract terms at the time of purchase, this distinction, as with so much of the Restatement, was met with resistance largely from insurance-industry representatives.

According to the Restatement, designating mandatory rules helps ensure fairness and consistency in interpretation and application of the substantive standard-form policy terms used in modern liability insurance policies. This is a

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<sup>166</sup> See e.g., Barker, *The American Law Institute Principles of the Law of Liability Insurance: Part II—Selected Comments from an Insurer Perspective*, *supra* note 63, at 4.

logical approach because insuring agreements and provisions for liability insurance of necessity must be standardized, use standard concepts and terms, and thus constitute contracts of adhesion.<sup>167</sup> In addition, while the Restatement addresses liability insurance, the rules of policy interpretation have the potential to spill over to disputes about first-party property (also heavily standardized and regulated) and other types of insurance.

Under the Restatement, default rules apply only if the substantive insurance policy term or terms at issue in a dispute have been negotiated jointly by the parties (insurer and policyholder) and are not in regular usage in the insurance markets. This rule is important to ensure uniform rules on policy terms and reduce litigation, stated goals of the Restatement,<sup>168</sup> and a necessary underpinning of the mass-marketing of insurance.

### C. SECTION 3, PLAIN MEANING RULE, AND RELATED PRINCIPLES

The initial formulation of this Section, which proposed a “presumption of plain meaning” that could be rebutted with the introduction of extrinsic evidence, generated as much controversy as any of the sections in the Restatement process. Earlier drafts of the Restatement sought to reach a middle ground between a strict approach to interpretation<sup>169</sup> and a highly contextual approach.<sup>170</sup> Preliminary Draft No. 1, for example, stated a rebuttable presumption that the plain meaning should

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<sup>167</sup> See discussion in MASTERS ET AL., *supra* note 41, § 1.01[A]. See also RESTATEMENT OF THE L. OF LIAB. INS. § 2 cmt. d.

<sup>168</sup> E.g., RESTATEMENT OF THE L. OF LIAB. INS. § 2 cmt. d.

<sup>169</sup> E.g., RESTATEMENT (FIRST) OF CONTRACTS (AM. L. INST. 1932).

<sup>170</sup> E.g., RESTATEMENT (SECOND) CONTRACTS. The Comments identify the objectives of insurance-policy interpretation also, as follows:

- “effecting the dominant protective purpose of insurance;
- facilitating the resolution of insurance-coverage disputes and the payment of covered claims;
- encouraging the accurate marketing of insurance policies; and
- providing clear guidance on the meaning of insurance policy terms in order to promote, among other benefits, fair and efficient insurance pricing, underwriting, and claim management.”

RESTATEMENT OF THE L. OF LIAB. INS. § 2, cmt. c. (*Objectives of legal insurance interpretation*).

apply unless “the court determines that a reasonable person would clearly give the term a different meaning in light of the extrinsic evidence.”<sup>171</sup> The presumption could be displaced if a court concluded that extrinsic evidence revealed an alternative meaning that “reasonable persons in the policyholder’s position would give to the term under the circumstances and that the plain meaning is, in this sense, a less reasonable meaning.”<sup>172</sup> Contrary to some of the more “emotional” descriptions of the approach, it focused from the outset, on insurance-policy plain meaning.<sup>173</sup>

In the end, the Restatement eliminated the “rebuttal presumption” concept and demoted the evidence point from the black-letter to a comment making use of such evidence permissive. This is a sensible approach, and one that courts in the authors’ experience generally employ after review of applicable law.

### 1. Provisions of the Final Restatement

Section 3(2) defines “plain meaning” as the “single meaning to which the language of the term is reasonably susceptible when applied to the fact of the claim at issue in the context of the entire insurance policy.”<sup>174</sup> This Section adopts principles that are widely accepted in both insurance-policy and contract interpretation. For example, this Section brings into play the reasonableness of terms used and makes clear that meaning should be considered as the terms are used in the insurance policy as a whole. The Section further makes clear that provisions that do not have a plain meaning as defined in subsection two are ambiguous and interpreted in as provided in § 4. Although insurers continue to complain about these sections, one could argue that the principles of policy interpretation adopted in the Restatement are less favorable to policyholders than those coming out of a strict adoption of the Restatement (Second), Contract’s contextual approach. This argument could be made in some quarters even though § 2 of the RLLI specifically states that, “[e]xcept as this *Restatement* or other applicable law otherwise provides,

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<sup>171</sup> See, e.g., RESTATEMENT OF THE L. OF LIAB. INS. § 3(2) (Preliminary Draft, No. 1, Mar. 2, 2015).

<sup>172</sup> See, e.g., *id.* at § 3 cmt. c. (*Rebuttable presumption*).

<sup>173</sup> See, e.g., BARRY R. OSTRAGER & THOMAS N. NEWMAN, HANDBOOK OF INSURANCE COVERAGE DISPUTES § 1.01 (Elisa Alcabes & Karen Cestari, eds., 19th ed. 2019); JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES § 4.04 (2d ed. 1999 & Supp. 2005); accord MASTERS ET AL., *supra* note 41, at § 2.03.

<sup>174</sup> RESTATEMENT OF THE L. OF LIAB. INS. § 3(2).

the ordinary rules of contract interpretation apply to the interpretation of liability insurance policies.”<sup>175</sup>

Given the substantial revisions to these provisions until the final adoption of the RLLI, it is unclear what is generating the continuing antipathy by the insurance industry to this Section. It may arise from comments that discuss custom, practice, and usage evidence, discussed below.

## 2. Comment c. Custom, Practice, and Usage

Comment c. explains:

Some courts that follow a plain-meaning rule also consider custom, practice, and usage when determining the plain meaning of insurance policies entered into between parties who can reasonably be expected to have transacted with knowledge of the custom, practice, or usage. The plain-meaning rule adopted in this Section follows this approach, which recognizes that informed insurance-market participants conduct their business in light of custom, practice, and usage in the insurance market and in the trade or business being insured.<sup>176</sup>

Consistent with generally accepted contract-interpretation principles, the Comment focuses on the objective meaning of the relevant insurance policy terms in the relevant market as distinguished from the subjective intent of a party. Comment c. defines dictionaries, court decisions, statutes and regulations, and secondary legal authority, such as treatises and law-review articles, as external sources of meaning that courts can always consult when determining the plain meaning of insurance policy terms.<sup>177</sup> In a further nod to insurance-company preferences, as widely expressed particularly throughout the final years of the RLLI drafting, a Comment to § 3 states:

Consideration of custom, practice, and usage at the plain-meaning stage does not, however, open the door to extrinsic evidence of the parties' specific or subjective intent or

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<sup>175</sup> *Id.* at § 2(3).

<sup>176</sup> *Id.* at § 3 cmt. c. (*Custom, practice, and usage*).

<sup>177</sup> *Id.* at cmt. b. (*Generally accepted sources of plain meaning*).

understanding regarding the insurance policy, such as drafting history, course of dealing, or pre-contractual negotiations. Rather, custom, practice, and usage refer only to aspects of the insurance market or the trade or business being insured that are so widely known as to form a shared backdrop against which an insurance policy is reasonably understood to have been written and executed.<sup>178</sup>

These sources of evidence, under the Restatement's formulation, come into play only if insurance-policy terms are considered ambiguous in the context of the facts of the claim at issue. We have seen no insurance-industry company commentaries that mention that the Restatement does not adopt the reasonable-expectations doctrine, a doctrine that is widely accepted<sup>179</sup> but reviled by insurers, and specifically rejects<sup>180</sup> the "latent ambiguity rule" applied in some states,<sup>181</sup> another doctrine that insurance companies oppose.

The controversy may also arise from the fact that the Restatement adopts the generally accepted rule, applied in most jurisdictions with regard to insurance policies and contracts alike, that a contract term is ambiguous "if there is more than one meaning to which the language of the term is reasonably susceptible when applied to the facts of the claim at issue in the context of the entire insurance policy."<sup>182</sup> In that situation, the term is construed against the party that supplied it.<sup>183</sup> Antipathy to this almost universal rule should not be a ground, expressed or otherwise, for supporting (or opposing) the RLLI (or the ALI).

### 3. Standard-Form Terms and "Sophisticated Policyholders"

Section 1, which defines terms used in the Restatement and is not part of Topic 1 of Chapter 1 addressing policy interpretation, includes a definition crucial to application of the principles of policy interpretation. Section 1(13) defines "standard-form term" as: a . . . term [that] appears in, or is taken from, an insurance

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<sup>178</sup> *Id.* cmt. c. (*Custom, practice, and usage*).

<sup>179</sup> *See, e.g.*, MASTERS ET AL., *supra* note 41, at § 2.05.

<sup>180</sup> RESTATEMENT OF THE L. OF LIAB. INS. § 4, cmt. b. (*Using external sources of meaning to determine whether a term is ambiguous*) (AM. L. INST. 2019).

<sup>181</sup> *See* MASTERS ET AL., *supra* note 41, in Ch. 2 generally, and § 2.05 specifically for a discussion of ambiguity and "latent ambiguity."

<sup>182</sup> RESTATEMENT OF THE L. OF LIAB. INS. § 4(1) (AM. L. INST. 2019).

<sup>183</sup> *Id.* § 4(2).

policy form (including an endorsement) that an insurer makes available for a non-predetermined number of transactions in the insurance market.

The Comments provide further gloss, stating:

any term that is not specifically negotiated by the parties for inclusion in the insurance policy at issue is a standard-form term. A term contained in an insurance policy form approved for use by and insurance regulatory authority for any insurer is a standard-form term, unless the circumstances clearly indicate the contrary.<sup>184</sup>

This provision is key to the application of the “ambiguity rule” in § 4, construing terms that are ambiguous against the party supplying the term. Insurers and the insurance industry largely control the terms that go into a standard-form policy. The Restatement eschews “the mechanical application” of *contra proferentem*,<sup>185</sup> stating that the RLLI formation gives insurers the opportunity to use extrinsic evidence to demonstrate to the court that the coverage-promoting interpretation of an ambiguous term is unreasonable in the circumstances . . . .<sup>186</sup> The § 1(13) definition helps ensure that policyholders are protected from the effects of ambiguous contract language into which they had no input.<sup>187</sup>

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<sup>184</sup> RESTATEMENT OF THE L. OF LIAB. INS. § 1 cmt. i. The fact is that most types of liability insurance use the same concepts and terms from one policy form to another (and from one kind of liability insurance to another). The RLLI acknowledges this feature of liability insurance in provisions that recognize the use of the same or similar concepts and terms from one policy form, and one kind of insurance, to another.

<sup>185</sup> RESTATEMENT OF THE L. OF LIAB. INS. § 4 cmt. f.

<sup>186</sup> *Id.*

<sup>187</sup> *E.g.*, Mark Geistfeld, *Interpreting the Rules of Insurance Contract Interpretation*, 68 RUTGERS U.L. REV. 371 (2015), presented at Rutgers Law School Symposium on the *Restatement* (Feb. 27, 2015) (citing Mark Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323, 329 (1986) (Rahdert) (“As numerous commentators beginning with Patterson, Kessler and Llewellyn have noted, *there is no mutual assent to most terms of an insurance policy*. Policy language is standardized and mass produced. It, or language very similar to it, appears in nearly every policy of like kind offered by underwriters. The purchaser of the policy probably has no opportunity to read the policy language before purchase. And even when read, the import of much of the technical language used would, in most circumstances, escape notice. *Beyond that, in the unlikely event that the potential insured could both read and understand the policy before purchase, he or she would be powerless to negotiate any change*. In other words, in most cases the insurance

In another nod to the fact that many key forms of liability insurance are regulated and subject to approval by state insurance commissions, the Restatement rejects a “sophisticated-policyholder exception” to principles of policy interpretation. The Comments in § 4 state that the rejection of this exception places the responsibility for residual ambiguity on the party that provided the policy language, thereby creating an incentive to draft terms that are as clear as possible.<sup>188</sup> In addition, as commentators have noted, it is difficult to define what constitutes a “sophisticated policyholder.”<sup>189</sup>

D. SECTION 8 (AND RELATED SECTIONS, §§ 7–9): MISREPRESENTATION

Controversy surrounded the sections on misrepresentation, §§ 7–9, throughout the drafting process. This controversy is not surprising given the significance of misrepresentation as a defense to coverage. Unlike many other coverage defenses, a successful defense of misrepresentation allows the insurer to avoid coverage, effecting a forfeiture of the insured’s contract rights.<sup>190</sup> In part for this reason, insurers often use misrepresentation as a defense to coverage. Despite significant revisions over the life of the Restatement, and earlier during the years that the project was denominated as a Principles project, insurers and industry groups continue to attack these rules, particularly the materiality requirement defined in § 8. However, contrary to generalized protestation one often hears about the RLLI, the final Restatement includes many provisions insurers support (and supported).

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policy is the classic example of the ‘adhesion’ contract.” (emphasis added))). See also MASTERS ET AL., *supra* note 41, in Ch. 2 generally, and § 2.01 at 2–3 specifically for a discussion of Rahdert and other principles applicable to insurance-policy interpretation.

<sup>188</sup> RESTATEMENT OF THE L. OF LIAB. INS. § 4, cmt. d.

<sup>189</sup> E.g. John K. DeMugno, *The American Law Institute’s Restatement, Law of Liability Insurance: A Final Update*, 30 No. 6 CAL. INS. L. & REG. REP. NL 1 (July 2018). Cf. discussion of “cost-benefit analysis” in RESTATEMENT OF THE L. OF LIAB. INS. § 3 cmt. c, with discussion of “sophisticated policyholder exception” in RESTATEMENT OF THE L. OF LIAB. INS. § 4, cmt. h.

<sup>190</sup> In addition, this inherently fact-based inquiry typically is decided as a jury question, delaying a policyholder’s recovery until the often discovery-intensive litigation over such an issue has concluded and the issue has been tried to the finder of fact. For a discussion of misrepresentation as a coverage defense, see MASTERS ET AL., *supra* note 41, §§ 19.02 and 19.02A.

## 1. The Materiality Standard

Under § 7, a liability insurer may rescind an insurance policy if:

- (a) The misrepresentation was material as defined in § 8; and
- (b) The insurer reasonably relied on the misrepresentation in issuing or renewing the policy . . . .<sup>191</sup>

Section 8 defines a misrepresentation as material “only if, but for the misrepresentation, a reasonable insurer in this insurer’s position would not have issued the policy or would have issued the policy *only under substantially different terms*.”<sup>192</sup> The Restatement states that a claim of misrepresentation does not block the insurer’s duty to defend.<sup>193</sup> The Comments make clear that the insurer bears the burden to prove materiality as defined in § 8.<sup>194</sup>

Insurers complain that the “substantially different” part of this test is not supported either by case law or, in those states that have adopted a statutory standard, by statute. The Restatement, however, recognizes these differences. For example, the Comments explain that “[c]ourts have used a wide variety of verbal formulations to express the requirement encapsulated in this section by the phrase ‘substantially different terms.’”<sup>195</sup> In addition, while not stating a position of the ALI, the Reporters’ Note to this Section shows consideration of the law on this issue, citing and explaining standards adopted in various state statutes and cases.<sup>196</sup> The Comments continue by stating that this formulation helps avoid forfeiture of coverage in situations when “a fact having only an insubstantial effect on policy terms is not of sufficient objective relevance to the risk being insured.”<sup>197</sup>

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<sup>191</sup> RESTATEMENT OF THE L. OF LIAB. INS. § 7(2)(a)–(b).

<sup>192</sup> *Id.* § 8 (emphasis added).

<sup>193</sup> RESTATEMENT OF THE L. OF LIAB. INS. § 7(2). Neither the black letter nor the Comments make clear, however, that misrepresentation and other fact-based defenses to coverage do not obviate the duty to defend under the generally accepted “potential for coverage standard stated,” “four-corner,” and “eight-corner” rules and related law. *See, e.g.*, MASTERS ET AL., *supra* note 41, § 3.12[A].

<sup>194</sup> *See, e.g.*, RESTATEMENT OF THE L. OF LIAB. INS. § 8, cmts. c & e.

<sup>195</sup> *Id.* § 8, cmt. e.

<sup>196</sup> *Id.* § 8, Reporters’ Note.

<sup>197</sup> *Id.* § 8, cmt. e.

Despite insurers' continued attacks on the standard, surely it makes sense to avoid forfeitures of coverage and contract rights over trivial misrepresentations which, as the Restatement says, "a reasonable insurer would regard" as "trivial or inconsequential."<sup>198</sup> In fact, public policy (certainly equity) "abhors forfeiture,"<sup>199</sup> and a common-sense consideration of materiality includes this very concept.<sup>200</sup> At the ALI's 2018 Annual Meeting, the Reporters similarly explained the rationale on this standard as necessary to "prevent insurers from rescinding insurance policies based on trivial misstatements."<sup>201</sup> After debate and this explanation, the ALI membership on a voice vote defeated a motion to delete the "substantially different terms" language from § 8.

## 2. The RLLI's Acknowledgment of Legislation on Misrepresentation

In addition, the Restatement applies a "strict liability" standard. Policyholder representatives fought this, as a point of information. The standard adopted does not distinguish between intentional and "innocent" misrepresentations, although it does note the practical application of this standard in individual cases.<sup>202</sup> In doing so, the RLLI acknowledges the principles set forth in legislation on this issue. The Comments note the "strong fairness and efficiency objections to this

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<sup>198</sup> It also states, in response to policyholder critiques, that, in practice, the unfairness that many observers contend results from the absence of a knowledge requirement does not arise as frequently as might be supposed because legislation sometimes addresses this issue, and because courts sometimes find alternative grounds for reaching the same result. *Id.*

<sup>199</sup> *Maxim*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>200</sup> For example, a dictionary definition of "material" defines the term as "having real importance or great consequences." Merriam-Webster Online Dictionary. 2004. <http://www.merriam-webster.com> (last visited Feb. 15, 2021). Black's Law Dictionary defines "material" as "important; more or less necessary." *What is Material?* BLACK'S LAW DICTIONARY ONLINE <https://thelawdictionary.org/material/> (Last visited Feb. 5, 2021).

<sup>201</sup> Author's notes; *see also* RESTATEMENT OF THE L. OF LIAB. INS. 1 § 8, cmt. e. (AM. L. INST. 2019).

<sup>202</sup> RESTATEMENT OF THE L. OF LIAB. INS. 1 § 7, cmt. j (*The problem of innocent misrepresentations*) (AM L. INST. 2019). As stated in the Restatement, under the rules in most states (whether by common law or legislation) and the rule followed in § 7, "the misrepresentation defense is available to the insurer whenever there is reasonable and detrimental . . . on a material misrepresentation by the policyholder, even if the policyholder's misrepresentation was entirely innocent and unintentional." States may include other rules, not discussed in the RLLI, that may blunt the more Draconian effects of such a rule. *See* MASTERS ET AL., *supra* note 41, § 19.02 on misrepresentation.

strict-liability standard,” but point out that legislatures in most states have adopted that standard, as insurance-industry advocates sought during the RLLI process.<sup>203</sup>

Thus, the discussion of this strict-liability standard shows the deference paid by the *Restatement* to rules made by legislatures on insurance issues and belies criticisms by NCOIL and insurance industry groups that the Restatement somehow sought to usurp the role of legislatures in summarizing and synthesizing rules applicable to insurance. The fact is that some states have legislated on this (and certain other issues of insurance law) addressed in the Restatement but many have not, relying instead on the courts to develop common-law rules. The rules on misrepresentation, like those on so many other issues addressed in the Restatement, are in many cases common-law rules, appropriate for discussion in a Restatement.

While § 8 refers to a “reasonable insurer,” it is important to note that the standard is not strictly an objective one.<sup>204</sup> The RLLI Sections on misrepresentation include “both subjective and objective aspects.”<sup>205</sup> Section 7 requires proof that the insurer “reasonably relied” on the representation, a mixed standard.<sup>206</sup> Section 8 requires proof that “a reasonable insurer in this insurer’s position” (again, a mixed standard) would not have issued the insurance policy or would have issued it with substantially different terms absent the misrepresentation.<sup>207</sup> Section 9, similarly, includes both objective and subjective elements, referring to a “reasonable insurer” “in this insurer’s position.”<sup>208</sup>

A significant focus throughout these Sections is on “reasonableness” but through the lens of what the insurer in question would have done. This emphasis on reasonableness in applying this standard—which, of course, can void all coverage—is carried out in ways other than those just discussed. For example, Comments to § 7 state that the Restatement does not endorse the use of warranties as distinct from representations, as a separate defense to coverage:

Warranties are said to remain strictly enforced with respect to marine insurance, for which the most important coverage is a

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<sup>203</sup> RESTATEMENT OF THE L. OF LIAB. INS. 1 § 7, cmt. j (*The problem of innocent misrepresentations*) (AM. L. INST. 2019).

<sup>204</sup> *Id.* at § 8.

<sup>205</sup> *Id.* at §§ 7–9.

<sup>206</sup> *Id.* at § 8.

<sup>207</sup> *Id.*

<sup>208</sup> *Cf. supra* note 200, with RESTATEMENT OF THE L. OF LIAB. INS. 1 § 9 (*Reasonable-reliance requirement*) (AM. L. INST. 2019).

form of property insurance. When policyholders are relatively unsophisticated (as in the case of consumer policyholders), the strict application of warranty provisions is unduly harsh and unfair to insurance, as the law has increasingly recognized. This section does not follow the few remaining courts that retreat warranties as a separate category, outside the special context of commercial marine—insurance policies.<sup>209</sup>

### 3. Other Noteworthy Provisions Relevant to “Misrepresentation Defenses”

Finally, in a sensible and equitable rule—particularly where the remedy is forfeiture of contractual rights—under § 7(3), an insurer “must return all of the premiums paid for the policy” when “the policy is rescinded under subsection (2).”<sup>210</sup> It is more common than not for insurers to fail to repay premiums when asserting that the policy is “void *ab initio*.” A failure to require a return of premiums encourages such unfortunate conduct by insurers, allowing them to treat misrepresentation as any ordinary policy defense, while at the same time accusing their insureds of fraud. Clearly, insureds then are worse off than if no premium dollars had been paid at all.<sup>211</sup>

The Restatement also rejects the “contribute-to-the-loss rule” or “cause relation approach.” These principles limit an insurer’s ability to assert a misrepresentation defense to situations in which the policyholder’s misrepresentation actually “materialized in (‘contributed to’) the loss that occurred.”<sup>212</sup> The Restatement rejects this reasonable approach for four reasons, which gave substantial deference to insurer concerns, without much nod to those of insurance purchasers. For example, the Comments refer to “the problem of high-risk policyholders intentionally and dishonestly understating their risks in order to get coverage at a price that is subsidized by honest” policyholders.<sup>213</sup> The Comments do

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<sup>209</sup> RESTATEMENT OF THE L. OF LIAB. INS. § 7 (AM. L. INST. 2019). This distinction between marine and other types of insurance, of course, is well-recognized in the law. Statutes include other relevant provisions and use a mixed objective-subjective standard. See N.Y. INS. L. § 3105(C) (“[E]vidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible”). See also MASTERS ET AL., *supra* note 41, § 19.02[B].

<sup>210</sup> RESTATEMENT OF THE L. OF LIAB. INS. § 7 (AM. L. INST. 2019).

<sup>211</sup> *Id.* at § 9.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

not acknowledge the public policy favoring enforcement of contract, especially for boilerplate contracts like insurance policies which are imbued with important public purposes. Other rationales refer to “difficulties” faced by an insurer but fail to give even a nod to the hardship faced by insureds who face the common assertion of this defense when trying to enforce their coverage.”<sup>214</sup>

E. SECTION 12: INSURER LIABILITY FOR THE CONDUCT OF DEFENSE  
COUNSEL

Section 12, entitled “Liability of insurer for conduct of defense,” generated intense controversy throughout the drafting process which continues, it seems, unabated today. Early drafts of the Section stated that an insurer could be vicariously liable for actions by insurer-retained defense counsel who breach their duty of care to insured clients in the course of the defense.<sup>215</sup> After multiple revisions, the Section was revised to apply traditional tort liability for negligent hiring and supervision to only those situations in which the insurer has undertaken to direct the action of defense counsel appointed by the insurer to defend the insured.

Negligent supervision of counsel retained by the insurers, without more, does not provide a basis for insurer liability under the rule stated in the RLLI. The final version of § 12 imposes liability on an insurer into two situations: first, when the insurer chooses counsel without exercising reasonable care; and, second, when the insurer specifically directs the conduct of the defense:

- (1) If an insurer undertakes to select counsel to defend a legal action against the insured and fails to take reasonable care in doing so, the insurer is subject to liability for the harm caused by any subsequent negligent act or omission of the selected counsel that is within the scope of the risk that made the selection of counsel unreasonable.

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<sup>214</sup> *Id.*

<sup>215</sup> While acknowledging a “dearth of reported case law” on the topic, the Reporters relied on provisions in the Restatement, Third, Agency, as support for this principle. Although case law is split on the issue, a majority of courts treat defense counsel as independent contractors whose conduct cannot then be imputed to the insurer that retained them to defend the insured. *Compare, e.g.,* Feliberty v. Damon, 531 N.Y.S.2d 778 (N.Y. 1988), and Ga. Code § 33-7-12; *with* Continental Ins. Co. v. Bayless & Roberts, Inc., 608 P.2d 281, 294 (Alaska 1980).

(2) An insurer is subject to liability for the harm caused by the negligent act or omission of counsel provided by the insurer to defend a legal action when the insurer directs the conduct of the counsel with respect to the negligent act or omission in a manner that overrides the duty of the counsel to exercise independent professional judgment.<sup>216</sup>

The principles in § 12(1) parallel the general tort law under which a defendant may be found liable when its negligence proximately causes harm in discussing the shift in approach as set forth in the final Restatement, the Comments explain that, “if liability insurers ensure that their chosen defense counsel have adequate liability insurance to cover the consequences of malpractice, there is no need for that vicarious-liability rule.”<sup>217</sup>

Insurers continue to complain about this Section, despite the significant revisions made to address their many comments and concerns. If a person acting as principal to another acting as agent commits negligent acts causing injury, a claim for liability arises. If an insurer takes action to override a defense lawyer’s duty of care to the insured client, it is reasonable to impose liability on the insurer for any professional malpractice that results.<sup>218</sup> The continuing controversy also is ironic given the insurers’ treatment of this provision in *Sapienza*<sup>219</sup> where, as discussed above, the Section is cited. The court relied ultimately on case law around the country to support the approach followed in § 12 (and to reject the minority rule favored by the insured). In another instance, the court rejected § 12 as contrary to the state law that governed there.<sup>220</sup>

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<sup>216</sup> RESTATEMENT OF THE L. OF LIAB. INS. §§ 12(1), 12(2) (AM. L. INST., Draft Sept. 7, 2018).

<sup>217</sup> *Id.* § 12, cmt. e. (*The vicarious-liability rule rejected*).

<sup>218</sup> *See, e.g.*, RESTATEMENT (THIRD) OF THE L. GOVERNING LAWYERS § 134. Cited in the Restatement § 12, cmt. d. (*Insurer liability when overriding the duty of the defense counsel to exercise independent judgment*).

<sup>219</sup> *See* discussion of *Sapienza*, *infra* pp. 156–159. Interestingly, the insurer in *Sapienza*, Liberty Mutual Fire Insurance Company, has argued in another venue that the ALI “invented” the rules set forth in § 12. NCOIL, Property & Casualty Insurance Committee, Minutes of Meeting held Dec. 7, 2018, at 2 (comments by Assistant Vice President, made after the Proposed Final Draft No. 2, dated Sept. 28, 2018, issued) (discussed *supra* note 133). In response to the insured’s citation of § 12, the *Sapienza* court conducted its own research on the issues, citing case law that specifically supports the rules set forth in § 12.

<sup>220</sup> *See* case-law discussion, *infra* pp. 156–159 (discussion of *Sapienza* cases).

In addition, the amicus brief submitted in *Sapienza* by insurance industry groups, the Complex Insurance Claims Litigation Association (CICLA) and NAMIC, did not cite the Restatement. This is consistent with what insurer representatives have confirmed is the practice by the insurance industry to reject affirmative citation to, or reliance on, the Restatement, presumably because the insurance industry is promoting legislation in many states that seeks to discourage, or even forbid, citation to the *Restatement*.

F. OTHER SECTIONS OF THE RLLI SUBJECT TO SIGNIFICANT  
CONTINUING CRITICISM BY THE INSURANCE INDUSTRY

Even committed opponents, such as the NAMIC and the American Property & Casualty Insurance Association (APCIA), acknowledge,<sup>221</sup> as it would seem they must, that many of the 100+ principles of law discussed in the Restatement do not raise concerns for insurance companies. If, as is true in many instances, the Restatement is stating a majority rule, then, surely, having courts, parties in litigation, and others refer to the RLLI's overview of the law, prepared during years of work by some of the best minds in the legal profession, should be considered by fair-minded professionals a positive.

In addition to the issues identified above, the issues below also continue to be identified as concerns by insurer industry proponents.

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<sup>221</sup> NCOIL Committee Minutes state that “NAMIC has joined forces with the [APCIA] to undertake a national project to address the Restatement and both organizations have approached it in such a way as to address it in three ways.” NCOIL, Property & Casualty Insurance Committee, *supra* note 72, at 2. The “three ways” include an effort that (i) “fixes the problems with the Restatement in that state,” acknowledging that “one size” does not fit all States; (ii) ensures that the legislative committee that addresses the industry bill in question is the insurance committee, not the judiciary committee, which “might alter the intent of the bill”; and (iii) “appropriately address[es] separation of powers” and the “state’s constitutional requirements in terms of what a legislature can say to the courts.” These “ways” recognize, contrary to statements captured in some of the Committee Meeting Minutes and in insurance industry criticisms of the RLLI, that many issues addressed in the Restatement have not been addressed in state legislation; and that efforts to undermine the Restatement and preclude courts from even reviewing it may run afoul of separation of powers principles integral to our form of government. *Id.* at 2–3.

## 1. Section 13: Duty to Defend / “One-Way Rule”

The duty to defend is one of the two fundamental duties of a liability insurance company and a primary reason businesses and individuals purchase liability insurance. Under the standard used by the vast majority of courts and endorsed by the Restatement, a liability insurer is obligated to defend if the allegations against the insured raise at least a potential for coverage under the policy. The black letter of the Restatement supports that standard, and the Comments specifically refer to it in those terms.<sup>222</sup>

The Restatement thus supports application of the duty to defend when “the insurer knows of an allegation that, under existing pleading rules, could reasonably be expected to be added as an allegation to the legal action, and that, if so added, would require the insurer to defend the action.”<sup>223</sup> The Restatement uses the “complaint allegation rule,” often called the “four-” or “eight-corners rule,” and limits the standard to “facts known to the insurer.”<sup>224</sup> The insurer “must resolve any factual assertion in favor of the duty to defend.”<sup>225</sup> The RLLI makes clear that, except for the six exceptions identified in §§ 13(3)(a)–(f)<sup>226</sup>—added at the behest of

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<sup>222</sup> RESTATEMENT OF THE L. OF LIAB. INS. § 13, cmt. b. (*The potential for coverage*) (AM. L. INST., Draft Sept. 7, 2018).

<sup>223</sup> *Id.* § 13, cmt. b. (*The potential for coverage*).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* § 13(3)(a)–(f). The exceptions set forth in § 13 follow:

(3) An insurer that has the duty to defend under subsections (1) and (2) must defend until its duty to defend is terminated under § 18 by declaratory judgment or otherwise, unless facts not at issue in the legal action for which coverage is sought and as to which there is no genuine dispute establish that:

(a) The defendant in the action is not an insured under the insurance policy pursuant to which the duty to defend is asserted;

(b) The vehicle or other property involved in the accident is not covered property under a liability insurance policy pursuant to which the duty to defend is asserted and the defendant is not otherwise entitled to a defense;

(c) The claim was reported late under a claims-made-and-reported policy such that the insurer’s performance is excused under the rule stated in § 35(2);

(d) The action is subject to a prior-and-pending-litigation exclusion or a related-claim exclusion in a claims-made policy;

the insurance industry—this principle applies “in one direction only,” “[e]xcept as provided in subsection (3) and discussed in Comment c, the consideration of facts outside the complaint works in one direction only: facts or circumstance is not alleged in the complaint or comparable document generally may not be used to justify a refusal or failure to defend.”<sup>227</sup>

The Restatement therefore adopts the common law, which has upheld the promise of a defense for the insured as long as the allegations or evidence outside the complaint supports the duty. While insurers have objected to this “one-way rule,” the majority of the courts uphold the use of such “extrinsic evidence” to activate the duty to defend as the Comments note.<sup>228</sup> This is true even if facts outside the complaint conflict with the plaintiff’s allegations but support coverage.

The traditional “four-corners” or “eight-corners rule” was of course designed as a rule of inclusion, not exclusion. The insurance industry sought to change this project from a Principles project, to a Restatement; and fought against any rule in the Restatement drafts that was not a majority rule. Insurers then should not be heard to complain about this rule, as this law specifically derives from contract, the protective nature of insurance, and the “piece of the rock” representations made by insurers to purchasers at the time of purchase.<sup>229</sup>

2. Section 19 (with Reference to §§ 15 and 50):  
Consequences of Breach of the Duty to Defend

Section 19 served as a flashpoint throughout the drafting of the Restatement. Under both the Principles, approved in 2014, and initial drafts of the Restatement, a breach of the duty to defend deprived a liability insurer of its right to assert coverage

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(e) There is no duty to defend because the insurance policy has been properly cancelled; or

(f) There is no duty to defend under a similar, narrowly defined exception to the complaint-allegation rule recognized by the courts in the applicable jurisdiction.

<sup>227</sup> *Id.* § 13, cmt. b. (*The potential for coverage*).

<sup>228</sup> *Id.* § 13, cmt. a. (*The duty to defend and the complaint-allegation rule*).

<sup>229</sup> It is true, however, that insurers representatives did peek in meetings. I attended to reject this “potential for coverage” standard in favor of “actual facts.” That effort lost, as it does not compare with the almost universal rule.

defenses, even if the breach was not in bad faith. Those drafts noted the prophylactic effect of that approach in encouraging insurers to honor their duty to defend.<sup>230</sup>

However, after rounds of comments and revisions, the final Restatement deleted from the black letter of this section any reference to forfeiture of coverage defenses as a remedy for breach of a liability insurer's duty to defend. As now configured, § 19 states a non-controversial position, which the Comments note is the "prevailing legal rule": "An insurer that breaches the duty to defend a legal action forfeits the right to assert any control over the defense or settlement of the action."<sup>231</sup> The Comments note that the remedy set forth in the final RLLI is available only for a "material breach" of the duty to defend, defined as "a refusal to defend when required, a provision of a materially inadequate defense, a failure to provide an independent defense when required, and a withdrawal of a defense when the duty has not terminated."<sup>232</sup>

This provision must be considered in light of other relevant sections in the *Restatement*. For example, as shown in § 15, entitled "*Reserving the right to contest coverage*," liability insurers that fail to "timely reserve their rights to contest coverage lose those rights."<sup>233</sup> These provisions note that the rule is now "well established" that "an insurer that does not raise the ground for contesting coverage should be understood to have waived its right to contest coverage in nearly all cases."<sup>234</sup>

Similarly, Comments to § 50, addressing insurer liability for bad faith, identify a forfeiture of coverage defenses as a potential remedy for insurer bad faith "as justice requires."<sup>235</sup> The Comments to § 50 discuss the basis for this rule which the RLLI says, "reinforces the importance" of the "litigation insurance" policyholders seek to purchase when buying CGL coverage:

The loss-of-coverage-defense remedy is particularly appropriate when an insurer refuses to defend in bad faith. Requiring the insurer to pay for a judgment or settlement entered in such a case reinforces the importance of the defense coverage provided by traditional liability insurance policies, which promise to pay for the defense of any potentially covered claim and, in most cases, also to select the

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<sup>230</sup> RESTATEMENT OF THE L. OF LIAB. INS. § 21 cmt. c (AM. L. INST., Draft Jan. 22, 2016).

<sup>231</sup> RESTATEMENT OF THE L. OF LIAB. INS. § 19 (AM. L. INST. 2019).

<sup>232</sup> *Id.* at § 19, cmt. b.

<sup>233</sup> *Id.* at § 15, cmt. a.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* § 50, cmt. c.

defense lawyer and manage the defense. An insurer that could abandon the defense whenever it concluded that the coverage-relevant facts were in its favor, without any risk of having to pay a judgment or settlement of the action, would have an incentive to do so.<sup>236</sup>

This loss-of-coverage-defense remedy also draws support from two places:

- (i) the rule followed in the minority of states, under which an insurer that breaches its duty to defend loses its coverage defenses, without regard to whether it acted in bad faith or whether available compensatory damages provide sufficient deterrence; and
- (ii) the rule in § 15, pursuant to which an insurer that defends without a reservation of rights loses its coverage defenses.<sup>237</sup>

In some quarters, § 15 has generated more controversy than might be expected.<sup>238</sup> However, the provisions in this Section come right out of insurance claim-handling and settlement statutes adopted around the country. For example, the Model Unfair Claims Settlement Practices Act (UCSPA) was promulgated by the National Association of Insurance Commissioners (NAIC) to promote fair practices and protect the public from unfair practices. The Model UCSPA defines, for example, the following as unfair practices: knowingly misrepresenting relevant facts or policy provisions relating to coverages at issue and “failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising

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<sup>236</sup> *Id.*

<sup>237</sup> *See id.* § 15, cmt. a. (*The basis for the reservation-of-rights requirement*). The rule arises, in part, from estoppel. The comments also note the difficulty insureds may face “to demonstrate detrimental reliance, particularly in the consumer context.” *Id.* These comments also differentiate between the “full-coverage case,” and others where conflicts of interest may arise between the insured and the insurer. *Id.*

<sup>238</sup> *See, e.g.,* Patricia McHugh Lambert, *A Primer on Controversy: Restatement of the Law, Liability Insurance*, JD SUPRA (June 12, 2019), <https://www.jdsupra.com/legalnews/a-primer-on-controversy-restatement-of-78757/>.

under its policies.”<sup>239</sup> It also provides for cease-and-desist orders, fines, and suspension or revocation of licenses as statutory remedies.

### 3. Sections 24 and 27: The Duty to Make Reasonable Settlement Decisions

Section 24, entitled “The Insurer’s Duty to Make Reasonable Settlement Decisions,” addresses what is, of course, another key protection that policyholders seek when they buy liability insurance: Coverage for settlements. Most insureds would prefer, when possible and consistent with their interests, to settle an action rather than to continue to fight it in court. As noted in the Comments, this Section seeks to clarify various strands found in the law, including the law on the duty of good faith and fair dealing and that on insurer bad faith.<sup>240</sup> As the Comments note, “the ultimate test of liability is whether the insurer’s conduct was reasonable under the circumstances.”<sup>241</sup>

This duty, often called generically “the duty to settle,” arises when the insurer has authority to settle the case against the insured, the policyholder faces a potential for a judgment in excess of policy limits. The Restatement defines the duty as follows:

#### **§ 24. The Insurer’s Duty to Make Reasonable Settlement Decisions**

(1) When an insurer has the authority to settle a legal action brought against the insured, or the insurer’s prior consent is required for any settlement by the insured to be payable by the insurer, and there is a potential for a judgment in excess of the applicable policy limit, the insurer has a duty to the insured to make reasonable settlement decisions.

(2) A reasonable settlement decision is one that would be made by a reasonable insurer that bears the sole financial responsibility for the full amount of the potential judgment.

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<sup>239</sup> UNFAIR CLAIMS SETTLEMENT PRACTICES ACT § 4 (NAIC 1997). The Act provides no private cause of action but shows applicable standards of conduct. *Id.* § 1. Its applicability is limited because it requires proof that the conduct constitutes a “general business practice.” *Id.* § 3.

<sup>240</sup> RESTATEMENT OF THE L. OF LIAB. INS. § 24, cmt. a (AM. L. INST., Discussion Draft Mar. 2, 2015).

<sup>241</sup> *Id.*

(3) An insurer's duty to make reasonable settlement decisions includes the duty to make its policy limits available to the insured for the settlement of a covered legal action that exceeds those policy limits if a reasonable insurer would do so in the circumstances.<sup>242</sup>

As noted above, § 24 defines the duty as “one that would be accepted or made by a reasonable person who bears the sole financial responsibility for the full amount of the potential judgment.”<sup>243</sup> The RLLI defines “the ultimate test of liability” as “whether the insurer's conduct was reasonable under the circumstances.”<sup>244</sup>

Section 27 defines the remedies recoverable for breach of this duty, using the time-honored *Hadley v. Baxendale*<sup>245</sup> standard of foreseeability:

### § 27. Remedies for Breach of the Duty to Make Reasonable Settlement Decisions

(1) An insurer that breaches the duty to make reasonable settlement decisions is subject to liability for any foreseeable harm caused by the breach, including the full amount of damages assessed against the insured in the underlying legal action, without regard to the policy limits.<sup>246</sup>

The Comments explain that, if the insurer breaches this duty, the insured is entitled to recover the policy limit and any “excess judgment,” which is “the paradigmatic measure of damages in a breach-of-settlement-duty lawsuit against an insurer.”<sup>247</sup> The Section sets forth an objective, “reasonable insurer” standard.

Some commentators have considered this “a broad duty” (meaning too broad a duty). In truth, again, it comes out of principles provided in insurance claims-

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<sup>242</sup> *Id.* § 24(1)–(3).

<sup>243</sup> *Id.* § 24(2); *see also id.*, cmt. b. Comments c.–l. discussing what constitutes “reasonableness,” causation, and proof. Comment c says that, like the “general duty of good faith and fair dealing, this settlement duty requires “the insurer to give equal consideration to the interests of the insured, “as to its own.” *Id.*

<sup>244</sup> *Id.* § 24, cmt. a. (*Relationship to the duty of good faith and fair dealing*).

<sup>245</sup> *Hadley v. Baxendale* [1854] EWHC J70 (156 ER 145, 9 Ex. Ch 341 (1854)).

<sup>246</sup> RESTATEMENT OF THE L. OF LIAB. INS. § 27(1). (AM. L. INST. 2019).

<sup>247</sup> *Id.* § 27, cmt. a. (*Liability for excess judgment*).

handling and settlement statutes around the country which seek to enforce reasonable claims-handling and settlement practices, and, thus, is not a fundamental reworking of insurer obligations or the law (statutory or common law) governing them. Again, if a State has established statutory or common-law on these issues, that law governs.

#### 4. Sections 47–50: Remedies

These provisions continue to generate controversy, but, as with other sections, were revised significantly throughout the process in response to insurer (and other) comments. Insurers considered particularly controversial one “innovation” in the proposed black letter, stating that insureds should be able to recover attorneys’ fees when they succeed in lawsuits to enforce coverage. While certain States allow recovery of such fees either by statute or common law,<sup>248</sup> the American Rule, providing that each party pays its own fees, prevails in many other states.

Other provisions state rules that are commonly accepted. For example, § 48 states that an insured seeking a determination of rights under its liability insurance policy is entitled to a variety of remedies that are commonplace in contract actions, and ones that lawyers take for granted. For example, can it be controversial that a policyholder is entitled to the following remedies identified in subsection (1)-(8)?

#### § 47. Remedies Potentially Available

An action seeking determination of the rights of the parties to a liability insurance policy may be brought by either the insurer or the insured. In such an action, the remedies that may be available include:

- (1) A declaration of the rights of the parties;
- (2) An award of damages under § 48;

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<sup>248</sup> *E.g.*, FLA. STAT. § 627.428(1) (2020); N.J. CT. R. 4:42-9; *Travelers Indem. Co. v. Rosedale Passenger Lines Inc.*, 55 F.R.D. 494 (D. Md. 1972) (applying Maryland common law to award attorney fees to policyholder who had to sue to enforce coverage). *See also* MASTERS ET AL., *supra* note 41 § 11.13[B]. Even insurers have sometimes argued for the right to recover attorney fees for a policyholder. *Liberty Mut. Ins. Co. v. Continental Cas. Co.*, 771 F.2d 579 (1st Cir. 1985) (insurer vs. insurer case) (Br. of Plaintiff-Appellee Liberty Mut. Ins. Co. (filed Mar. 1, 1985)).

- (3) Court costs or attorneys' fees to a prevailing party when provided by state law or the policy;
- (4) If so provided in the liability insurance policy or otherwise agreed by the parties, an award of a sum of money due to the insurer as recoupment of the costs of defense or settlement;
- (5) Collection and disbursement of interpleaded policy proceeds;
- (6) Payment or return of premiums;
- (7) Indemnification of the insurer by the insured when state law permits recovery from highly culpable insureds; and
- (8) Prejudgment interest.<sup>249</sup>

Under § 48, in reliance on § 27, insureds harmed by their insurers' failure to make reasonable settlement decisions may recover "for any foreseeable harm caused by the breach, including the full amount of damages assessed against the insured in the underlying legal action, without regard to the policy limits."<sup>250</sup> Section 48 also provides that, in addition to the cost of the defense, and indemnification for amounts required to indemnify the insured, an insured may also recover the following for breach of a liability insurance policy:

Any other loss, including incidental or consequential loss, caused by the breach, provided that the loss was foreseeable by the insurer at the time of contracting as a probable result of a breach, which sums are not subject to any limit of the policy.<sup>251</sup>

While insurers continue to complain about this provision, it is a venerable, first-year contracts principle that the party breaching a contract is responsible for the consequential damages from this breach that were foreseeable at the time of contracting.<sup>252</sup>

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<sup>249</sup> RESTATEMENT OF THE L. OF LIAB. INS. § 47(1)–(8). (AM. L. INST. 2019).

<sup>250</sup> *Id.* § 27, cmt. c. (*Other foreseeable loss*); see also *id.* § 48(3).

<sup>251</sup> *Id.* § 48(4).

<sup>252</sup> *E.g.*, *Hadley v. Baxendale*, [1854] EWHC J70.

## VI. CONCLUSION

The Restatement presents cause for satisfaction and cause for unhappiness—by both policyholders and insureds, on the one hand, and insurers, on the other. There is, as shown in the discussion of commentaries and legislation above, however, an “inequality of arms” and approach in how the two sides have addressed these concerns. This of course reflects the institutional advantages enjoyed by insurers. As shown by insurer directives to their counsel not to cite the Restatement—even when it supports their position—this approach seems perverse. Regardless, consistent with rules of good process and ethical standards that call for full disclosure, those who endeavor to critique the ALI process should engage in good and fair process themselves, consistently disclosing their affiliations and whether they are being paid for their time in writing and speaking on the topic; and seek to include contrasting viewpoints.

We look forward to using the Restatement as support and as a foil as we represent clients and we hope to contribute to our practice area in years to come.