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## Insurers Concerned As New Legal Guidelines Are Drafted By Prominent Group

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Insurers are concerned by the early returns from the American Law Institute as it dedicates one of its Restatements to liability insurance – a project that could result in suggested new guidelines for judges handling those cases.

The ALI completed its most recent session dedicated to its Restatement of the Law of Liability Insurance project earlier this month in Philadelphia, and some industry attorneys expressed caution at the possible ramifications.

The ALI issues “Restatements” of certain areas of the law in attempts to guide judges who handle those cases. The final result of liability insurance project is scheduled to be discussed at a May meeting.

Laura Foggan, an attorney at Wiley Rein in Washington, D.C., says there are a number of sections in the Restatement draft that trouble insurance companies.

“There are many sections that appear to be aimed at crafting new legal rules, generally with a tilt against insurers and often to the detriment of the insurance system,” Foggan said.

She explained, in her opinion, the Restatement draft took that approach instead of “undertaking a straightforward effort to restate or codify the existing law on liability insurance.”

“Historically, courts have given weight to Restatements as well-respected summaries of black-letter law. But when Restatements instead assume roles as self-appointed advocates for approaches deemed to be ‘better,’ their applicability in court cases is far more controversial and they should not be given any special weight,” Foggan stated.

The ALI picked two “reporters” to lead the effort, one of whom is University of Pennsylvania Law School professor Tom Baker.

Baker stated the feedback to which the ALI listened most was from judges.

“Most of the lawyers personally involved with the project either represent insurance companies regularly or policyholders regularly. It’s a practice where people typically don’t do both sides,” Baker said.

“They come from a particular perspective. Whereas judges, they just want a good set of rules that they can follow.”

Foggan, though, pointed to one section which she believed undermines a longstanding rule that insurance contract language must be given its plain meaning. She fears that suggesting judges do otherwise might lead them to look to information outside the terms of the policy in question to determine its meaning.

“This would inject great uncertainty and expense into insurance cases,” Foggan said.

Foggan also alluded to the Restatement draft potentially creating a new penalty for an insurer that unreasonably fails to defend a policyholder, forcing it to automatically provide indemnity coverage while paying defense costs owed from the failure to defend.

“Another controversial provision still being considered proposes a newly invented approach under which an insurer that reasonably rejects a settlement of an underlying claim against its policyholder could be liable above its coverage limit for an excess judgment entered against the policyholder – even though it acted reasonably,” Foggan commented.

Lastly, Foggan indicated another example of Restatement rules having the potential to have a major impact on cases is the proposal for shifting

responsibility for fees.

Under that proposal, the payment of fees incurred in litigating insurance disputes is shifted to an insurer if it loses on whether it has a duty to defend, which is a departure from the American Rule – i.e., the basic rule of American common law that each party is responsible for paying its own litigation fees,” she said.

Though a final stage of the project has yet to reach completion, Foggan reiterated insurer caution on various portions of the draft which has been presented thus far.

“The ALI Restatement of the Law of Liability Insurance project is still underway, so we will have to see what ultimately is presented as the final product, but there are serious insurer concerns with various parts of the current draft,” Foggan said.

Foggan’s concerns were echoed by David G. Harris of Goldberg Segalla in Greensboro, N.C., who questioned if the ALI’s proposed Restatement rules were in line with established precedent.

“Generally speaking, I would say that there has been a lot of concern among those in the legal field who handle insurance law matters that many of the rules that have been adopted by ALI in the Restatement of the Law of Liability Insurance are at odds with established precedent in many jurisdictions,” Harris said.

Harris expressed his opinion that the Restatement does not appear to always adhere to the ALI’s stated purpose of setting forth clear formulations of common law, “as it presently stands or might appropriately be stated by a court.”

“Given the enormous influence of the ALI’s Restatements in the legal field, the Restatement of the Law of Liability Insurance will certainly impact the development of law in ways that may not be in line with established precedent,” Harris added.

Another attorney, Randy Maniloff of White & Williams in Philadelphia, opined precedent would more likely be given greater consideration where applicable, but also that the ALI rules may be chosen as the guidelines necessary to resolve situations without such precedent.

“Liability insurance coverage is a rule-based area

of the law. There are certain issues that arise regularly and each state often has two or three choices of which rule to adopt to address the issue," Maniloff said.

Maniloff reiterated established law would likely rule the day where available, but that the ALI guidelines would possibly be given greater weight in situations where the law was non-existent or less clear.

"The ALI Restatement is providing its determination on what many of these rules should be," Maniloff said.

"If a state has clear law on a rule, I see the ALI Restatement having no impact. In other words, I do not see a court ignoring precedent and instead opting to adopt the ALI's rule.

"However, if a state has no law on an issue, or it is not clear, I can imagine the court looking to the Restatement, knowing the seriousness of purpose of the ALI, and opting to adopt the Restatement rule to resolve the issue."

Sherilyn Pastor, of McCarter & English in Newark, N.J., said the Restatement is likely to shape courts' treatment of future insurance disputes and will be helpful to judges.

"The Restatement provides a detailed analysis of various complex insurance issues, and it offers the common law rules that have developed around them," Pastor said.

"The Restatement's rules and its in-depth treatment of issues will be enormously helpful to judges wrestling with complicated issues, particularly where they have not previously been decided by courts in their jurisdiction."

According to Pastor, the Restatement "details the law and best thinking on a variety of insurance-related rules and issues, including how insurance policies should be interpreted, insurers' obligations to defend their policyholders when they are sued, and, the consequences for an insurer that breaches its promises to its policyholder."

Though, Pastor indicated the Restatement's treatment of certain issues has become controversial since its impact "could greatly affect

