

Shaping the Law

The forthcoming Restatement of the Law of Liability Insurance appears to be largely pro-insured, but the document may not have much impact on the very specialized field anyway.

The American Law Institute is preparing a publication, slated for release in mid-2017, that it hopes will have a major impact upon the law governing liability insurance claims. The co-authors (reporters) of this project have been energetic consumer protection advocates; consequently, there is profound concern the project has strayed from its stated purpose and undertakes to shift the law against insurers.

Restatements are ALI publications which “aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court.” In the past, Restatements have sought to codify and promote a more uniform body of common law and to clarify rules reflected in judicial decisions. Restatements often have been adopted by courts, shaping the common law.

The Restatement of the Law of Liability Insurance creates rules pertaining to all aspects of liability insurance law—including interpretation, duty to defend, duty to settle, application of limits and retentions, waiver, trigger and allocation, and bad faith. Thus far, the Restatement’s approved drafts have formulated pro-insured rules on key issues. It includes rules deeming extrinsic evidence admissible whether or not an insurance contract provision is ambiguous. This may preclude efficient disposition of cases by, among other things, establishing onerous discovery obligations falling upon the insurer only. In like manner, the duty to defend is extended in a seemingly limitless manner. And new duty to settle rules introduce what appears to be a higher standard for insurers to settle cases within policy limits relative to the prevailing bad faith standard. Throughout, even superficially neutral



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provisions commonly are reshaped by accompanying comments implementing a pro-insured construction.

Those rules that do not favor the policyholder tend to concern matters of lesser consequence. An exception noted by some is the Restatement’s nominal acceptance of pro rata allocation in long-tail cases, consistent with the majority of relevant jurisdictions. However, the Restatement’s pro rata rule seems narrowly articulated, not expressly applying, for example, to defense costs.

The content matters, of course, only inasmuch as courts adopt this Restatement. They well might not. Consider that ALI acknowledges that a Restatement merits judicial consideration insofar as it reflects the “informed consensus” of ALI’s members. Early Restatements on fundamental subjects such as torts or contracts met this standard. (No attorney can be admitted to the bar without a working knowledge of such primary subjects. So most ALI members approving past Restatements probably understood the substance and legal import of that to which they were giving ALI’s imprimatur.) More recently, however, Restatements have been deemed “of questionable value,” as Justice Antonin Scalia observed in a 2015 opinion.

Notably, liability insurance law, including topics such as directors and officers liability policies and allocation of long-tail claims, is a decidedly specialized field. Most voting members of ALI profess no expertise in liability insurance law. Such members must place faith in the Restatement’s advisers and an ad hoc consultative group, surprisingly few members of which claim comprehensive expertise in liability insurance litigation, and which bodies have no veto power over the reporters who draft the rules. Accordingly, insofar as this Restatement ultimately fails to reflect an informed consensus, courts may give it no more deference than it merits: essentially that of a law review article—openly opinionated, while hardly authoritative.

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