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ALI Shouldn't 'Teach' Insurance Restatement In A Courthouse

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In May 2018, the American Law Institute approved the first Restatement of the Law on Liability Insurance, or RLLI. As is well-known, the RLLI has been mired in controversy. Initially, the RLLI began in 2010 as a "Principles" project. For the first time in its history, two years into the project — and after the ALI had already approved two of the project's four chapters — the ALI recharacterized the project as a restatement.[1]

Prior to the May, 2017, ALI annual meeting, a "firestorm of protest erupted from the defense community … along with state insurance regulators, trade industry associations, individual insurers, and outside defense counsel"[2] causing the ALI to adjourn the vote approving the RLLI for a year, with the understanding the reporters[3] would address the concerns that had been raised.

Indeed, there was so much controversy regarding the RLLI that numerous constituencies, including governors, legislators, judges, regulators, policyholders, insurers and insurance trade organizations, made hundreds of submissions to the ALI and the reporters[4] to voice their alarm with the RLLI and to request that it be revised to correct misstatements or mischaracterizations of the law, to delete novel provisions that, while possibly appropriate for a principles project, were not appropriate for a restatement and to omit provisions — within the province of legislators and regulators and outside the purview of the ALI — that established changes in public policy.[5]

In response to this public outcry, the ALI and the reporters did correct several controversial provisions of the RLLI but numerous controversial provisions remain, some of which have either no — or scant — legal authority and are more in line with a "Principles" document that sets forth what the reporters aspire the law to be in contrast to stating what the law actually is.[6]

Even though, as of January 2015, the ALI recognizes that a restatement can set forth a "better rule," and thereby is not compelled to follow the majority rule, that rule still must be tethered to a body of respected legal authority.[7] This is particularly true because, as the ALI recognizes, "[a]n unelected

body like [the ALI] has limited competence and no special authority to make major innovations in matters of public policy."[8]

The Marketing Campaign

With the approval of the RLLI in May 2018, the ALI has now begun a campaign to, in effect, sell it. Consequently, reporter Tom Baker has undertaken a busy travel schedule to "teach" the RLLI to various audiences across the country. These presentations include, in addition to various law-firm and bar-sponsored events, events actually sponsored by the bench. For example, the Chief Judge of the United States District Court for the Southern District of Texas and a judge of the United States Court of Appeals for the Fifth Circuit are hosting a program at the federal courthouse in Houston, Texas, on the RLLI on Feb. 25, 2019. The notice from the ALI advertising the event states that Baker "will lead a discussion of the areas of controversy and how the [RLLI] will be helpful to courts and lawyers in Texas.[9]

The Courtroom, Not the Courthouse

This invitation raises disturbing issues that one can fairly assume have not been brought to the attention of the sponsoring judges. First, and the most obvious concern, is that judicial sponsorship will readily lead to the conclusion that the sponsoring judges have implicitly endorsed the RLLI. While each judge is more than capable of making up his or her own mind about the legitimacy of the RLLI, there can be no question that a program sponsored by judges with an explicit goal of discussing "*how* the [RLLI] will be helpful to courts and lawyers in Texas," (emphasis added) has already assumed the RLLI will be helpful, begging the first key question of "whether" it will be helpful.

If the ALI wants to promote the RLLI, judges should not be asked to lend the prestige of their office to aid in that promotion.[10] While there is no question that judges may be ALI members and thereby participate in the ALI process to complete a restatement, a different concern is raised when, after a restatement has been completed, they are asked to promote a restatement by sponsoring an ALI event in a courthouse with all the dignity that portends.

The central issue of whether the RLLI will be useful to courts and lawyers (in Texas and elsewhere) is already being vigorously debated in numerous federal and state courts across the country, in a setting where parties have a full opportunity to be heard and judges have a full opportunity to study the particular issue in depth.[11] The forum for the debate about the usefulness of the RLLI is all the more important because the ALI readily admits that restatements are not limited to restating the law. Rather, restatements are on a "quest to determine the best rule," which "will also effect changes in the law, *which is proper for an organization of lawyers to promote*…."[12]

In the case of the RLLI, the very fact that it is not limited to restating the law and was undertaken as a "quest" to determine the "best rule" is, in part, what has generated so much controversy. When combined with scant or no legal authority, it is clear that the proper treatment of the RLLI should be and will be debated in court. Judges who are ALI members should not be put in the awkward position of hosting an ALI event to market an ALI product with the unintended consequence of seemingly endorsing

it. This is all the more true regarding the RLLI where Ohio, for example, has taken the extraordinary step of enacting legislation to reject the RLLI in its totality.[13]

Second, the very judges hosting this event (or other judges hosting similar events) are likely to handle liability insurance coverage cases that (1) ask them to adopt certain provisions of the RLLI and (2) may even present them with the situation of having to rule upon an expert opinion proffered by Baker.[14] While there is little doubt about the ability of judges to separate a reporter's advocacy of a restatement he or she wrote from his or her advocacy as an expert, judges should not be put in the position of having to show there is no conflict between hosting an event about the benefits of the RLLI and thereafter being called upon to reject it as not beneficial or in line with the relevant law, let alone no appearance of a conflict, particularly where, as here, the ALI and reporter Baker have ample other venues in which to promote the RLLI.

Third, while this event is open to the public,[15] it is fair to say that few, if any, of the attendees, other than Baker, will have read all 50 sections of the nearly 500 page RLLI, let alone the hundreds and hundreds of cases cited therein. Given the burden on judges, it is also unlikely that they have worked their way through the RLLI or read the hundreds of submissions opposing so many of its provisions.

Whether the RLLI "will be helpful to courts and lawyers in Texas" should be determined in the courtroom, where all parties have a full and fair opportunity to brief the particular issue, not in the courthouse, where few — if any — attendees are equipped to answer that fundamental question.

Given the foregoing, should events like these go forward under the auspices or with the imprimatur of a sitting judge? Or, rather, would not a better way to proceed be that, to the extent the ALI wishes to promote the RLLI, it should do so in a forum outside the courthouse to avoid any appearance that the sponsoring judges are favorably predisposed to adopting some or all of the RLLI?[16] A modest proposal, for your consideration.

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[1] Restatement of the Law, Liability Insurance, p. 1x (Am. Law Inst., Proposed Final Draft No. 2, 2018) (hereafter "RLLI").

[2] Michael F. Aylward, The Plain Meaning Problem: Should the American Law Institute Restate or Rewrite the Rules for Interpreting Insurance Policies? FOR THE DEFENSE (2017).

[3] Professor Tom Baker (the Reporter) and Professor Kyle Logue (the Associate Reporter), collectively, the "Reporters."

[4] There have been over 200 submissions to the ALI and Reporters regarding the RLLI. Most are available on the ALI website. See https://www.ali.org.

[5] See Capturing the Voice of the American Law Institute: A Handbook for ALI Reports and Those Who Review Their Work (ALI 2015) at 3-4 (hereafter "ÁLI Handbook" (setting forth the standards applicable to Restatements).

[6] As just one example, Section 12(1) of the RLLI creates an unprecedented new cause of action whereby an insurer is liable for the independent legal malpractice of defense counsel. As the Reporters candidly admit, "there is a dearth of reported cases holding liability insurers directly liable for negligent selection." RLLI, § 12, Reporter's Note b.

[7] ALI Handbook, at 5, 7. "Like a Restatement, the common law is not static. But for both a Restatement and the common law, the change is accretional. Wild swings are inconsistent with the work of both a common-law judge and a Restatement. And while views of which competing rules lead to more desirable outcomes should play a role in both inquiries, the choices generally are constrained by the need to find support in sources of law." Id. at 6.

[8] Id. at 6.

[9] ALI Restatement Lunch Event: "The Restatement of the Law of Liability Insurance." www.ali.org.

[10] The ALI history reflects few, if any, similar judicially-sponsored events to justify other Restatements.

[11] See, for example, Progressive Nw. Ins. Co. v. Grant, No. 15-9267-JAR-KGG, 2018 U.S. Dist. LEXIS 163624 (D. Kan. Sept. 25, 2018) (rejecting insured's effort, citing to §12 of the RLLI, to hold insurer liable for defense counsel's malpractice, noting that the RLLI itself recognized a "dearth of reported cases" on point and deciding it was "not inclined to use a nonbinding Restatement as a means to overturn or expand Kansas law.") A federal district court in Kentucky similarly rejected a different provision of the RLLI, concluding there was "no decision from a Kentucky court supporting [the] position [regarding insurer's obligation to retain independent defense counsel]" and that Kentucky law differed materially from the RLLI's approach. Outdoor Venture Corp. v. Phila Indem. Ins. Co., C.A. No. 6:16-cv-182-KKC, 2018 U.S. Dist. LEXIS 167986, at *55-57 (E.D. Ky. Sept. 27, 2018) (citing Restatement of the Law of Liability Insurance § 16 Tentative Draft No. 1 (March 21, 2016)).

[12] ALI Handbook, at 5 (emphasis in original).

[13] On July 30, 2018, the Ohio Revised Code of Insurance, Title XXXIX, Chapter 3901.82, was amended to provide: "The 'Restatement of the Law, Liability Insurance' that was approved at the 2018 annual

meeting of the [ALI] does not constitute the public policy of this state and is not an appropriate subject of notice."

[14] For example, in a December 2016 written expert report submitted on behalf of a policyholder, Reporter Baker opined, "a liability insurer's substantial delay in asserting potential coverage defenses and alleged right of recoupment harms policyholders by giving them a false sense of security that is prejudicial, especially when the new defenses have the potential to align the insurer's interests regarding facts at issue in the underlying action with those of the plaintiffs in that action." In that case, Reporter Baker opined on two topics that are directly at issue in the RLLI, § 15 regarding an insurer's reservation of rights and §§ 21 and 43 regarding the lack of any right to recoupment, both sections advancing rules directly in line with his opinion in that case. See, Expert Report and Affidavit of Prof. Tom Baker (December 2, 2016), Cushman & Wakefield, Inc. v. Illinois Nat'l Ins. Co., No. 14-cv-08725, 2016 WL 9275802 (N.D. Ill. Jan. 30, 22017) ECF 162. Whether Reporter Baker is retained by a policyholder or an insurer is immaterial to the key concern that he is a testifying expert whose opinion is likely to be relevant, and therefore examined by one or more of the sponsoring judges.

[15] It has been reported that a similar judicially-sponsored event has already occurred in California and more may be scheduled.

[16] At the very minimum, should this event — and future ones like it — go forward, they should also include as a co-speaker the Insurer Liaison to the RLLI who can provide the counterpoint to any remarks of the Reporter. Because the RLLI was the first Restatement of its kind on liability insurance, the RLLI project had an "Insurer Liaison" who, in addition to submitting numerous writings to the ALI and Reporters, also attended numerous ALI meetings on behalf of insurers, and has been a frequent speaker, along with Reporter Baker, on the RLLI.