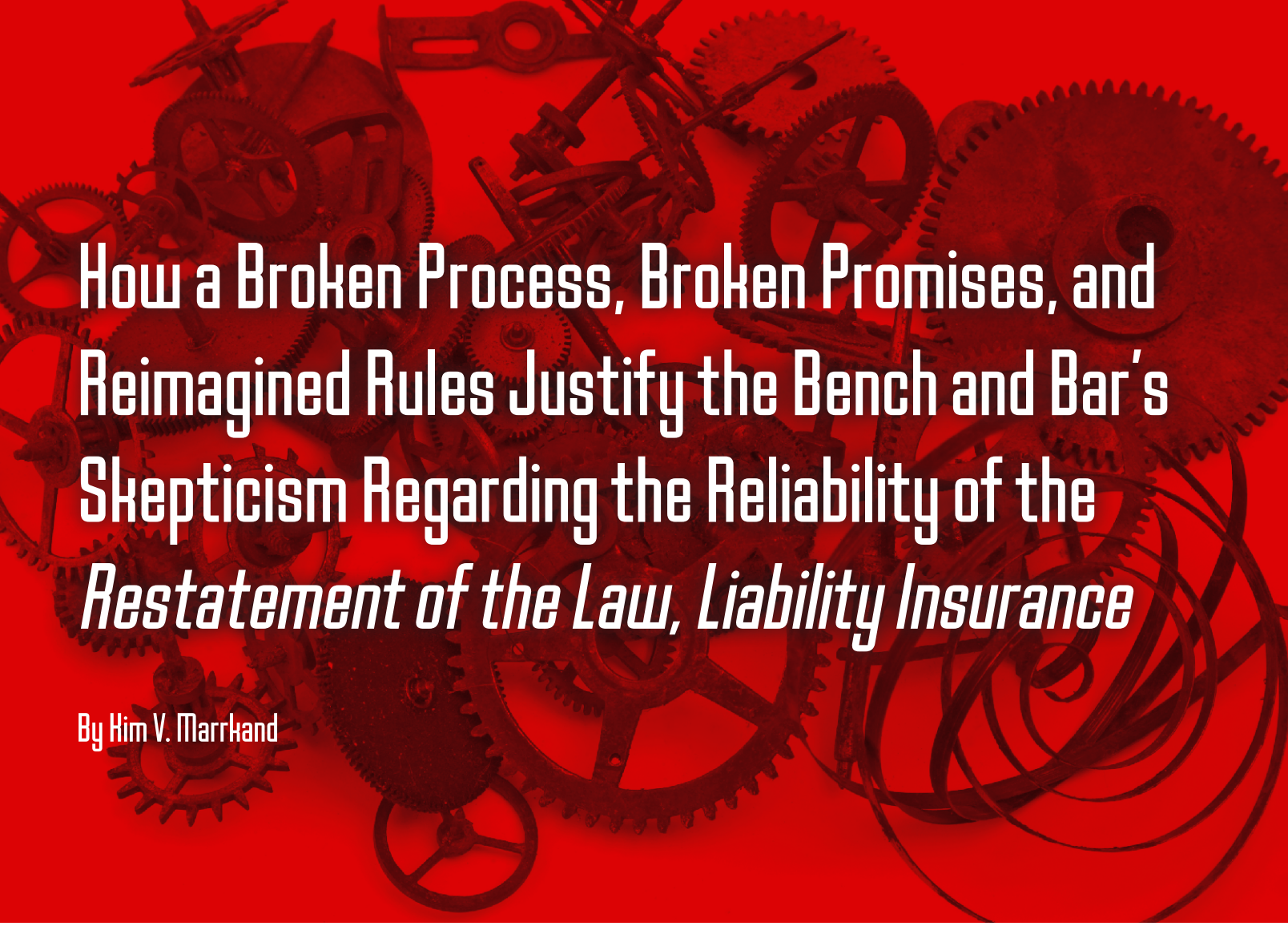

How a Broken Process, Broken Promises, and Reimagined Rules Justify the Bench and Bar's Skepticism Regarding the Reliability of the *Restatement of the Law, Liability Insurance*

By Kim V. Marrkand

In June 2019, the American Law Institute (ALI)[1] published the final draft of the *Restatement of the Law, Liability Insurance* (RLLI). This was the ALI's first foray into addressing liability insurance, and the path to final publication was a rocky one, with numerous stakeholders—including governors, legislators, regulators, insureds, and insurers—weighing in. Along the road, the ALI took the unprecedented step, two years into the project, of changing a "principles" document into a "restatement" and thereafter pulling the restatement from the agenda of its annual meeting to allow more work to be done to address the concerns that had been raised—concerns that, in significant part, were not addressed and remain today.

Most readers of this article might be surprised to learn that the RLLI was so controversial and that they should be skeptical of its reliability. Because liability insurance is so embedded in our civil justice system and in the very way business is done, any effort to "restate" the rules of liability insurance should either do just that or, if not, be transparent when rules are reimagined, reshaped, or created to coincide with what the restatement's authors and the ALI's members believe to be "better" rules regarding liability insurance.

By understanding the process that led to the final RLLI, what "approval" by the ALI really means, and how the rules in the RLLI vary from well-settled law, the bench and bar are justified in being skeptical about relying on the RLLI to "restate" the law of liability insurance.

The Provenance of the RLLI

The first step in the creation of the RLLI began in 2010 when the ALI commissioned the publication of *Principles of the Law of Liability Insurance* (PLLI),[2] the ALI's first effort to address liability insurance.[3] Nearly a decade later, in 2019, the ALI published the renamed *Restatement of the Law, Liability Insurance*, notwithstanding the pleas over several years from governors, legislators, insurers, insureds, defense counsel, insurance regulators, and insurance trade associations not to do so until major revisions were made.[4] While some minor changes were made, the remainder of the requested changes were not made even though it was never shown that those changes were unreasonable, unbalanced, or not grounded in well-developed case law. Judges and practitioners are accustomed to written opinions that explain the reasoning for an outcome, but the process utilized by the ALI for the RLLI required no written response from the RLLI's authors, leaving the various constituencies alarmed by each version (of which there were approximately 26 over the nearly 10-year life of the project)

to await the next version to discern what changes might—or might not—be made, with or without explanation.

In its final form, the RLLI is a nearly 500-page treatise that, as was predicted by the very stakeholders who raised the alarm, is so unbalanced that, when it has been cited to a court, 92 percent of the time it has been a policyholder who has introduced the RLLI into the dispute.[5]

Given this stark reality, the efforts—whether by the ALI itself, certain of its members, or others—to rehabilitate the RLLI are disappointing, particularly because, in effectively demonizing the various stakeholders who sounded the alarm by belittling their efforts as "attacks" or "lobbying," they obscure the legitimacy of these collective concerns and the role that a seriously compromised process played in justifying the skepticism of the RLLI that exists today.[6]

Having determined in 2010 to delve into liability insurance, the then executive director of the ALI—highly regarded professor Lance Liebman—explicitly told the readers of the PLLI that it "would be comprised of coherent doctrinal statements *based largely on current state law but also grounded in economic efficiency and in fairness to both insureds and insurers*."[7] With that understanding, the American Insurance Association (AIA) agreed to participate in the PLLI project; the AIA appointed a liaison, and he, along with a handful of other thought leaders, joined the project. This promising beginning was thwarted almost immediately, however, when the reporters chose to operate in "stealth mode" for the first two years of the PLLI project's existence, completing two chapters of a four-chapter project "before people started paying attention."[8]

In January 2014, "given the direction of this project over the past two years and its likely future course," the AIA took a major step and withdrew its participation and liaison from the PLLI project.[9] Presciently, Stephen Zielezienski, the general counsel of the AIA, explained to Director Liebman that "[t]he present chapters of the [PLLI] are unbalanced and do not take account of the insurance industry's perspective. Repeated efforts to incorporate or account for that perspective have been ignored. We see nothing to indicate that this project will yield a more balanced product at its conclusion."[10]

Approximately a month later, Justice Antonin Scalia sounded an alarm questioning the validity of restatements in general when, in an unrelated case, he explicitly commented that "modern Restatements . . . are of questionable value, and must be used with caution. . . . Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be."[11] In his warning, Justice Scalia emphasized that "it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law."[12]

At the time of Justice Scalia's admonition, the ALI had very modest standards for principles projects; they pointedly allowed reporters to propose "aspirational" or novel rules as to what the law *should* be. In contrast, the ALI set higher standards for restatements, which required, as the name implies, that they restate the law as it is.[13] It was the failure of the *Restatement (Third) of Restitution and Unjust Enrichment* (2010) to set forth the law that led to Justice Scalia's warning about restatements in general, a warning that applies equally to the RLLI.

In March 2014, alarmed by the AIA's withdrawal and the direction of the PLLI project, the general counsel/corporate officers of 10 major insurers took the extraordinary step of writing directly to the PLLI project's advisers to express their serious concerns and to propose opening a more inclusive dialogue regarding the PLLI.[14] Neither the ALI nor any advisers responded to their letter.

With tension growing, in the fall of 2014—after the PLLI project had been underway for four years and two chapters, comprising 34 of the 50 sections, had already been approved[15]—the ALI took the unprecedented step of converting it to a restatement. This change prompted two reactions: (1) confusion because it was unknown what would happen to the two chapters of "aspirational" law[16] that the ALI had approved; and (2) optimism that the process would start over, eliminate the "aspirational" rules in the PLLI, and ground the RLLI in the law as it is,[17] in line with the ALI's own standards for restatements, which were to "*apply[] existing law* . . . [and] assume the stance of *describing the law as it is*."[18]

From Principles to a Restatement

That optimism, however, was short-lived. In January 2015, the ALI council changed its standards and issued new rules for restatements. When the PLLI was converted to the RLLI in 2014, it was generally understood that restatements would describe the law as it is; under the newly issued 2015 standards, the requirement that a restatement actually describe the law as it exists was deleted in its entirety. Instead, a restatement was to "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*"[19]—the latter determination to be made by the reporters and later approved by the ALI members, even where courts had said otherwise or had said nothing at all.

Thus, as of 2015, the ALI process had resulted in complete turmoil as to what exactly was to emerge from a project that started in 2010 as a principles project. Would the proposed rules be tethered to existing law, or would they be aspirational in line with the ALI's guidelines? Or, when changed in 2014 to a restatement, would they state the law as it is, or, given the guidelines' change in 2015, would they contain rules that "might" be stated by a court?

Notwithstanding the confusion, both within and outside the ALI, over the nature and scope of the project (a confusion that understandably impacted the reporters as the relevant standards changed no less than three times during the project's life cycle), state regulators, insurers, legislators, defense counsel, judges, and trade organizations—and even policyholders,

TIP: As Justice Scalia noted, "modern Restatements . . . must be used with caution." His warning applies equally to the *Restatement of the Law, Liability Insurance*.

against their self-interest[20]—all attempted to engage in a constructive dialogue with the ALI and reporters about the defects in the RLLI.[21] Given that these stakeholders had no direct entry point to the reporters, the primary way to convey their concerns was to submit written comments, some in the form of "letter briefs" and others in the form of emails, many containing proposed new language or changes in line with well-settled law. Of the nearly 200 such submissions to the ALI, the vast majority came from this group of stakeholders.[22]

As the RLLI neared completion, and with the firestorm of criticism only building,[23] the ALI agreed in May 2017 to give the reporters an additional year to address the major concerns that had been raised with the RLLI. On their end, the reporters agreed at the 2017 annual meeting to embark upon a self-described "listening tour" of these concerns. In early August 2017, however, a scant few months after the ALI's promise that more work would be done, and in the absence of the completion of any listening tour, the reporters released a new draft of the RLLI in which, in their opening memorandum, they announced that they had made virtually no material changes to the RLLI.[24]

In the face of the reporters' candid admission that no material changes had been made, the governors of South Carolina, Iowa, Maine, Nebraska, Texas, and Utah wrote directly to the president of the ALI to express their "serious concerns over the direction" of the RLLI.[25] In their unprecedented letter, the governors wrote, in relevant part:

> Rather than offering a reliable and authoritative summary of existing law, the draft restatement proposes changes to established legal principles governing liability insurance contracts and disputes. Many of these proposed changes are properly within the prerogative of our state legislatures, at odds with established common law or both. . . . From deciding where to locate to whether to hire more employees, businesses frequently rely upon the stability of the insurance market. Thus, we are concerned that the Draft Restatement could negatively affect our states' economic development opportunities by creating uncertainty and instability in the liability insurance market. If this trend continues, and courts embrace the ALI's aspirational approach, it could potentially jeopardize the availability and affordability of liability insurance. Therefore, if the ALI does not significantly revise or rescind the Draft Restatement, this implicit usurpation of state authority may require legislative or executive action.[26]

Given the lack of meaningful changes to the RLLI—even after the scores of insurer submissions; the pleas from six governors; and the outreach of policyholders, legislators, and regulators, all in an effort to provide some balance to the discussion—the insurers sought to have the AIA insurer liaison, Laura Foggan, participate in the reporters' presentations to the council. This request was rejected, leaving the council members to rely only on the reporters.[27] As Professor Logan pointed out in his article discussing when a restatement is actually not a restatement, "the level of understanding and preparation in this [council] group may not be the match for a strong-willed reporter."[28] Whether the reporters were strong-willed or not, given the history and controversy surrounding the RLLI, the council's decision to deny the insurer liaison's request to join the meetings was particularly unwarranted—especially in view of the fact that the RLLI was the ALI's first foray into liability insurance, a topic not within the expertise of most council members, and the ALI had never before directed its "artillery" at a single product (here, liability insurance policies), which begs the question of what might have occurred had the liaison been present to provide balance, contrary legal authority, and perspective otherwise missing from the RLLI.

Every single one of these multiple missteps had an enormous impact on what emerged as the final RLLI. Considering that the RLLI has been relied upon 92 percent of the time by policyholders, there is no question that the bench and bar should be skeptical of its reliability.

RLLI Sections 27 and 12: A Remaking of Insurance Liability Law

Two sections, among many, prove that, even under the elastic new standards for restatements, the RLLI does not restate the law, does not reflect what a court might appropriately state as the law, and does not set forth an emerging trend in the law.[29] Furthermore, these two sections, as with many other sections, essentially mirror or expand the rules that were proposed in the PLLI—when the project was free to set forth aspirational rules untethered to applying or describing existing law, the standard for a restatement.

Section 27. As first set forth in the PLLI—and now repurposed in RLLI section 27—where an insured tort defendant is found liable and assessed both compensable and punitive damages, an insurer who breaches the newly

Kim V. Marrkand *is a member at Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., and founder and cochair of its insurance group. She worked extensively on the RLLI project, starting in 2012 when it was originally envisioned as a principles treatise. She may be reached at kmarrkand@mintz.com. The opinions expressed in this article are those of the author and do not necessarily reflect the views of the firm, its clients, or any of their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

denominated duty to make a "reasonable settlement decision"[30] is liable for both the compensable and punitive damages assessed against the insured.[31] The general rule is that, where coverage exists, an insurer has a duty to settle within policy limits where there is a potential for an excess verdict and the insured's liability and the plaintiff's damages are reasonably clear.[32] This is the familiar "excess verdict" case. What is unfamiliar, and without precedent, is the creation of a novel rule where the insurer, in addition to paying the compensable damages that comprise the excess verdict, is also charged with paying the punitive damages awarded for the insured's willful wrongdoing. As the reporters conceded when they first proposed this radical change in the PLLI in 2013—and concede in the final version of the RLLI—the five courts that have addressed this issue "concluded that *the insurer may not be held responsible for such punitive damages*."[33] The sole justification for section 27's novel rule is a dissenting opinion in two of the cited cases.[34] This one section forcefully illustrates that the RLLI is *not* applying or describing—or even in line with an emerging trend of—existing law; it is simply a new social policy, lifted from the original rule in the PLLI, lacking legal support yet blessed with the imprimatur of the ALI. Every single effort of the numerous stakeholders to eliminate this legally unsupported rule was dismissed, and it alone illustrates why the bench and bar should view the RLLI with a healthy dose of skepticism that it describes, applies, or reflects the law of any court.[35]

Section 12. The provenance of an equally radical rule, section 12, first surfaced in the PLLI with respect to creating a new tort for an insurer's direct liability for defense counsel's legal malpractice. In the final RLLI, an insurer is liable for defense counsel's legal malpractice if the insurer negligently selects defense counsel or overrides defense counsel's professional judgment.[36] Even though the reporters concede that "there is a dearth of reported cases holding insurers directly liable for negligent selection" and "no cases were found holding a liability insurer liable for the torts of [defense] counsel on a theory of apparent authority or negligent supervision," the RLLI still sets forth this novel rule.[37]

Conclusion

Whether one looks at the fractured ALI process of changing the project midstream or revising the rules governing restatements after four years of work (and approval by the ALI membership) or reimagining insurance liability law, the conclusion that emerges is that, at a minimum, the RLLI should be viewed with caution and with the understanding that it is not a fair, balanced, or reliable statement of insurance liability law. Instead, it is a treatise that should be given no more weight than any other scholarly article.[38] ◄

The RLLI does not restate the law, does not reflect what a court might appropriately state as the law, and does not set forth an emerging trend in the law.

Notes

1. Founded in 1923, the ALI is a 4,300-member private organization comprised predominately of academics and lawyers. Included within its membership as ex officio members are the justices of the U.S. Supreme Court, the chief judges of the circuit courts of appeal, the chief justices of each state's highest court, and the deans of all accredited law schools, among others. Thus, when the ALI "speaks," it does so with the voice of legitimacy that this august body of ex officio members provides. The ALI's restatements have become influential primarily because of their reputation for neutrality and scholarship; historically, they generally do not reflect a bias for or against any constituency, nor do they promote sweeping public policy changes that are the purview of legislators or regulators. As the ALI acknowledges, "[a]n unelected body like [the ALI] has limited competence and no special authority to make major innovations in matters of public policy." Am. Law Inst., Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work 5 (rev. ed. 2015) [hereinafter 2015 ALI Style Manual]. Similarly, as Professor David A. Logan wisely observed, the ALI should be reluctant to remake the law because the common law is organic; judges prefer precedent and dialogue, as tested in developed case law; and precedent assures "evolution, not revolution." David A. Logan, *When the Restatement Is Not a Restatement: The Curious Case of the "Flagrant Trespasser,"* 37 Wm. Mitchell L. Rev. 1448, 1477 (2011) (quoting Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. Sch. L. Rev. 5, 6 (1991)).

2. Within the ALI ecosystem, principles projects "assume the stance of expressing the law as it should be, which may or may not reflect the law as it is." Am. Law Inst., Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work 12 (2005) [hereinafter 2005 ALI Style Manual] (emphasis added). When the *Style Manual* was amended in 2015, principles projects were changed to addressing an area "so new that there is little established law." 2015 ALI Style Manual, *supra* note 1, at 15.

3. Professors Tom Baker and Kyle Logue were selected as the two reporters for the PLLI/RLLI project. As Professor Baker explained,

the driving force for the project was the ALI. Randy Maniloff, *Interview with Professor Tom Baker, University of Pennsylvania Law School*, Coverage Opinions (Feb. 13, 2013), https://www.law.upenn.edu/live/files/1758-tom-baker-ali-interview. There was no hue and cry from the bench or bar that existing liability insurance law was so broken that the ALI needed to fix it through a set of new, aspirational principles. At other times in its history, this same point has been made as scholars have questioned the ALI's justification—or lack thereof—for devoting its "artillery" to a particular project. *See* Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 Geo. Wash. L. Rev. 1212, 1212, 1215 (1993) (questioning the lack of justification for the ALI's effort to create novel rules for corporate governance that resulted in an "often bitter fourteen-year battle" within the ALI).

4. *See* Michael F. Aylward, *The American Law Institute's New Law of Liability Insurance Restatement*, FDCC Insights 1 (June 2017); *see also infra* notes 14, 16, 21, 26.

5. Laura A. Foggan, Liaison to the ALI's RLLI Project, ICP Symposium: The First 18 Months of the ALI's Restatement of the Law, Liability Insurance: How's It Going? (Dec. 5, 2019) (on file with author) (analyzing citations to the RLLI).

6. Given the number of concerns raised by commentators regarding the process flaws associated with the RLLI and various other principles/restatement projects, it is perplexing that the ALI has not undertaken an internal critical self-analysis of its processes. The defensiveness of the ALI to scrutiny and its general collective shrug to criticism serves no one and only underscores the need for self-reflection and needed changes. Retired judges who are members of the ALI could play a major role in such an undertaking.

7. Principles of the Law of Liability Insurance, at foreword (Am. Law Inst., Tentative Draft No. 1, Apr. 9, 2013) (emphasis added). As discussed *infra*, Professor Liebman's promise was, however, in direct conflict with the ALI's own rules governing principles projects.

8. Maniloff, *supra* note 3, at 2. Noticeably absent from this process were legislators, insurance regulators, and other government officials—major stakeholders in the issuance, availability, and scope of coverage afforded under liability insurance policies. When these stakeholders did become involved, on their own initiative, they, as well as other insurers, were often faulted for their timing, as if they had become involved too late. In response, Tom Newman, a long-standing ALI member, reminded ALI members of Justice Frankfurter's observation: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *See* 2014 A.L.I. Proc. 184, at 7. Given that some insurers were involved from the beginning and the project was in stealth mode for two years, and for four years was solely an idealistic principles project, this criticism seems particularly ill-considered.

9. Letter from J. Stephen (Stef) Zielezienski, Senior Vice President & Gen. Counsel, Am. Ins. Ass'n, to Lance Liebman, Dir., ALI (Jan. 31, 2014) (on file with author).

10. *Id.*

11. Kansas v. Nebraska, 574 U.S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part).

12. *Id.*

13. *See generally* 2005 ALI Style Manual, *supra* note 2. Thus, within the ALI itself, there had been confusion about the purpose of the PLLI. Was it to set forth rules based on current state law, as Director Liebman had explicitly stated in the PLLI, or would it contain aspirational rules as to what the law should be, in line with the ALI guidelines set forth in the *Style Manual*? The reporters clearly believed the latter.

14. Letter from Patricia Henry, Glob. Gov't Affairs Officer, ACE; Thomas J. Scherer, Senior Vice President & Gen. Counsel, AIG Prop. Cas.; Susan L. Lees, Exec. Vice President, Gen. Counsel & Sec'y, Allstate Ins. Co.; Maureen A. Brundage, Exec. Vice President, Gen. Counsel & Corp. Sec'y, Chubb Corp.; Alan Kreezko, Exec. Vice President & Gen. Counsel, Hartford Fin. Servs. Grp., Inc.; James F. Kelleher, Exec. Vice President & Chief Legal Officer, Liberty Mut. Ins. Co.; Jeffrey W. Jackson, Senior Vice President & Gen. Counsel, State Farm Mut. Auto. Ins. Co.; Kenneth F. Spense III, Exec. Vice President & Gen. Counsel, Travelers Cos.; Steven A. Benner, Exec. Vice President, Gen. Counsel & Corp. Sec'y, USAA; and Arnold F. D'Angelo Jr., Senior Vice President & Chief Claims Counsel, Zurich Am. Ins. Co., to Advisers (copying Roberta Cooper Ramo, President, ALI; Lance Liebman, Dir., ALI; Richard L. Revesz, Dir. Designate, ALI; Stephanie A. Middleton, Deputy Dir., ALI; Am. Ins. Ass'n; Prop. Cas. Insurers Ass'n of Am.; Nat'l Ass'n of Mut. Ins. Cos.; Tom Baker, Prof.; and Kyle D. Logue, Prof.) (Mar. 24, 2014) (on file with author). The insurers made three concrete proposals, provided proposed text, and submitted a 50-state survey on the law of misrepresentation. The proposals were to (1) put the project on hold until the ALI evaluated the economic consequences of the proposed rules; (2) follow settled law, absent compelling reasons to justify not doing so; and (3) cite contrary authority and competing rationale, both judicial and statutory. *Id.*

15. Principles of the Law of Liability Insurance, at ix (Am. Law Inst., Tentative Draft No. 2 (rev.), July 23, 2014). A chapter is "approved" by the ALI members who attend the ALI's annual meeting. While the ALI has several thousand members, only several hundred actually attend the annual meeting. The annual meeting is usually two days; each project is given approximately two hours on the agenda. Of those members in attendance, very, very few have had the time or resources to read the complete text of the particular project up for discussion, which, as is relevant here, would have been true for the 50-section, 500-page RLLI, as well as the thousands of cases cited therein, the contrary case law, and the hundreds of submissions questioning various sections of the RLLI. The process leading up to the actual vote involves the council, advisers, and members consultative group (MCG); each member of each group is given a draft of the particular chapter for discussion with the reporters. The advisers advise and the MCG consults; neither has any power over whether the reporters accept or reject any advice or comments they receive. The council, the governing body of the ALI, can push back on certain sections but operates on a consensus basis. The council is comprised of approximately 60 ALI members; rarely are all of its members able to attend council meetings. Because of a very ambitious agenda wherein council members discuss multiple projects over two days twice a year, most projects, including the RLLI, are allotted approximately two hours for discussion. As of 2017, during the height of the debate about the

RLLI, the ALI had 20 projects underway, including 11 restatements, six principles, and three model codes. It would, therefore, be completely misleading to suggest that there is a rigorous review of each chapter, as that would imply that each council meeting is attended by ALI members who have read all of the material and that they exert total control over what the reporters draft and submit to the full membership. At the annual meeting, the voting ALI members understandably rely on the reporters to summarize the various chapters; the reporters lead the discussion, provide the commentary, and respond to any motion.

16. For example, in dealing with misrepresentation and rescission, contrary to the law of every jurisdiction, the ALI already had approved the PLLI's aspirational and novel rule prohibiting an insurer from rescinding a policy for negligent misrepresentations, replacing it with a new rule limiting insurers' rescission rights solely to when the insured's material misrepresentations were intentional or reckless. *See generally* Principles of the Law of Liability Insurance (Am. Law Inst., Tentative Draft No. 1, Apr. 9, 2013). As noted above, in their March 2014 letter to the advisers, the 10 insurers' general counsel had provided the ALI—and the reporters—with a 50-state survey justifying the elimination of that unsupportable rule. Ultimately, that novel provision was deleted, but the fallout, as with other changes made in the final RLLI on the basis of insurers' well-grounded objections, involved chastisement of the insurers for "lobbying" or "attacking" the ALI and the reporters, irrespective of the validity of the insurers' objections.

17. Supporters of the RLLI have made the odd argument that because no one really knows what the law "is"—or when a rule is a majority rule or how that is determined—the reporters rightly were free to choose the law that they thought should apply. Practitioners, however, can easily answer the question of what the law is or is not, as can any sitting judge.

18. 2005 ALI Style Manual, *supra* note 2, at 4 (emphasis added).

19. 2015 ALI Style Manual, *supra* note 1, at 4–6 (emphasis added); *cf.* 2005 ALI Style Manual, *supra* note 2, at 4–6 ("Restatements are addressed to courts and others applying existing law. Restatements aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might plausibly be stated by a court. Restatement blackletter formulations assume the stance of describing the law as it is. . . . Restatements are instruments for innovations of this sort. Nevertheless, the improvements wrought by Restatements are necessarily modest and incremental, seamless extensions of the law as it presently exists.").

20. Letter from 27 Gen. Counsel to David F. Levi, President, ALI (Dec. 1, 2017) (on file with ALI) (raising fundamental concerns that the RLLI did not "restate" liability insurance law).

21. In 2015, in an effort to reengage with the ALI, the AIA agreed to recommit to the process, and a new AIA liaison, Laura Foggan, was appointed. As set forth in Foggan's communications with the ALI, many of the RLLI's 50 sections do not "restate" but "replace" existing law. *See, e.g.*, Letter from Laura A. Foggan, Project Liaison, RLLI, to David F. Levi, President, ALI & Dean, Duke Univ. Sch. of Law, and Roberta Cooper Ramo, Council Chair, ALI (copying Richard Revesz, Dir., ALI; Stephanie Middleton, Deputy Dir., ALI; Tom Baker, Reporter, RLLI; and Kyle Logue, Assoc. Reporter, RLLI) (Jan. 8, 2018) (on file with ALI) (with four-volume appendix).

22. There is no lack of irony when the RLLI's supporters on the one hand complain that their submissions were outnumbered by insurer-related submissions but on the other hand must concede that every pro-insured motion (except one) that they made at the various annual meetings was allowed while no insurer motion was allowed.

23. *See* Aylward, *supra* note 4, at 1.

24. *See generally* Restatement of the Law, Liability Insurance (Am. Law Inst., Preliminary Draft No. 4, Aug. 4, 2017). A subsequent draft, released on December 4, 2017, again made no material changes.

25. Letter from Governors Henry McMaster (S.C.), Kim Reynolds (Iowa), Paul R. LePage (Me.), Pete Ricketts (Neb.), Greg Abbott (Tex.), and Gary R. Herbert (Utah), to David F. Levi, President, ALI (Apr. 6, 2018) (on file with author).

26. *Id.*

27. Several council members did ask hard questions and conduct their own legal research; they deserve enormous credit for pushing back, in particular, on the efforts to undo the long-established "plain meaning" rule and on the startling overreach regarding insurer direct liability for defense counsel's legal malpractice set forth in section 12.

28. *See* Logan, *supra* note 1, at 1481.

29. *See generally* 2015 ALI Style Manual, *supra* note 1.

30. Principles of the Law of Liability Insurance § 27 (Am. Law Inst., Tentative Draft No. 2 (rev.), July 23, 2014).

31. *Compare id.* § 30, *with* Restatement of the Law, Liability Insurance § 27 cmt. e (Am. Law Inst. 2019).

32. *See* Greenidge v. Allstate Ins. Co., 312 F. Supp. 2d 430, 439 (S.D.N.Y. 2004); State Auto Prop. & Cas. Ins. Co. v. Perez, 2013 U.S. Dist. LEXIS 204920, at *13–14 (C.D. Ill. Oct. 7, 2013).

33. Restatement of the Law, Liability Insurance § 27 reporters' note e (Am. Law Inst. 2019) (emphasis added).

34. *Id.*

35. Neither Professor Robert E. Keeton's seminal article *Liability Insurance and the Responsibility for Settlement*, 67 Harv. L. Rev. 1136 (1954), nor case law in its aftermath adopted an insurer's responsibility for an excess verdict framed as a duty to make reasonable settlement decisions, nor does the RLLI cite any authority otherwise. Restatement of the Law, Liability Insurance § 24 (Am. Law Inst. 2019) (discussing primarily the goal of imposing a negligence standard on insurers, and ignoring the requirement of insurer bad faith or an examination of the totality of the circumstances when determining whether insurers should be held liable for an excess verdict).

36. Restatement of the Law, Liability Insurance § 12 (Am. Law Inst. 2019).

37. *Id.* § 12 reporters' note d.

38. Kansas v. Nebraska, 574 U.S. 445, 476 (2015) (Scalia, J., concurring in part and dissenting in part) (concluding that restatements "should be given no weight whatsoever as to the current state of the law, and no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar").