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The Making of a Restatement

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Restatements are the end result of a collaborative and deliberative process among the primary drafters of the Restatement, known as “Reporters,” the American Law Institute’s (ALI) Council, which acts as the ALI’s Board of Directors, two groups of experts in the field who provide the Reporters with critical feedback during the drafting process, known as the project’s “Advisors” and “Members Consultative Group” (MCG), and ultimately the full membership of the ALI. The Reporters typically are academics with expertise in the field. The Reporters of the Restatement, Law of Liability Insurance are Professor Tom Baker, University of Pennsylvania Law School, and Professor Kyle Logue, University of Michigan Law School.

The Drafting Process

Once appointed, the Reporters begin the process by preparing a “Preliminary Draft” of a portion of the Restatement for discussion with the Restatement project’s Advisors and MCG. After meeting with the Advisors and the MCG, the Reporters will reconsider and revise the Preliminary Draft. When the Reporters are ready to present their work to the Council for its consideration, they prepare a “Council Draft.” After obtaining the Council’s approval, the Reporters prepare a “Tentative Draft” for discussion at the ALI’s annual meeting each May.

Once approved by the membership at an Annual Meeting, a Tentative Draft or a Proposed Final Draft represents the most current statement of the Institute’s position on the subject and may be cited in opinions or briefs until the official text is published. Preliminary Drafts and Council Drafts do not represent the position of the ALI and may not be cited as authority.

Current Status of the Restatement of the Law of Liability Insurance

To date, the Restatement, Law of Liability Insurance project has not progressed beyond the Council Draft stage. However, many of the proposed Restatement provisions are identical, or substantially similar, to the provisions of the Restatement project’s antecedent project, “Principles

of the Law of Liability Insurance,” which were approved by the ALI’s membership in 2013 and 2014.

Principles projects are similar in scope to a Restatement, but have a different purpose. While the goal of a Restatement is to describe the law as it presently stands or as it might plausibly be stated by a court, a Principles of the Law is aspirational—it states what the ALI believes the law *ought* to be. However, where the law with respect to a particular issue is not well developed or where there is a clear division of authority, language proposed by the drafters for a Principles project may also be suitable for a Restatement project. Of course, the suitability of particular provisions of the Principles of the Law of Liability Insurance for use in the Restatement is a matter of perspective and, not surprisingly, a hotly debated question at recent meeting between the Reporters and the Advisors and Members Consultative Group.

From Principles to Restatement

When completed, the Restatement, Law of Liability Insurance will contain four chapters. Chapter One will address basic principles of insurance contract interpretation, the doctrines of waiver and estoppel, and the effect of misrepresentations made by policyholders during the application process. Chapter Two will address the management of potentially insured claims and focus on the duties of insurers to defend and settle claims and the duties of insureds to cooperate. Chapters Three and Four will cover trigger of coverage, allocation and contribution, application of limits, deductibles and retentions, choice of law and remedies.

Due in part to the work already done on the Principles project, the Reporters were able to present the Council a draft of Restatement Chapters One and Two in September 2015. The Council approved both chapters at its October 2015 meeting, with the exception of two provisions. After extensive discussions with the Advisors and Members Consultative Group at meetings on October 29 and 30, 2015, the Reporters redrafted both provisions. Later this month, the Reporters plan to return to the Council with Council Draft No. 2 containing the revised provisions from Council Draft No. 1 and all of Chapter Three.

My next post will examine the policy interpretation provisions in Chapter One that have been approved by the Council and will go to the ALI’s full membership in May 2016