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## **Why Every Insurance Lawyer Should Care about the American Law Institute's Restatement, Law of Liability Insurance**

By John K. DiMugno

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The law of liability insurance is complex and plagued by a lack of consensus among the jurisdictions and often within a jurisdiction.

Courts have taken fundamentally irreconcilable approaches to a myriad of issues, and only a handful of the states' highest courts have ruled definitively on a variety of outcome determinative questions.

### **Enough of Consensus for a Restatement?**

Given the lack of consensus on these and other questions, the American Law Institute's (ALI) decision in late 2014 to develop a Restatement, Law of Liability Insurance has become one of the most important and hotly debated topics in the insurance field. Although the ALI describes Restatements of the Law as "clear formulations of common law and its statutory elements or variations," reflecting "the law as it presently stands or as it might plausibly be stated by a court," the line between restating the law and promoting legal change is not always clear. Indeed, the ALI's Style Manual advises Reporters not to adhere to what Professor Herbert Wechsler called the "a preponderating balance of authority" but instead to "propose the better rule and provide the rationale for choosing it." Consequently, when jurisdictions disagree on a particular point, the drafters of Restatements have not merely counted jurisdictions and adopted the majority rule. Rather, the drafters have endeavored to adopt the rule that a rational court, faced with the issue for the first time, would find most persuasive, even if that rule is not widely followed. Not surprisingly, various constituencies within the insurance industry and bar have fought hard to have their voices heard and to influence the content of the final Restatement of the Law of Liability insurance.

### **Why It Matters**

The ALI's Restatements exert great influence over judges and, consequently, the development of the law. Judges, after all, are generalists who sometimes have little or no

background in an area of law and thus are easily tempted to take the ALI's lead when pondering difficult legal questions. An early and famous example of the ALI's influence on the law is §402A of the Restatement (Second) of Torts, which sets forth the rule of strict products liability. When § 402A was adopted, few states had adopted strict products liability. Professor William Prosser, the Restatement's Reporter, nevertheless insisted on the rule of strict products liability based on his belief that a majority of states eventually would adopt the rule. The fact that strict products liability is now the rule throughout the country is testament to the influence of a Restatement on the development of the law. The ALI's current efforts are particularly likely to affect the direction of insurance law in light of the number of states that have yet to resolve fundamental questions of insurance law.

In order to familiarize the insurance community with the ALI's Restatement, Law of Liability Insurance project, the Thomson Reuters Legal Solutions Blog will carry a series of posts on the Restatement's proposed provisions, with a focus on those provisions most likely to change, or influence the direction of, the law in at least some jurisdictions should they ultimately be adopted by the ALI's membership. This is the first in that series.

My next post in the series will examine the historical background and current status the ALI's Liability Insurance project.