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# Hard Battles over Soft Law: The Troubling Implications of Insurance Industry Attacks on the American Law Institute Restatement of the Law of Liability Insurance

Jeffrey W. Stempel

*William S. Boyd School of Law, University of Nevada Las Vegas*

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# **HARD BATTLES OVER SOFT LAW: THE TROUBLING IMPLICATIONS OF INSURANCE INDUSTRY ATTACKS ON THE AMERICAN LAW INSTITUTE RESTATEMENT OF THE LAW OF LIABILITY INSURANCE**

JEFFREY W. STEMPEL\*

## **ABSTRACT**

ALI Restatements of the Law have traditionally exerted significant influence over court decisions and the development of the common law. During the past two decades, however, the ALI has seen an upsurge in interest group activity designed to shape or even thwart aspects of the Institute's work. Most recently, the Restatement of the Law of Liability Insurance (RLLI) has been the focus of not only criticism of particular provisions but a concerted effort by members of the insurance industry to demonize the project as a whole and bar use of the document by courts.

The vehemence of insurer opposition seems odd in that the RLLI is a mainstream document that leans in favor of insurers on several important issues. Why have insurers been so vehemently opposed to the RLLI? Have previously non-partisan law reform efforts now become afflicted with the same interest group muscle flexing that pervades modern electoral politics? And if so, what are the implications for the future of this aspect of American law? This Article examines not only the background of and debate over the RLLI but also addresses the evolution of special interest group interaction with law reform organizations in order to offer an explanation for the increasing politicization of what historically has been largely non-partisan creation of "soft law."

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\* Doris S. & Theodore B. Lee Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. Thanks to Bill Boyd, Xin Chen, Jay Feinman, Chris French, Dan Hamilton, Yong Han, Helmut Heiss, Erik Knutsen, the late Doris Lee, Ted Lee, Mike Kaufman, David McClure, Ann McGinley, Dan Schwarcz, Manfred Wandt, and participants in 2018 Annual Meeting of the Asia-Pacific Risk & Insurance Association, the Project Group for the Principles of Reinsurance Law (PRICL), and the ALI Restatement of the Law of Liability Insurance process, particularly long-suffering Reporters Tom Baker and Kyle Logue. © 2021 Jeffrey W. Stempel.

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#### I. INTRODUCTION: SOFT LAW AND ITS DISCONTENTS

In the United States, much of law is decentralized because of the nation’s political federalism that gives States significant autonomy regarding their substantive law.<sup>1</sup> In an effort to improve the law and provide greater consistency, the American Law Institute (“ALI”), a law reform group comprised of judges, professors, and practicing attorneys formed in 1923, published its first Restatement (of the Law of Contracts) in 1931.<sup>2</sup> Thereafter followed Restatements of the Law of Torts, Property, Judgments, Restitution, Conflict of Laws, and more. During the 1960s, the ALI began preparing “Second Restatements” updating the fields. The 1990s ushered in “Third

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<sup>1</sup> Insurance law is more fragmented than most contract law, in part because of the McCarran-Ferguson Act, 15 U.S.C. §1011, which provides for state regulation of the business of insurance unless expressly countermanded by federal law.

<sup>2</sup> See *infra* Part I (describing origin and history of ALI and Restatements); RESTATEMENT (FIRST) OF CONTRACTS (AM. L. INST. 1932).

Restatements.”<sup>3</sup> For the most part, Restatements have been influential, perhaps even highly influential. They have been frequently cited by courts, commentators and legislators as either authoritative statements of the law or correct analyses of the law. But in recent years, Restatements and other ALI projects have been subjected to criticism for allegedly departing too much from settled law or having been too shaped by special interest influence.

Most recently, the *Restatement of the Law of Liability Insurance*<sup>4</sup> (hereinafter “RLLI”), approved in 2018 and published in 2019, faced substantially more, ongoing, opposition than its predecessors.<sup>5</sup> Despite a quiet start, the 2014–2018 period have witnessed a full court press of lobbying by the insurance industry designed to shape the RLLI in ways favorable to insurers. Notwithstanding considerable success in affecting the content of the RLLI, many insurers and their representatives continue to contend that the document unduly favors policyholders. Many insurers advocated terminating the entire RLLI project.<sup>6</sup> When these efforts failed, they took the battle to state legislatures, where they have succeeded in obtaining passage of a good deal of anti-RLLI resolutions and even statutes.<sup>7</sup> Lobbying efforts have included seeking to enlist the aid of state legislators, state courts, and governors, with some success. For example, in April 2018, the governors of six states wrote to the ALI opposing adoption of the RLLI unless it was revised in favor of insurers.<sup>8</sup> The gubernatorial letter is stunning in two ways.

First, it appears to represent the first time any governors – acting in their capacity as governors rather than attorneys or ALI members – have lobbied the ALI regarding a project, much less seeking to interfere with the ALI’s normally deliberative process. The governors sought further concessions for insurers or termination of the eight-year-

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<sup>3</sup> See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. (AM. L. INST. 1998); RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIAB. (AM. L. INST. 2000); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM (AM. L. INST. 2010); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT (AM. L. INST. 2011).

<sup>4</sup> See RESTATEMENT OF THE L. OF LIAB. INS. (AM. L. INST.) [hereinafter RLLI].

<sup>5</sup> See *infra* Part III.

<sup>6</sup> See *generally infra* Part II.

<sup>7</sup> See *infra* notes 204–09.

<sup>8</sup> See Letter from Henry McMaster, Governor of South Carolina, Kim Reynolds, Governor of Iowa, Paul R. LePage, Governor of Maine, Pete Ricketts, Governor of Nebraska, Greg Abbott, Governor of Texas, Gary R. Herbert, Governor of Utah, to David F. Levi, President, Am. L. Inst. (Apr. 6, 2018), <http://ncoil.org/wp-content/uploads/2018/04/2018-04-062520Governors2520to2520ALI2520re2520Draft2520Restatement-2-1.pdf> [https://perma.cc/9H34-YDPR] [hereinafter Gubernatorial Letter]. Materials submitted to ALI and motions made during the ALI consideration of the RLLI that are cited in this Article were posted on the Project website for the RLLI and available to Institute members until the Project was completed and the RLLI was published. Copies are on file with the author and the Cleveland State Law Review. The materials remain archived with ALI as well, although not currently posted for viewing on the ALI website, [ali.org](http://ali.org).

old project as well as threatening state-specific action to prohibit or reduce its use by courts.<sup>9</sup>

Second, the letter largely parrots the talking points used by insurer representatives in their materials criticizing or opposing the RLLI without providing any support for assertions that the RLLI is not “offering a reliable and authoritative summary of existing law” but rather “proposes changes to established legal principles governing liability insurance contracts and disputes.”<sup>10</sup> A dead giveaway of sorts is that the gubernatorial letter quotes – as does much of the insurance industry literature against the RLLI – the late Justice Scalia’s assertion that “[o]ver time, the Restatements’ authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what law ought to be . . . . And it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law.”<sup>11</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Kansas v. Nebraska*, 574 U.S. 445, 475–76 (2015) (Scalia, J., concurring in part and dissenting in part). The full Scalia quote – which is a rather strong assault on the Restatements but had no other Justices joining the concurring/dissenting opinion – reads as follows:

Modern Restatements – such as the Restatement (Third) of Restitution and Unjust Enrichment (2010), which both opinions address in their discussions of the discouragement remedy – are of questionable value, and must be used with caution. The object of the original Restatements was “to present an orderly statement of the general common law.” Restatement of Conflict of Laws, Introduction, p. viii (1934). 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. [W. Noel] Keyes, *The Restatement (Second): Its Misleading Quality and a Proposal for Its Amelioration*, 13 *Pepp. L. Rev.* 23, 24–25 (1985). Section 39 of the Third Restatement of Restitution and Unjust Enrichment is illustrative; as Justice Thomas [in his partial concurrence and dissent] notes, it constitutes a “novel extension of the law that finds little if any support in case law. Restatement sections such as that should be given no weight whatever 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. And it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law.”

*Id.* Left unmentioned was that a majority of the Supreme Court was perfectly comfortable with Justice Elena Kagan’s majority opinion that considered the ALI Restatement (Third) of Restitution and Unjust Enrichment (2010). It was also discussed in the longer dissenting opinion of Justices Thomas (joined by Justices Scalia, Alito, and Chief Justice Roberts in part). This opinion was critical of a particular provision of the Restatement but did not extrapolate this dissatisfaction to all Restatements. See *infra* note 47, discussing *Kansas v. Nebraska*.

The Scalia attack on Restatements has been cited by insurer opponents of the RLLI in a number of its attacks on the RLLI. Jay M. Feinman, *A User’s Guide to The Restatement of the Law, Liability Insurance*, 26 *CONN. INS. L.J.* 95, 108 (2019).

Whatever merit there may be to Justice Scalia's criticism regarding the Restitution Restatement,<sup>12</sup> it is a vastly overblown assertion regarding Restatements generally<sup>13</sup> and the RLLI in particular.<sup>14</sup> But because it was said by a Supreme Court Justice – albeit a Justice frequently isolated from mainstream legal opinion<sup>15</sup> – the attack on

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<sup>12</sup> The Restitution Restatement, although not firmly adopting the prevailing rule on the point in question, adopted a position that enjoyed significant judicial and academic support. It was persuasive to five Supreme Court Justices in the *Kansas v. Nebraska* litigation (Majority Opinion author Kagan and Justices Ginsburg, Breyer, Sotomayor and Kennedy). See *Kansas v. Nebraska*, 574 U.S. at 445.

<sup>13</sup> Although individual sections of particular Restatements have critics and, more importantly, courts that reject them, Justice Scalia appears to be the only major judicial figure who has asserted that the Restatements have generally departed widely from settled law. *But see* Kristin David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 222 (2007) (regarding retired Seventh Circuit Judge Richard Posner as a critic as well as prominent Stanford Law Professor Lawrence Friedman but noting criticisms quite different than those being advanced by insurers opposed to the RLLI). See also Kristen David Adams, *The American Law Institute: Justice Cardozo's Ministry of Justice?*, 32 S. ILL. U. L.J. 173, 174 (2007); Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 424 (2004).

In response to the Gubernatorial Letter, *supra* note 8, ALI President David Levi noted that “[o]ur good friend, Justice Scalia, who could be critical of us, was also an admirer and frequently cited and relied upon our work product.” Letter from David F. Levi, President, Am. L. Inst., to Henry McMaster, Governor of South Carolina, Kim Reynolds, Governor of Iowa, Paul R. LePage, Governor of Maine, Pete Ricketts, Governor of Nebraska, Greg Abbott, Governor of Texas, Gary R. Herbert, Governor of Utah (Apr. 26, 2018) (on file with author). Judge Levi's point is well taken. Justice Scalia cited Restatements as authority in nearly 100 of the opinions he wrote, including three issued after his criticism made in *Kansas v. Nebraska*. See *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 197–99 (2015) (Scalia, J., dissenting); *Zivotofsky v. Kerry*, 576 U.S. 1, 77 (2015) (Scalia, J., dissenting).

<sup>14</sup> See *infra* Part II.

<sup>15</sup> Although an excellent writer and colorful personality, Justice Scalia is seen by many as someone whose combative and confrontational style diminished his ability to form majority coalitions. See, e.g., RICHARD HASEN, *THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION* (2018) (finding Scalia to be “one of the most influential justices ever to serve” on the Court but also “caustic and openly abrasive,” which inhibited his ability to form majority coalitions or be the author of majority opinions); see also Richard L. Hasen, *Antonin Scalia's Disruption of the Supreme Court Ways Is Here to Stay*, WASH. POST (Feb. 13, 2018), <https://www.washingtonpost.com/news/posteverything/wp/2018/02/13/antonin-scalias-disruption-of-the-supreme-courts-ways-is-here-to-stay/> [<https://perma.cc/N6Y3-SGJR>] (noting that in *King v. Burwell*, 576 U.S. 473 (2015), the decision upholding the Affordable Care Act, “if it were up to Scalia, the law would have gone into a death spiral because of his interpretation of a single clause of a single sentence in the 2,700-page statute read out of context” yet he was in other cases willing to disregard plain text if he viewed its result as sufficiently “absurd”). Accord Miranda McGowan, *Do as I Say Not as I Do: An Empirical Investigation of Justice Scalia's Ordinary Meaning in Interpreting Statutes*, 78 MISS. L.J. 1301 (2008) (finding inconsistent fidelity to text in Scalia opinions). As an empirical matter, Justice Scalia frequently wrote dissents or concurrences that were not joined by any other justices – as was the case in *Kansas v. Nebraska*. But to staunch conservatives in the United States, however, Scalia is largely considered to be the best modern Supreme Court Justice.

“modern” Restatements (a suggestion that in the proverbial good old days, Restatements stayed in their metaphorical lane and did not venture into law reform) garnered attention and became a useful if misleading talking point for critics of Restatements – who are also implicitly criticizing the ALI and the concept of a “think tank” or law reform organization, particularly if it, on occasion, embraces a jurisprudence disliked by business interests.

Even though it is only two pages long, the gubernatorial letter found time to make the truly bizarre allegation that adoption of the RLLI was an impermissible intrusion on state law – a claim that rings particularly hollow in that the topics of many prior Restatements (e.g., Torts, Contracts, Real Property, Judgments) are also legal matters generally committed to state substantive law.<sup>16</sup> More bizarre, is the assertion made by the governors that:

[f]rom 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 [RLLI] could negatively affect our states’ economic development opportunities by creating uncertainty and instability in the liability insurance market [and] could potentially jeopardize the availability and affordability of liability insurance.<sup>17</sup>

Ominously, the gubernatorial letter ended with a threat, stating that “if the ALI does not significantly revise or rescind the Draft Restatement, this implicit usurpation of state authority may require legislative or executive action.”<sup>18</sup> In other words, if the RLLI is not revised to the satisfaction of the insurance industry, politicians friendly to the industry will attempt to legislate or decree contrary rules rather than permitting the states’ own courts to determine whether the RLLI is persuasive.<sup>19</sup> These governors

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<sup>16</sup> Gubernatorial Letter, *supra* note 8, at 1 (suggesting that RLLI is improper because “of the McCarran-Ferguson Act’s unambiguous commitment of insurance matters to state jurisdiction” and that many of the RLLI provisions “are properly within the prerogative of our state legislatures”).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> This has already occurred regarding some past ALI provisions. For example, when businesses and property owners disliked a section of the ALI RESTATEMENT (THIRD) OF TORTS, INTENTIONAL TORTS TO PERSONS that they viewed as insufficiently protective of land and facility owners, they successfully lobbied roughly 20 state legislatures to enact a contrary rule essentially immunizing property owners from tort liability to trespassers.

Much of this was spearheaded by two pro-business political organizations: the American Tort Reform Association (“ATRA”) and the American Legislative Exchange Council (“ALEC”). In language that is strikingly similar to attacks on the RLLI, critics of the Torts Restatement provision argued that the provision was “radical” and “would threaten to bring about fundamental changes” unsupported by case law that would “result in higher insurance premiums.” See, e.g., Carter Wood, *As Long as It’s Not ‘Flagrant,’ Trespassing Is OK? There Ought to Be a Law*, POINT OF LAW (Jan. 25, 2011), <http://www.pointoflaw.com/archives/2011/01/as-long-as-its-phi> [https://perma.cc/33HU-BCKZ] (noting that the ALEC – the American Legislative Exchange Council has drafted model legislation to prevent application of ALI Restatement (Third) of Torts provision that would

who purport to be so concerned about federalism show considerably less respect for separation of powers.<sup>20</sup>

As discussed below, insurer opposition to the RLLI, like other recent anti-Restatement activity by some business entities, is something more than the type of vigorous debate that has often characterized the ALI drafting and decision process or the behind-the-scenes lobbying said to characterize some prior projects.<sup>21</sup> In the past, the culmination of the disagreement was a vote on a challenged provision and ultimately a vote on the Restatement itself. Thereafter, those dissatisfied with the outcome of the debate vented their opposition through argument in litigation. They did not attempt to overrule or annihilate disfavored provisions or an entire Restatement through legislative, agency, or executive action.

The current insurer position is akin to that of a sports team that purports to participate in a contest in good faith but when it appears to be losing threatens to have an effective opposing player ejected (for the alleged crime of being an opponent) or walk off the field. Having lost the contest (e.g., the wording of a particular Restatement provision), the participant then attacks the process externally and seeks to sideline the document rather than grappling with it on neutral grounds of rational argument before courts of law adjudicating the issue in question. Because Restatements are not binding law, no court is obligated to follow a Restatement provision, which of course leaves insurers free to argue the purported superiority of preferred alternative approaches. Under these circumstances, it is bizarre to see insurers attempting to ban the RLLI, perhaps reflecting a lack of confidence in the correctness of their preferred alternative approaches.

The RLLI path to adoption demonstrates the increasing politicization of American law. The hardball politics that has characterized American electoral contests and impeachment proceedings and that also frequently appears regarding the “hard” law of statutes, agency regulation, and Supreme Court decisions now appears to have become part of the American legal landscape for soft law as well.

By “soft” law, I mean recommended law or legal doctrine that is intended to have influence but is not itself enacted into positive law as is the prototypical “hard” law of

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require property owners to show some care in preventing dangerous conditions even for trespassers and citing North Dakota H.B. 1452 as an example).

<sup>20</sup> Reactions to the RLLI and other ALI projects do not divide on strictly partisan lines. Many ALI members are themselves wealthy lawyers or businesspersons with traditionally Republican sensibilities favoring limited government, lower taxes, less regulation, market-based economy and solutions to problems as well as more deference to private actors and prerogatives, including freedom of contract. Further, most ALI members who are practicing lawyers represent large, well-heeled, sophisticated clients. As discussed *infra*, in Part II, the ALI is an organization of what might be termed the civic-minded establishment – but by no means a group committed to radical or even substantial change.

Notwithstanding this, the anti-RLLI lobbying has come from politically conservative forces, as further discussed *infra*, in Part III. Regarding the April 6, 2018 gubernatorial letter, all six of the signing governors are Republicans from what in the U.S. are generally described as “red” states (those color-coded as favoring Republican presidential candidates and with Republican congressional delegations and state legislatures). A similar pattern is reflected in the legislators who have taken up the insurance industry cause opposing the RLLI. See *infra* Part III.

<sup>21</sup> See *infra* Part II.



statutes and codes. Enforceable executive orders and administrative agency regulations comprise a slightly less flinty version of hard law.

The realm of soft law can be further divided into a hierarchy of (1) *model statutes or codes* such as the Model Penal Code or the American Bar Association Rules of Professional Conduct and Code of Judicial Conduct.<sup>22</sup> These are drafted with the intent that state governments (e.g., legislatures or supreme courts) will use them as a template for promulgating their own statutes or rules.<sup>23</sup> Then there is (2) *the soft law of “black letter” provisions of the Restatements*, which are perhaps in a category of their own in that they set forth a doctrinal rule that the Institute hopes courts will follow.<sup>24</sup> But there is no coercion. Courts may reject Restatement black letter as they see fit. The (3) *Comments to a Restatement* form even softer law in that the Comments, although approved by the Institute, are less directive or prescriptive than the black letter of Restatements.<sup>25</sup> Softer still are the (4) *Reporters’ Notes* to the Restatement provisions. They receive commentary from Institute membership but are not formally voted upon by the members.<sup>26</sup> At the same time, these Notes have more authority than (5) *individual treatises*, which are the work of individual authors (who may even be attorneys representing clients with a position on issues addressed in the treatise), which do not receive the scrutiny of the Reporters’ Notes.<sup>27</sup> Items such as (6) *law review articles* are softer still, having influence if deemed persuasive by individual readers (including courts) but not generally subjected to close review prior to publication.<sup>28</sup>

This Article addresses the important role of the ALI in U.S. law, reviewing the increasingly partisan environment in which the ALI has been forced to operate as the law itself has become more politicized (Part II). The lobbying of the ALI over the RLLI is detailed and assessed for the light it shines on the increasing insertion of special interest activity into an area that was previously treated as one of rational, studied, neutral deliberation (Part III). This Article also examines the degree to which heightened controversy over the RLLI and other Restatements is peculiar to the United States and charts the implications for future efforts to provide the helpful guidance of soft law (Part IV).

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<sup>22</sup> *Order of Authorities*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/order\\_of\\_authorities](https://www.law.cornell.edu/wex/order_of_authorities) [<https://perma.cc/9TN2-UH3L>].

<sup>23</sup> Deanna Barmakian, *Uniform Laws and Model Acts*, HARVARD L. SCH. LIBR. (Nov. 4, 2020), <https://guides.library.harvard.edu/law/unifmodelacts> [<https://perma.cc/Z54T-SJEP>].

<sup>24</sup> *Restatement of the Law*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/restatement\\_of\\_the\\_law#:~:text=Primary%20tabs,ALI\)%20to%20clarify%20the%20law](https://www.law.cornell.edu/wex/restatement_of_the_law#:~:text=Primary%20tabs,ALI)%20to%20clarify%20the%20law) [<https://perma.cc/S5BJ-TSCU>].

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Restatement of the Law*, *supra* note 24.

<sup>28</sup> *Id.*

## II. THE AMERICAN LAW INSTITUTE'S SURPRISING EVOLUTION TO LIGHTNING ROD STATUS

### A. *Institute Origins and the General Success of the Restatements in the Twentieth Century*

Since the ALI was formed in 1923, its leadership has been a “Who’s Who” of American Law.<sup>29</sup> William Draper Lewis, Dean of the University of Pennsylvania Law School, was an initiating founder and the ALI’s first Executive Director, serving for nearly 25 years (1923–47).<sup>30</sup> Its list of both Directors and Presidents continues the tradition.<sup>31</sup> Membership is largely by election and is limited (there were 2,802 elected members as of May 2020 as well as 1,630 “life members” originally elected but placed in this status after 25 years of membership).<sup>32</sup> In addition to producing the

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<sup>29</sup> Examples includes luminaries who are very well known to U.S. lawyers such as Columbia Professors Herbert Wexler and Lance Liebman, Yale and the late Yale/Penn/Hastings Law Professor Geoffrey Hazard, NYU Law Dean Richard Revesz, former ABA President Roberta Cooper Ramo, and noted Judges Louis Brandeis, Learned Hand, Henry Friendly, Lee Rosenthal and David Levy. *About ALI*, ALI, <https://www.ali.org/about-ali/> [https://perma.cc/94LA-T3MY].

<sup>30</sup> *The Story of ALI*, ALI, <https://www.ali.org/about-ali/story-line/> [https://perma.cc/4K8B-R2FD].

<sup>31</sup> The first President was George W. Wickersham (1923–36) of Cadwalder, Wickersham & Taft, a large New York law firm with an extensive basis of corporate clients. He was followed by George Wharton Pepper (1936–1947) (of Pepper, Hamilton & Scheetz, an elite Philadelphia law firm), Harrison Tween (1947–1961) (a prominent New York attorney), Norris Darrell (1961–76), R. Ammi Cutter (1976–80), Charles Alan Wright (1993–2000) (a Yale and Texas law professor, author of the definitive one-volume treatise on federal courts and co-author of a leading multi-volume treatise on federal procedure), Michael Traynor (2000–08) (a prominent attorney and son of California Supreme Court Justice Roger Traynor, one of America’s most famous judges), Roberta Cooper Ramo (2008–2017) (a partner in New Mexico’s largest and most prestigious law firms) and David Levi (2017–present), (former federal judge, Dean of Duke University Law School, and son of former U.S. Attorney General Edward Levi). *Id.* Directors following Pennsylvania Dean Lewis were Herbert Funk Goodrich (1947–62), Columbia Law Professor Herbert Wechsler (1963–84), Geoffrey C. Hazard, Jr. (1984–99) (law professor at California-Berkeley, Chicago, Yale, Penn, and Hastings Law Schools and former Director of the American Bar Foundation), former Columbia Law Dean Lance Liebman (1999–2014), and former NYU Law Dean Richard Revesz (2014–present). *Id.*

<sup>32</sup> See AMERICAN LAW INSTITUTE, 2019-2020 ANNUAL REPORT 22 (2020). Total membership of 4,680, with 2,802 elected members, 1,630 Life Members, 246 ex officio members, and 2 honorary members. *Id.* (also showing 37% of members in private practice, 37% academics, 14% judges, and 12% government, corporate, or nonprofit organization attorneys).

Restatements and Principles projects,<sup>33</sup> the ALI promulgates model statutes<sup>34</sup> and conducts continuing legal education programs.<sup>35</sup> Restatements were among the first projects undertaken by the ALI, and were well-received by courts and the practicing bar. Principles projects are distinguished from Restatements in that Principles are more inclined to examine an area of law thought to be in need of change and to propose changes or revisions in prevailing law.<sup>36</sup> Restatements are not restricted to merely summarizing prevailing existing law but make legal determinations that may not enjoy majority support in the courts but are viewed as the substantively superior rule of law.

ALI Restatements function as soft law in that a Restatement position on a legal matter is not authoritative unless adopted by a court or legislature. But the Restatements – even though arguably not as influential as model codes<sup>37</sup> – are what

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<sup>33</sup> Among the Principles projects have been Corporate Governance (1994), Family Dissolution (2002), Transnational Insolvency: Cooperation Among the NAFTA Countries (2003), Intellectual Property (2008), Software Contracts (2010), and Aggregate Litigation (2010). PRINCIPLES OF THE L. OF CORP. GOVERNANCE (AM. L. INST. 1994); PRINCIPLES OF THE L. OF FAM. DISSOLUTION (AM. L. INST. 2002); PRINCIPLES OF THE L. OF TRANSNAT'L INSOLVENCY: COOP. AMONG THE NAFTA COUNTRIES (AM. L. INST. 2003); PRINCIPLES OF THE L. OF INTELL. PROP. (AM. L. INST. 2008); PRINCIPLES OF THE L. OF SOFTWARE CONTS. (AM. L. INST. 2010); PRINCIPLES OF THE L. OF AGGREGATE LITIG. (AM. L. INST. 2010).

<sup>34</sup> Examples are the Model Penal Code promulgated by ALI in 1962 and the Uniform Commercial Code (“UCC”), which was a joint project with the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). The UCC has been largely adopted in all 50 American States, as have many of the other Uniform Laws promulgated by NCCUSL. *Uniform Commercial Code*, USLEGAL, <https://uniformcommercialcode.uslegal.com/> [<https://perma.cc/YBA8-RENC>]. Because many of the Uniform Laws have been enacted as statutes in the states, these may be considered closer to hard law than the Restatements or Principles, which are seldom adopted by legislation but are intended more as guides for courts.

<sup>35</sup> In addition to its own CLE programs, the ALI often collaborates with the American Bar Association (“ABA”). ALI-ABA CLE programs are among the most prestigious and popular in the U.S. In addition, the ABA (like ALI and NCCUSL) promulgated model rules and codes, most famously the Model Rules of Professional Conduct governing attorney ethics and the Model Code of Judicial Conduct, governing judicial ethics. These are also closer to hard law than the Restatements in that the Models of Professional and Judicial Conduct have been largely adopted by the American States, albeit with some occasional distinct variations. *See generally* STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS (2019 ed.) (annotated version indicating state variance from basic ABA Model); JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS (5th ed. 2018); GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING (4th ed. Supp. 2021).

<sup>36</sup> *See Frequently Asked Questions: How Do Principles of the Law Differ from Restatements of the Law?*, ALI, <https://www.ali.org/publications/frequently-asked-questions/#differ> [<https://perma.cc/U5SU-BLC7>] (“Restatements are primarily addressed to courts. They 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. Principles are primarily addressed to legislatures, administrative agencies, or private actors. They can, however, be addressed to courts when an area is so new that there is little established law. Principles may suggest best practices for these institutions. See ALI’s style manual for more information.”).

<sup>37</sup> As discussed previously, one might subdivide soft law into categories or along a continuum. Model codes are potentially the strongest soft law in that, if accepted, they become

might be termed “Super Soft Law” in that they have had substantial influence far larger than treatises or industry standards or most model laws (the exception perhaps being the more successful proposed Uniform State Laws promulgated by the National Conference of Uniform State Law Commissioners (“NCCUSL”) such as the Uniform Commercial Code (“UCC”) or the Model Rules promulgated by the American Bar Association (“ABA”).

Courts and legal scholars have frequently cited ALI Restatements,<sup>38</sup> with perhaps some growth due to the increasing number of Restatements and growth from the increasing number of court decisions. Restatements are historically cited in hundreds or thousands of cases each year, a pattern that continues in the Twenty-First Century.<sup>39</sup> Legal literature reflects an ongoing interest in the Restatements that increased substantially during the early 1980s.<sup>40</sup> Since then, Restatements have been frequently cited in the legal literature at a pace that equals or exceeds citation in Reported cases.<sup>41</sup>

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enacted into positive law. Restatement black letter is next strongest because, although non-binding, it is presented in “rule” form that usually represents a case law consensus and is designed to be followed. Restatement Comments are less formal and forceful but can be highly influential. Reporters Notes function as something of a “super-Treatise” in that they not only represent useful scholarly analysis but analysis that had been subjected to substantially more scrutiny during the drafting process than an ordinary treatise by a law professor.

<sup>38</sup> See, e.g., *Wooster Floral & Giffs, L.L.C. v. Green Thumb Floral & Garden Ctr., Inc.*, No. 2019-0322, 2020 Ohio LEXIS 2718 (Dec. 15, 2020) (citing with favor RESTATEMENT OF UNFAIR COMPETITION §21 in finding that defendant flower vendor’s use of domain name did not cause consumer confusion); *Bilt-Rite Contractors, Inc. v. Architectural Studio*, 866 A.2d 270, 286 (Pa. 2005) (adopting RESTATEMENT (SECOND) OF TORTS §552 to permit negligent misrepresentation claim despite plaintiff’s lack of privity with defendant); *Temple v. Wean United, Inc.*, 364 N.E.2d 267, 271 (Ohio 1977) (adopting RESTATEMENT (SECOND) OF TORTS § 402A). But see *Tincher v. Omega Flex*, 104 A.3d 328, 335 (Pa. 2014) (“[W]e decline to adopt the Restatement (Third of Torts: Products Liability §§ 1 et seq., albeit appreciation of certain principles contained in that Restatement has certainly informed our consideration of the proper approach to strict liability in Pennsylvania . . .”).

<sup>39</sup> Simply entering the word “restatement” into a LEXIS database (done on March 11, 2021) returns thousands of responses, although there are of course a significant number of false positives. A more restricted LEXIS search of “ALI or Institute w/3 Restatement” (conducted March 11, 2021) produces 3,820 cases in response. Depending on how one frames a search and the database used, one can find differing responses but it is clear that Restatements get cited frequently.

<sup>40</sup> As with court cases, a search of secondary literature reflects substantial citation to Restatements, more if the term is used alone (along with some false positives) and somewhat less for narrower searches (e.g., “ALI or Institute w/3 Restatement”) (4,465 responses if there is no date restrictions), the former of which has more than 2,000 responses while the latter has 169 responses in 2019 and 153 responses for 2020.

<sup>41</sup> Compare number of court decisions (44), with number of law review articles or treatises (169) in response to the search “ALI or Institute w/3 Restatement and date is 2019” (conducted March 11, 2021). Some of this may be due to the expansion in the number of scholarly law reviews and journals during that time period. But it is unlikely that this explains all of the upsurge. One trial hypothesis worth exploring is that after a period of being viewed as “dry” doctrinal law, Restatements are now recognized as capturing important perspectives on issues of legal policy. Alternatively, the status of Restatements as authoritative, even when

Restatements are almost always cited favorably or with neutrality.<sup>42</sup> Criticisms like those of Justice Scalia in *Kansas v. Nebraska* appear only infrequently.<sup>43</sup> And apart from the sheer number of citations, the Restatements found favor with influential courts and judges. For example, in a leading opinion on accountant liability, Justice Benjamin Cardozo, writing for the New York Court of Appeals, favorably cited the Restatements of Torts, Contracts, and Agency.<sup>44</sup>

While Scalia-like criticism in judicial opinions is comparatively rare and Restatements continue to exert considerable influence, they have been subject to more criticism and resistance – as has the ALI – during the past 30–40 years<sup>45</sup> in spite of the

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controversial, may have made them a popular source of attribution for law review authors needing to fill footnotes.

<sup>42</sup> See, e.g., *Olsen v. Etheridge*, 686 N.E.2d 563 (Ill. 1997), excerpted in DAVID EPSTEIN ET AL. MAKING AND DOING DEALS: CONTRACTS IN CONTEXT 998 (5th ed. 2018) (a leading law school instructional text finding RESTATEMENT (SECOND) OF CONTRACTS § 311 (AM. L. INST. 1981) persuasive regarding vesting of contract rights and reversing older caselaw to the contrary).

<sup>43</sup> A closer look at the *Kansas v. Nebraska* decision and the role of RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (AM. L. INST. 2010) suggests the Scalia criticism, shared by Justices Thomas and Alito, is not a particularly damning indictment of that Restatement even though they are correct that it was doing more than merely summarizing caselaw; see *Kansas v. Nebraska*, 574 U.S. 445, 475–76 (2015) (Thomas, J., dissenting, joined by Scalia and Alito); see also *id.* at 475 (Roberts, C.J., concurring in part and dissenting in part) (agreeing that Court has equitable power to order partial disgorgement (and thus RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (AM. L. INST. 2010)) but agreeing with dissenters that equitable power did not permit adjustment of Compact regarding definition of “imported water” that would not be counted against States’ allocation of River water). In other words, *Kansas v. Nebraska*, although a 5-4 decision in part, was 6-3 decision regarding the Restatement, with the three dissenters generally known as the most conservative members of the Court. To a degree, this reflects the larger division of the legal profession over Restatements. The most conservative lawyers want Restatements to simply record majority rules as black letter. Liberals and moderates and the ALI itself regard it as legitimate for Restatements to adopt more persuasive minority rules as black letter and on occasion to craft hybrid black letter in order to meet the overall law and policy of the topic to which the Restatement speaks.

<sup>44</sup> See *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441, 448 (N.Y. 1931) (finding that there can be liability to clients for negligently certifying statements without adequate investigation but that liability to third parties exists only if there is fraud but not if there is only negligence). Ironically, the Restatements have since moved in the direction of greater liability for professional negligence if a third party’s reliance on the professional’s work was reasonably foreseeable. See RESTATEMENT (SECOND) OF TORTS § 552 (AM. L. INST. 1979) (professional may be liable for negligence if third party’s reliance on professional’s work or statements was justifiable).

<sup>45</sup> See, e.g., William T. Barker, *Lobbying and the American Law Institute: The Example of Insurance Defense*, 26 HOFSTRA L. REV. 573, 574, 590 (1998) (noting controversy regarding panel counsel efforts to obtain revision of early drafts of Law Governing Lawyers Restatement, defending efforts as aptly within ground rules and based on law and policy arguments rather than political threats); Carrie Menkel-Meadow, *The Silences of the Law Governing Lawyers: Lawyering as Only Adversary Practice*, 10 GEO. J. LEGIS. ETHICS 631, 632 (1997) (taking issue with Lawyers Restatement for looking “backward, not forward” and providing little guidance for legal profession “of the twenty-first century”); Jonathan R. Macey, *The Transformation of*

ALI's efforts to both portray itself as and in fact be a nonpartisan organization rather than an interest group for client interests. The shorthand expression of this sentiment frequently used by ALI members is that they "Leave Clients at the Door" when conducting Institute business.<sup>46</sup> More specifically, ALI Council Rule 4.03 states:

To maintain the Institute's reputation for thoughtful, disinterested analysis of legal issues, members are expected to leave client interest at the door. In communications made within the framework of Institute proceedings, members should speak, write, and vote on the basis of their personal and professional convictions and experience without regard to client interests or self-interest.<sup>47</sup>

Elaborating on the Rule, ALI leadership noted that "[t]his does not mean that we leave our views, shaped by our personal and professional experience, and our expertise, often gleaned from representation of clients, at the door."<sup>48</sup> However, "[t]he vision of the founders of the ALI was that members would view their participation as a public service, and not as in the service of the self or of clients" a concept that

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*the American Law Institute*, 61 GEO. WASH. L. REV. 1212, 1212 (1993) ("Few law reform efforts in this century have been as controversial as the often bitter fourteen-year battle within the [ALI] over its efforts to articulate a set of rules about American corporate law."); Joel Seligman, *Sheep in Wolf's Clothing: The American Law Institute Principles of Corporate Governance Project*, 55 GEO. WASH. L. REV. 325, 325 (1986) ("No project of the [ALI] has ever been as harshly criticized as its Corporate Governance project was during the early 1980s.") (citing Business Roundtable and other opposition); NEW YORK CITY BAR, REPORT BY THE COPYRIGHT & LITERARY PROPERTY COMMITTEE, RECOMMENDATION TO REJECT THE AMERICAN LAW INSTITUTE'S PROPOSAL TO CREATE A RESTATEMENT OF LAW, COPYRIGHT (2018), [https://s3.amazonaws.com/documents.nycbar.org/files/2017309-RestatementFormCopyright\\_FINAL\\_1.12.18.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/2017309-RestatementFormCopyright_FINAL_1.12.18.pdf) [https://perma.cc/YBA8-RENC] (recommending rejection of Council Draft No. 1 and discontinuance of Copyright Restatement because law "is governed by federal statute and is inextricably intertwined with rapidly changing technology" and therefore "uniquely unsuitable for a Restatement project").

<sup>46</sup> Stephanie A. Middleton, *Leaving Clients at the Door*, ALI REP., Spring 2018, at 10, 10. Middleton is the Deputy Director of the ALI. It is probably not accidental that the Institute choose to include an article on this core value of the ALI in light of the attack by insurer interests on the RLLI as the Annual Meeting approaches. It was also probably no coincidence that the Annual Meeting program reprinted Rule 4.03, which also received informal emphasis from ALI leadership prior to consideration of the RLLI at the May 2018 Annual Meeting.

<sup>47</sup> ALI Council Rule 4.03. The early years of the ALI provides considerable support for this view. Discussion of particular proposed provisions of a Restatement were discussed and debated at length by the participants. See, e.g., Edward Yorio & Steve Thel, *The Promissory Basis of §90*, 101 YALE L.J. 111, 116–17 (1991), reprinted in DAVID EPSTEIN ET AL., MAKING AND DOING DEALS: CONTRACTS IN CONTEXT 365–66 (4th ed. 2014) (noting debate during 1926 ALI Annual Meeting between Harvard Professor Samuel Williston, Reporter of the First Restatement of Contracts and "famous New York lawyer" Frederic Coudert (of the then-prominent firm Coudert Brothers) regarding the scope of remedies available where an agreement by promissory estoppel is found).

<sup>48</sup> Middleton, *supra* note 46, at 10.

“should inform members on how we are to engage in the work of the ALI.”<sup>49</sup> This tradition is amply reflected in the statements of the founders<sup>50</sup> and appears to have been taken to heart by the membership.<sup>51</sup>

Although the ALI is very much an “establishment” group drawing much economic support from corporate America,<sup>52</sup> it has attempted not to serve as a vessel for the interests of commercial actors such as clients and contributors. While decidedly “insider,” and friendly to the status quo, the ALI historically has differed from organizations such as the U.S. Chamber of Commerce or the National Association of

<sup>49</sup> *Id.*

<sup>50</sup> Middleton recorded statements of some ALI founders, including Elihu Root:

At the first meeting of the ALI in 1923, Elihu Root recognized that the Institute’s work “must be so done as to carry authority, as to carry conviction of impartial judgment upon the most thorough scientific investigation and tested accuracy of statement. . . . Participation in the enterprise must be deemed highly honorable. Selection for participation must be deemed to confer distinction; it must be recognized a great and imperative public service.”

*Id.* (omission in original).

<sup>51</sup> Commenting on conference sessions discussing the initial ALI projects on Torts, Agency, Contracts and Conflicts of Law, inaugural President George Wickersham he had been favorably impressed by

the utter absence of any dogmatic attitude on the part of scholars of world-wide repute in these discussions. No attitude of resentment, or even impatience at even the most destructive criticism was exhibited at any time, but only the keenest desire for accuracy and for clarity; a welcoming of all helpful criticism and a patient weighing and analysis of every suggestion that any part of the draft under consideration was susceptible of improvement or required modification.

*Id.* (quoting George Wickersham at the 1924 ALI Annual Meeting).

<sup>52</sup> As noted, the ALI is composed of practicing lawyers, judges, and law professors. Approximately two-thirds of the roughly 2,800 current members are lawyers engaged in private practices, with roughly two-thirds of that group working in what can fairly be described as reasonably large or even huge law firms largely serving business clients, often Fortune 500 or even Fortune 100 clients that are the largest business organizations in the world. This segment of ALI membership is particularly light on small firm lawyers with a predominantly plaintiff’s practice. Consequently, it is fair (in my view) to describe the practicing lawyer members of the ALI as a rather establishmentarian, even conservative group. The government lawyers may be less establishment but for every public defender, there is a prosecutor. Law professors are probably on balance a more liberal or anti-establishment component of the ALI membership, but the division is not lopsided, as many of the law faculty ALI members are politically or jurisprudentially conservative. The judicial members of ALI represent the spectrum of American judicial attitudes. For example, the ALI Council includes judges generally regarded as quite liberal (e.g., California Supreme Court Chief Justice Goodwin Liu) and quite conservative (e.g., Texas Supreme Court Justice Nathan Hecht). My point, which is worth remembering when assessing insurer attacks on the RLLI, is simply this: the ALI is not a distinctly left-leaning group in the manner of the American Civil Liberties Union (“ACLU”) or Common Cause but something more like the Brookings Institute or the RAND Corporation, centrist organizations that lean toward progressive reform.

Manufacturers who have an avowed purpose of promoting members interests. By contrast, ALI's orientation has been the greater interest of the justice system and society, which has tended to make it more of a "liberal establishment" or elite gripped with noblesse oblige rather than a group rigidly defending the status quo.<sup>53</sup>

As a result, much of the ALI's work in Restatements, Model Codes, and Principles projects could be described as restrained progressivity lying somewhere between rigid defense of the status quo and anti-establishment radicalism. Although some ALI projects have been viewed as unduly pro-business or pro-defendant, most have, at least as a whole, been largely in the direction of expanding rights, duties and recompense in a manner consistent with the dominant public policy thinking of experts in the field in question. But this is not necessarily consistent with dominant political currents. Consequently, even though the ALI is a core establishment body, much criticism of its efforts has come from America's political right, which has alleged that Restatements are too liberal in their deviations from the majority rules of the common law, examples of which – including reaction against the RLLI – are discussed below.

#### B. *The Nature of Restatements and the Process of Restatement Creation*

To assess the ALI's claim to neutrality, some understanding of the Restatement process is required. Restatements, of course, are well known to law students and lawyers because of the popularity of the *Restatement of Contracts* and the *Restatement of Torts*, both of which are frequently cited in judicial opinions and are often reprinted (at least in part) in materials assigned for law school classes. A Restatement is designed to collect and synthesize the law of a given area. The format for a Restatement, familiar to most lawyers, is that of "black letter" sections setting forth a Rule, followed by Comments and Illustrations concerning the Rule, followed by the Reporter's Note, which is something of a mini-treatise collecting caselaw regarding the black letter law and commentary.

A Principles project is distinguished from a Restatement in that the former is less tethered to existing law and has greater freedom to adopt an approach regarded as

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<sup>53</sup> The term "liberal establishment" in the U.S. has a certain flexibility. It often connotes a socioeconomic cluster of persons, entities, or organizations, who do not use their positions to gain greater personal power but are instead interested in promoting the overall health of society. Another term popular in the U.S. – *noblesse oblige* (defined as "the inferred responsibility of privileged people to act with generosity and nobility toward those less privileged") – captures this concept of the liberal establishment. See Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/noblesse%20oblige> [https://perma.cc/4A3X-CXMP] (defining term as "the obligation of honorable, generous, and responsible behavior associated with high rank or birth"). For example, when teaching in New York, I frequently heard the term liberal establishment used to describe the Association of the Bar of the City of New York, an organization with strong participation from elite law firms that frequently took liberal/left/progressive positions on issues of law and policy.

Alternatively, the term liberal establishment is sometimes used by conservatives as a criticism of wealthy persons who purportedly adopt leftish positions (e.g., lighter sentences for crimes; reduced police presence) that may not adversely impact the wealthy in safe neighborhoods but purportedly bring adverse consequences (e.g., more crime) in poorer neighborhoods. For an example of this type of use of the term, see generally M. STANTON EVANS, *THE LIBERAL ESTABLISHMENT* (conservative commentator claims elite business and political interests work in concert to further mutual interests and diminish individual rights).



superior even if it lacks support in existing law or has even been rejected by courts. However, a Restatement need not adopt as a rule only positions embraced by the majority of courts. Rather, as discussed quite eloquently in the ALI's January 2015 Revised Style Manual, excerpted at the beginning of the RLLI, the Institute notes that "Restatements are primarily addressed to courts. They 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."<sup>54</sup> A Restatement rule should have at least some support in caselaw but need not be the majority rule. Rather, in examining the legal landscape, the ALI may embrace the judicial approach viewed as superior even if it is the minority rule, and even a distinct minority rule:

A Restatement thus assumes the perspective of a common-law court, attentive to and respectful of precedent, but not bound by precedent that is inappropriate or inconsistent with the law as a whole. Faced with such precedent, an Institute Reporter is not compelled to adhere to what [former ALI Director and Columbia University law professor] Herbert Wechsler called "a preponderating balance of authority" but is instead expected to propose the better rule and provide the rationale for choosing it. A significant contribution of the Restatements has also been anticipation of the direction in which the law is tending and expression of that development in a manner consistent with previously established principles.

The Restatement process contains four principal elements. The first is to ascertain the nature of the majority rule. If most courts faced with an issue have resolved it in a particular way, that is obviously important to the inquiry. The second step is to ascertain trends in the law. If 30 jurisdictions have gone one way, but the 20 jurisdictions to look at the issue most recently went the other way, or refined their prior adherence to the majority rule, that is obviously important as well. Perhaps the majority rule is now widely regarded as outmoded or undesirable. If Restatements were not to pay attention to trends, the ALI would be a roadblock to change, rather than a "law reform" organization. A third step is to determine what specific rule fits best with the broader body of law and therefore leads to more coherence in the law. And the fourth step is to ascertain the relative desirability of competing rules. Here social-science evidence and empirical analysis can be helpful.<sup>55</sup>

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<sup>54</sup> See THE AMERICAN LAW INSTITUTE, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 4 (2015) [hereinafter ALI HANDBOOK].

<sup>55</sup> See *id.* at 5. Ironically, and disturbingly, when insurers have complained about an RLLI draft by stating that an RLLI position will damage insurance markets, cause substantial increases in premiums, make insurance less available or the like, they have done so without marshalling empirical evidence. See *infra* Part II. But insurers are the entities with the greatest access to underwriting, claims, loss, pricing, and profitability information – much of which is proprietary and not available to scholars or the general public, including the ALI. Such deafening silence in this regard seriously undermines insurance industry claims about deleterious impact from the RLLI – or for that matter any legal rule insurers regard as favoring policyholders. If a pro-policyholder rule actually does adversely affect the insurance business

Where a Restatement adopts a minority rule or modified or hybrid rule or expresses some creativity in attempting to improve law as well as to synthesize it, this is not disregarding the law but simply a recognition that “what a Restatement can do that a busy common-law judge, however distinguished, cannot is engage the best minds in the profession over an extended period of time, with access to extensive research, testing rules against disparate fact patterns in many jurisdictions.”<sup>56</sup>

As the name implies, a Restatement summarizes existing law. Consequently, Restatements read to a degree like very thorough, well-organized treatises. The Restatements not only summarize the law but also identify divisions in the law and typically endorse a “better” rule of law in cases where courts are divided. They are also distinguished from treatises in that Restatements represent the collaborative work of an organization rather than that of a single author or group of co-authors.

Related to this, is the extensive process by which Restatements are promulgated. The project is led by “Reporters” who do the primary drafting of the Restatement (and revisions in response to commentary or objection), aided by a group of roughly 40 Advisors who are experts in the field as well as a Members Consultative Group (“MCG”) that includes any ALI member sufficiently interested in the project to participate.<sup>57</sup> Draft provisions are reviewed by the ALI “Council,” a leadership group of another 50 distinguished attorneys, judges and professors. Over the course of four to six years (or more), portions of a proposed Restatement are considered by the ALI Membership in attendance at the group’s Annual Meeting before there is a final vote to adopt a Restatement.<sup>58</sup> Whether one likes or dislikes the provisions of a Restatement, the thorough rigor of the process seems indisputable. Then comes publication and use of the Restatements by the courts in making decisions. Often, draft provisions of Restatements are found authoritative by courts. The RLLI began in 2010 as a Principles Project but was converted to a Restatement in 2014.

### *C. Subsurface Politics and Increasingly Open Contentiousness Over Restatements*

Although the type of overt pressure being placed on the ALI by insurers opposed to the RLLI is a modern development, there have in the more distant past been efforts by interest groups to shape the content of Restatements. For example, tobacco industry representatives worked hard – and with some success – to convince the Torts Restatement Reporter William Prosser and others to exempt cigarettes from the strict liability regime that was emerging in the famous Section 402A of the Restatement

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or the fortunes of insurers, the insurance industry should be able to produce at least some evidence in support of this contention.

<sup>56</sup> ALI HANDBOOK, *supra* note 54, at 6.

<sup>57</sup> Barker, *supra* note 45, at 576.

<sup>58</sup> *Id.* at 578.

(Second).<sup>59</sup> Disturbingly, this included retaining prominent ALI members as consultants or expert witnesses.<sup>60</sup>

In response, ALI's President and Director argued that the investigators alleging impropriety, or at least weakness in the ALI conflict rules, had misunderstood the nature of a law reform organization.

The article [criticizing lobbying of the ALI] errs in its assumption that finding correct legal rules is the same as assessing the results of medical research. It does not recognize that ALI's process for considering improvements in law must be open to input from all sides of the relevant issues. The process which produces Restatements would not be credible or of practical use without participation by lawyers who represent clients on all sides. The article also incorrectly states that ALI's process takes place in backrooms, when in fact our drafts are publicly available at all stages, encouraging constructive improvements, disagreements, amendments, and arguments.<sup>61</sup>

This ALI rejoinder is correct insofar as it goes but does not effectively address the concern regarding interest groups volitionally retaining ALI Reporters, Council Members, potential Reporters, or persons influential in the organization in order to impact their assessments or enlist them in lobbying the ALI membership, perhaps without much in the way of disclosure to those who may be lobbied.<sup>62</sup> It also tends to overlook possible erosion of the "check your clients at the door" ethos that is supposed to govern ALI deliberations.

Regarding the process of Restatement creation, the ALI is essentially correct that much of the process is conducted in plain sight, which includes the opportunity for interested parties to comment on drafts throughout the process. But it is not quite as conveniently transparent as painted by the ALI leadership. Not all Restatement Drafts, much less all relevant drafting material, are available to non-members and the public, although this limitation is probably easily circumvented by ALI members sharing materials with non-members known to be interested in the process.

The same problem arises with comments made on Drafts. They are essentially unavailable to non-members. The comments are available on the ALI website – to members who log in. Again, commentary can be shared by members with others, but this is something less than full transparency. In addition, the ALI website may only contain a limited number of comments. For example, RLLI commentary made prior to 2014 was not on the ALI website at the time of the May 2018 Annual Meeting at which the RLLI was approved. But even with this limitation, the website contained more than 200 comments submitted considering the RLLI. However, after formal

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<sup>59</sup> See Elizabeth Laposata, Richard Barnes & Stanton Glantz, *Tobacco Industry Influence on the American Law Institute's Restatements of Torts and Implications for its Conflict of Interest Policies*, 98 IOWA L. REV. 1, 27 (2012).

<sup>60</sup> *Id.* at 37–38.

<sup>61</sup> Roberta Cooper Ramo & Lance Liebman, *The ALI's Response to the Center for Tobacco Control Research & Education*, 98 IOWA L. REV. 1, 1 (2013).

<sup>62</sup> This Article does not take a position regarding whether RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1979) is insufficiently protective of smokers or other users of dangerous products.

publication of the RLLI in 2019, the comment section of the project website was removed.

When the compilation of comments is available, it only encompasses written statements submitted as comments. Things like phone calls, visits, or casual conversation with Reporters, Council, or others with ALI influence are not catalogued. Consequently, opportunities for ex parte contact abound. Further, the entire process can be circumvented, at least to a degree, if a person or entity seeking influence approaches the ALI without expressly submitting a formal comment. For example, the threatening letter submitted by six governors<sup>63</sup> was sent directly to ALI President David Levi and not to the Director or Deputy Director for posting as a comment. It was only after President Levi elected to post the letter in the Comments section of the RLLI project page that the letter became fully available to ALI Members.<sup>64</sup> The general public was and insofar as I can tell, remains unaware of the gubernatorial lobbying attempt made on behalf of insurers. One wonders whether voters in these states would share their governors' affinity for the insurance industry.

The ALI process is hardly one of smoke-filled back rooms. But it is sufficiently contained that insiders with access to ALI members – by, for example, hiring them as lawyers or experts – have a considerable advantage over not only non-members but rank-and-file members. The great bulk of ALI activity is conducted by a limited subgroup: Officers, Staff, Reporters, Advisors, MCG members (at least those that are active),<sup>65</sup> and those that attend the Annual Meeting (usually well less than a third of the membership and perhaps only fifteen percent of the membership voting at any one time) with some seriousness.

Consequently, the “TobaccoGate” story told by critics of Torts Restatement Section 402A is one that must be taken seriously and does not portray ALI in a particularly favorable light, even if it is not the stuff of scandal. Perhaps more disturbing is the possibility that this sort of quiet electioneering takes place with great frequency but has simply not been uncovered as was the case with tobacco and the Torts Restatement.<sup>66</sup>

More publicly, overt but less well-documented electioneering appeared to take place in connection with the ALI's *Principles of Corporate Governance* Project. The

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<sup>63</sup> See Gubernatorial Letter, *supra* note 8, at 1.

<sup>64</sup> And although one might treat this as a “no harm/no foul” situation, this is not quite accurate. The gubernatorial letter is dated April 6, 2018. It was not posted to the ALI website until May 2, 2018. In other words, the governors and their insurer allies bought nearly a month of stealth by lobbying the ALI President directly rather than formally making a Comment.

<sup>65</sup> Participation in the Members Consultative Group varies considerably. Some MCG members are extremely attentive and active. Others, probably the majority, read relevant materials as they emerge but do not attend MCG meetings, much less participate actively or submit comments. To a lesser degree, this takes place even with Advisors, who are invited into a project and whose attendance at meetings is financially supported by ALI. Perhaps as many as a fourth of the Advisors are frequently absent or make no statements regarding drafts. See Barker, *supra* note 45, at 576.

<sup>66</sup> This is in my view a larger problem than commonly acknowledged. In a world of inequality, powerful interests often simply have a vast advantage over others in terms of access to decisionmakers and consequent greater ability to influence decisionmakers.

Project, as the name implied, focused on control of corporations and their decision making and involved issues of management prerogatives, shareholder rights, and government regulation.<sup>67</sup> It appears that many corporations, concerned that the resulting ALI product might restrict management prerogatives, enlisted their lawyers who were ALI members in attending ALI Annual Meetings solely for the purpose of voting in favor of corporate management and against public or shareholder groups seeking to curb or regulate management authority.<sup>68</sup>

The *Restatement of Law Governing Lawyers* also saw some arguable interest group voting on particular sections as subgroups of attorneys apparently voted based on business concerns as much as the merits of the topic. A particular example was the proposal that would have relaxed the traditional prohibition against attorneys advancing funds to clients except for payment of litigation-related expenses.<sup>69</sup> The proposal would have permitted attorneys to provide living expense income to clients for both subsistence and to prevent clients being strong-armed into settlements out of economic desperation.<sup>70</sup>

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<sup>67</sup> Seligman, *supra* note 45, at 325.

<sup>68</sup> *Id.* at 343–44.

<sup>69</sup> See MODEL RULES OF PRO. CONDUCT r. 1.8(e) (AM. BAR ASS'N 1983) (a lawyer “shall not provide financial assistance to a client in connection with pending or contemplated litigation” other than advancement of courts costs and expenses, including payment of such costs for an indigent client); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 36(2) (AM. L. INST. 2000) (adopting essentially the same position as ABA Model Rule 1.8(e)).

<sup>70</sup> RESTATEMENT OF THE L. GOVERNING LAWS. §48(2)(b) (AM. L. INST., Tentative Draft No. 4, 1991) [hereinafter *LAWYERS RESTATEMENT* Tentative Draft No. 4] provided that although a lawyer should generally not make loans to a client, it would be permissible to

[m]ake or guaranty a loan on fair terms, the repayment of which to the lawyer may be contingent on the outcome of the matter, if the loan is needed to enable the client to withstand delay in litigation that otherwise might unjustly induce the client to settle or dismiss a case because of financial hardship rather than on the merits.

Although a clear minority approach, there was significant judicial and professional support for the approach. See *LAWYERS RESTATEMENT* Tentative Draft No. 4, *supra*, reporters note, citing inter alia, ALA. R. OF PRO. CONDUCT r. 1.8 (2008); CAL. R. OF PRO. CONDUCT, r. 4-210(A)(2) (1989) (current version CAL. R. OF PROF. CONDUCT r. 1.8.5 (West. Supp. 2020)); N.D. R. OF PRO. CONDUCT r. 1.8(e) (2009); MINN. R. OF PRO. CONDUCT r. 1.8(e)(3) (2005); TEX. CODE OF PRO. RESP. DR 5-103 (1979) (current version at TEX. DISCIPLINARY CODE OF PRO. CONDUCT r. 1.08) (1991)); La. State Bar Ass’n v. Edwins, 329 So.2d 437 (La. 1976).

At the 1991 Annual Meeting, a motion was made to delete this subsection on the ground that lawyers should never be lenders to clients and that this created the potential for unseemly overspending by lawyers to retain clients and to give clients the means to “pump up” damages claims by obtaining medical care and services (this commentator apparently never having heard of physicians treating a bodily injury plaintiff “on a lien”). Defenders of the subsection argued that after the lawyer was returned, lawyer humanitarian aid was not long a danger as a marketing device. The motion to delete was defeated by a vote of 78 to 74. See AM. L. INST., 68TH ANNUAL MEETING: PROCEEDINGS 1991, at 518–21 (1992) [hereinafter 1991 ALI PROCEEDINGS].

During the intervening five years, the provision remained sufficiently controversial that it was removed from the proposed final draft of the revision by the ALI Council. See RESTATEMENT

In response, opponents argued that permitting such payments would lead to a competition among attorneys to recruit clients through promises of support. There was essentially no talk from opponents about whether payments of this sort were valuable for humanitarian reasons or to lower the metaphorical playing field between plaintiffs (who are often individuals) and defendants, who are often businesses with substantial resources (or liability insurance providing defense and funding for judgments and settlements).<sup>71</sup>

More recently, property owner interests opposed a section of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* that provided trespassers with the possibility of recovery for injuries on property if they could prove sufficiently wrongful conduct by the owner.<sup>72</sup> Restatement Section 51 provided that landowners owed a reasonable duty of care to persons on their land, even trespassers. It has been intellectually opposed during the ALI process and politically opposed through interest group efforts to obtain state legislative disapproval of the provision.<sup>73</sup>

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OF THE L. GOVERNING LAWS. §48(2) (AM. L. INST., Proposed Final Draft, 1996) (eliminating subsection (b) quoted above). In response, a motion was made to restore subsection (b). As before, a principal argument made in support of loan prohibition was that it would be used as a marketing device for attracting clients. The voice vote was sufficiently close that a show-of-hands was required. The motion to restore failed but a precise tally was not announced. *See* AM. L. INST., 73RD ANNUAL MEETING: PROCEEDINGS 1996, at 272–78 (1997) [hereinafter 1996 ALI PROCEEDINGS]; *id.* at 278 (in particular “[t]he noes clearly have it”).

In addition to reflecting what I regard as an incorrect policy choice, the legal establishment’s tendency to undervalue the difficulties faced by plaintiffs, and inordinate fear of lawyer competition for clients, the episode also illustrates the degree to which the ALI Membership defers to the Restatement drafting process, Reporters, and the ALI Council. The loan provision enjoyed support of the rank-and-file when it was the position of the Reporters and Council. When the Council’s attitude changed in 1996 (the Reporters continued to support subsection (b)), the rank-and-file deferred to the Council.

<sup>71</sup> *See* discussion in preceding footnote; *see, e.g.*, 1996 ALI PROCEEDINGS, *supra* note 70, at 277 (comments of Michael H. Rubin in opposition to motion to restore subsection (b)) (“I fear that we are moving towards a situation where lawyers are not professional but, put on the adjective that you’d like, businessmen in disguise . . . .”); *see also* 1991 ALI PROCEEDINGS, *supra* note 70, at 518 (comments of Marjorie E. Gross) (advocating prohibition on attorney loans to clients because it “protects lawyers from competition by other lawyers, not on the basis of their skills or expertise, but on the amount of money they’re willing to pay the client up front,” and also stating “[w]hat I do find offensive . . . is buying clients”); *id.* at 519 (comments of Frank Tradewell Davis, Jr.) (“[In some] states . . . loans have exceeded hundreds of thousands of dollars for living expenses.”); *id.* at 519 (comments of Michael Franck) (“[S]ome lawyers use this opportunity in order to increase the special damages of the client by making it possible for the client not to return to work and therefore increasing the value of the claim.”); *id.* at 520 (comments of Judge Martin Evans) (“I suspect that the number of cases in which clients will be bought and there will be a bidding process will be far larger than what we might expect . . . .”).

<sup>72</sup> David Logan, *When the Restatement is not a Restatement: The Curious Case of the “Flagrant Trespasser,”* 37 WM. MITCHELL L. REV. 1448, 1462 (2011).

<sup>73</sup> *See id.* at 1467–68; Stephen D. Sugarman, *Land Possessor Liability in the Restatement (Third) of Torts: Too Much and Too Little*, 44 WAKE FOREST L. REV. 1079, 1081–82 (2009); VICTOR SCHWARTZ & CARY SILVERMAN, *THE NEW RESTATEMENT: BLUNTING THIS*

Perhaps predictably, it was opposed by property owner interests, most prominently the American Tort Reform Association (“ATRA”), which attempted to defeat the proposed standard at the 2012 ALI Annual Meeting. When efforts to provide greater immunity to property owners through the ALI process failed, ATRA and the owners took their case to state legislatures and were successful in passing what might be termed “Restatement Override Legislation” in several states. Typical statutes of this sort provided that landowners owed no duty – none whatsoever – to trespassers, even trespassers such as small children cutting across a yard or field on the way to school and falling into a hidden pit, quicksand, or off a rickety bridge.<sup>74</sup>

In addition, business interests have expressed opposition to ALI projects on such as the *Restatement of Consumer Contracts* and the *Restatement of Data Privacy*. The consumer contracts project is opposed out of fear that it will oppose rigid enforcement of the “fine print” contained in many standardized contract forms. The position of many business leaders is that language in a consumer contract such as a credit card bill or mobile phone account should be given the same effect accorded to provisions in business-to-business contracts such as those between Ford Motor Company and its suppliers.<sup>75</sup> Corporate America appears worried about the data privacy project out of fear it will impose greater burdens to protect privacy and may lead to more liability in cases where privacy is breached.<sup>76</sup>

The evolution of efforts to impact the Restatements appears to have been one of increasing bare-knuckled efforts to obtain particular results for particular interests. The tobacco industry lobbying of Reporters is of course problematic in that much of it was done in low profile and involved payments that, despite funding legitimate work, are discomfiting. But say what you will about Big Tobacco, it was largely playing by the rules, at least intellectually in that it was trying to persuade ALI on the merits regarding its position on product liability.

By contrast, activity directed at Corporate Governance, the Third Torts Restatement, and occasionally even the Lawyer’s Restatement had an air of trying to turn out or rally the party faithful in the manner of a “get out the vote” campaign and intimidate or overwhelm the ALI process rather than an effort to examine an issue at length and debate it on the merits. As reflected in the story of insurer opposition to the

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POTENTIALLY DANGEROUS TRIAL LAWYER WEAPON 7 (2011); Chris Appel, Memorandum in Support of Kansas House Bill 2106 (supporting measure designed to disapprove of RESTATEMENT (THIRD) OF TORTS § 51 (AM. L. INST. 2000) imposing duty of reasonable care on ordinary trespassers such as children cutting across an open field and listing state where similar legislation has been enacted, including North Carolina, North Dakota, Oklahoma, South Dakota, and Texas). Mark Behrens, *No Trespassing: ALEC Model Legislation Would Promote Trespasser Responsibility and Prevent Activist Judges from Facilitating Lawsuits by Intruders*, in INSIDE ALEC 21, 21 (Jan. 2011).

<sup>74</sup> See Appel, *supra* note 73.

<sup>75</sup> See Jeffrey W. Stempel, *How to Make a Dead Armadillo: Consumer Contracts and the Perils of Compromise*, 32 LOY. CONSUMER L. REV. 605, 606 (2020) (describing controversy and attacks on Consumer Contracts Restatement by both consumer advocates and business community).

<sup>76</sup> See Daniel J. Solove & Paul M. Schwartz, *ALI Data Privacy: Overview and Black Letter Text*, 68 UCLA L. REV. 1, 7–8, 27, 29 (2020) (defending project but noting opposition from commercial interests).

RLLI, interest group activity involving Restatements appears to have moved even further in the direction of electioneering over deliberation, as the opposition has involved distortion, disinformation, lobbying pressure, threats, and carrying the fight to other arenas having lost in the ALI and apparently lacking confidence that it could win in the courts, at least without first demonizing the RLLI.

### III. THE BATTLE OVER THE RLLI

Although the first three years of the project reflected relative collaboration between policyholder interests and insurer interests, things changed in 2014 when it moved from a Principles project to a Restatement project. Since then, the RLLI has been significantly under attack by substantial portions of the U.S. insurance industry. The attacks seem misplaced in that the RLLI primarily enunciates black letter rules that are fairly settled and uncontroversial. Where the RLLI takes a position on a legal issue over which the jurisdictions are split, it has roughly an equal number of pro-policyholder and pro-insurer positions. Arguably, on the most important issues implicating the largest amount of money, the RLLI has sided with insurers more than policyholders.<sup>77</sup> Under these circumstances, it is quite odd to see substantial opposition to the RLLI from insurers. The RLLI reflects mainstream approaches to insurance issues.<sup>78</sup> Several of the provisions in fact take demonstrably pro-insurer

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<sup>77</sup> See RANDY MANILOFF & JEFFREY STEMPEL, *GENERAL LIABILITY INSURANCE COVERAGE: KEY ISSUES IN EVERY STATE* ch. 22 (4th ed. 2018) (providing section-by-section review of RLLI and comparison to state law concerning the topics address in the RLLI); 2 JEFFREY W. STEMPEL & ERIK S. KNUTSEN, *STEMPEL AND KNUTSEN ON INSURANCE COVERAGE*, § 14A-7 (4th ed. Supp. 2019) (providing comprehensive review of RLLI and concluding that it has slightly more sections favorable to policyholder but that economic impact of sections favorable to insurers is larger).

<sup>78</sup> Insurance law is distinguished (or plagued, depending on one's viewpoint) by the dominance of treatises written by practitioners rather than full-time law academics. To be sure, academics come to subject matter areas with a viewpoint, but it usually is a viewpoint taken after years of study and analysis rather than formed while representing paying clients to whom duties of loyalty are owed. Further, pursuant to MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 2020), practicing attorneys must avoid conflicts of interest, including so-called "positional" conflicts in which the lawyer (or his law firm) says X in Case One but then says Y in Case Two.

A positional conflict is presented when success by the lawyer in Case One (e.g., persuading a court to adopt a strict view of late notice on behalf of an insurer client) could create precedent that harms the lawyer's client in Case Two (e.g., a policyholder whose notice of a claim was slightly late but caused no harm to the insurer). See Jeffrey W. Stempel, *Legal Ethics and Law Reform Advocacy*, 10 ST. MARY'S J. LEGAL MALPRAC. & ETHICS 245, 253–55 (2020) (describing concept). Consequently, the world of big-time insurance coverage practice (and only attorneys in big time practice are likely to write treatises) is fairly starkly divided into treatises written by policyholder attorneys (e.g., PETER KALIS ET AL., *POLICYHOLDER'S GUIDE TO THE LAW OF INSURANCE COVERAGE* (2000); EUGENE ANDERSON ET AL., *INSURANCE COVERAGE LITIGATION* (2d ed. & Supp. 2020)) and by insurer attorneys (BARRY R. OSTRAGER & THOMAS R. NEWMAN, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* (20th ed. 2020); ALLAN D. WINDT, *INSURANCE CLAIMS AND DISPUTES* (6th ed. 2013)). An arguable exception is RANDY MANILOFF & JEFFREY STEMPEL, *supra*, but different chapters had different authors and there may be some resulting slant. For example, Chapter 18 on "Allocation of Latent Injury and Damage Claims" was written by an insurer attorney who has been heavily involved (and very



positions and the document as a whole is not unduly slanted to either policyholders or insurers.

Principles projects appear to have had less authority and been treated more like scholarly articles or white papers by courts while Restatements were often treated as the near-equivalent of authoritative case law,<sup>79</sup> which is perhaps unfortunate. Most portions of a Principles document were not creative endeavors extending the law but Restatement-like summations of existing law and practice. Principles projects, like the Restatements, have also been subject to substantial vetting by not only the Reporters chosen for the project but also by the ALI's quite rigorous review protocols (although it may be the case that ALI participants were less willing to vigorously debate Principles as compared to the close scrutiny given Restatements). Some of this may result from the very low-profile Principles projects have had with the practicing bar, which is the conduit through which the bench is normally appraised (through briefs and oral argument) in an adversary system.

In any event, Principles projects do appear to have a lower profile and less impact on case law, which in turn may have accounted for the insurance industry's relatively benign view of the RLLI during its first few years. As previously noted, the Project began in 2010. Selected to provide feedback to the Reporters was a group of approximately 40 Advisers composed of roughly equal numbers of judges, law professors, policyholder attorneys, and insurer attorneys or executives.<sup>80</sup> In addition,

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successful) in pressing the insurer view of allocation before the courts. The multi-volume classic insurance treatises *COUCH ON INSURANCE 3D* (edited in part by insurer attorney Steven Plitt) and *APPLEMAN ON INSURANCE* (Library ed.) (edited by law professor Jeffrey Thomas) have chapters initially authored by policyholder and insurer practitioners.

Because of these factors, one need not be a cynic to conclude that on close questions, a policyholder treatise and an insurer treatise might present the state of the law or the conflicting policy arguments with different emphasis. And for the most part this is good in that different perspectives are brought to issues that can in turn be considered by bench and bar. But this situation also makes it more difficult in this area to "look up" or verify the state of the law – all of which is made more difficult by the state-centered nature of insurance law.

Under these circumstances, a good case can be made that the RLLI is arguably the best source available for providing a neutral assessment of the law in that while the document takes positions on divided caselaw, the Comments provide nuanced discussion of the position and the Reporters Notes collect diverse caselaw on varying sides of the issue.

<sup>79</sup> See, e.g., cases cited *supra* note 38. This is not to say that the Principles projects were ignored or had no impact. A March 17, 2021 LexisNexis search ("ALI or American Law Institute w/2 Principles") reflected 578 cases, a track record that would be the envy of most law professors (as well as in 3,758 secondary materials such as law review articles and treatises). But the same search using the word "Restatement" revealed citations in 2,351 cases – more than four times as many (but a lower-than-expected number of 3,165 in secondary sources). To be sure, there are more Restatements in print than Principles, which have been a more recent genre of ALI work. In addition, the Restatements of Torts and Contracts touch on much-litigated subjects and are unsurprisingly the most cited Restatements. But many of the Restatements (e.g., Foreign Relations) are hardly the stuff of everyday courtroom fare. It thus seems safe to conclude that the impact in the courts of Principles is consistently below that of Restatements. However, legal scholars appear to be equally interested in both.

<sup>80</sup> And it is not an overgeneralization to say the composition of the Advisers group, members of which are identified in the introductory pages of the Restatement, was evenly balanced. In

as with all ALI projects or restatements, ALI members can volunteer to be part of the project's Members Consultative Group ("MCG").<sup>81</sup>

The Advisers and the MCG are provided with drafts and meet at intervals to discuss the drafts and provide criticism and commentary to the Reporters. Typically, a draft is discussed by the Advisers over a full day at ALI headquarters in Philadelphia, followed by discussion with the MCG on the ensuing day. Ten such sessions were held in connection with the RLLI.

In addition to the formal process of distributing and discussing drafts within the Institute, the ALI maintains a record of the Restatements and Projects on its website, to which both ALI members and non-members may post comments. The RLLI was no exception and as of the May 2018 Annual Meeting had been subject to more than

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its final incarnation (the group expanded slightly during the years of the project), it included eleven (11) insurer attorneys or executives (Michael Aylward, Vanita Banks, William Barker, Sheila Birnbaum, Kim Brunner, Robert Cusumano, Sean Fitzpatrick, John Nada, Natasha Nye, Nathaniel Shapo (a former insurance commissioner) and Robert Tomlinson), eleven (11) policyholder attorneys or advocates (Amy Bach, David Brown, Steven Goldman (a former insurance commissioner), Jonathan Goodman, Barry Levin, Lorelie Masters, Meghan Magruder, J.W. Montgomery, David Mullikin, Henry Parr, and Larry Stewart), nine (9) professors in addition to the Reporters (Kenneth Abraham, Michelle Boardman, Malcolm Clarke, Robert Jerry, Leo Martinez, Adam Scales, Daniel Schwarcz, Jeffrey Stempel, and Jeffrey Thomas) and nine (9) judges or former judges (Marc Amy, the late Walter Croskey, Lee Edmond, Peter Flynn, William Highberger, Jack Jacobs, Randall Shepard, Sara Vance, and Herbert Wilkins). Somewhat difficult to characterize is Douglas Richmond, counsel and vice-president of insurance broker Aon but who represented insurers as an attorney and is an accomplished legal scholar with more articles than most full-time law professors. Also difficult to characterize are Advisers who are not policyholder counsel and coverage specialists but frequently represent plaintiffs (Allen Black, Henry Parr) who of course have an interest in having defendants with insurance coverage. In addition, insurer attorney Laura Foggan was designated liaison from the American Insurance Association. *See* RLLI, *supra* note 4, at VII-VIII (listing Advisers). Overall, it was an amazingly balanced group, which had been the goal of the Reporters and the ALI from the outset. In hindsight, one might be critical of the Institute for not adding other official liaisons to the group such as a formal representative of insurance brokers, corporate risk managers, third-party administrators, or government regulators as was the case for insurers.

<sup>81</sup> There are more than 100 MCG members involved with the RLLI (*see* RLLI, *supra* note 4, at IX-XII) and the group includes a mix of counsel, with members who were particularly prominent insurer attorneys or advocates (e.g., Douglas Houser, Michael Marick, Alan Rutkin, William Shelley) and insurer attorneys with an extensive track record of scholarly writing (Randy Maniloff, Thomas Newman, Steven Plitt, Victor Schwartz). The MCG also included notable policyholder counsel (David Goodwin, Timothy Law, Kurt Melchior, Dale Swope) and legal scholars (Jay Feinman, Jill Fisch, Larry Garvin, Michael Green, Richard Marcus, Peter Kochenburger, Ellen Pryor, Keith Rowley, Anthony Sebok, S.I. Strong) and persons with substantial insurance industry experience (Dennis Connolly). Professors Garvin and Rowley are co-authors of two different casebooks widely used in law schools – and have not objected to the RLLI's provisions regarding contract construction, provisions insurer critics label as unrepresentative or even radical. Although silence is not necessarily acquiescence, we think it is odd that the contract interpretation sections of the RLLI labeled radical by insurers have not attracted criticism from mainstream contracts scholars.

250 comments<sup>82</sup> and more than thirty-six (36) motions regarding portions of the drafts.<sup>83</sup>

After meeting with Advisers and the MCG, the Reporters revised the then-current draft and presented a “Council Draft” to the ALI Council, which reviews, discusses, and then votes upon the Restatement sections before it. The RLLI was discussed at five different Council meetings between 2012 and 2018 prior to the May 2018 Annual Meeting.<sup>84</sup>

After approval by the Council, the relevant portions of a Restatement are put before the ALI membership at its Annual Meeting. At the Annual Meeting, Restatement provisions are discussed seriatim before those on the floor, with members permitted to offer amendments and commentary. Votes are taken on the proposed amendments while commentary is generally considered by the Reporters for potential editorial changes after the Meeting. The proceedings are transcribed and published by the Institute and provide something of a legislative history regarding review of a restatement. The RLLI was subject to discussion at the 2012, 2013, 2014, 2015, 2016, 2017 and 2018 Annual Meetings, with final approval made at the May 2018 Annual Meeting.<sup>85</sup>

#### A. Insurance Industry Opposition to the RLLI

In its early phases, the Principles contained some provisions that could be viewed as quite pronouncedly pro-policyholder<sup>86</sup> and which were opposed by insurers and some advisers. These provisions were subsequently revised. After the RLLI was converted from a Principles project to a Restatement in 2014, insurer complaints increased. For example, in March 2014, on the eve of an Advisers/MCG meeting, all Advisers received via FedEx a letter signed by ten insurer counsel accompanied by an

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<sup>82</sup> Between January 1, 2014 and July 15, 2017, there were 231 comments submitted regarding the RLLI. See *Restatement of the Law of Liability Insurance*, AM. L. INST. (formerly available at ali.org) (on file with the author and in ALI archives). In addition, persons interested in the RLLI frequently make direct contact with the Reporters but do not send their comments to the ALI for posting. But whatever the final tally, it is clear that the RLLI has received substantial scrutiny and commentary. From July 15, 2017 through the time of the May 2018 Annual Meeting, there were another 99 comments as well as ten motions directed at the RLLI. *Id.*

<sup>83</sup> See *id.*

<sup>84</sup> See AM. L. INST., ANNUAL MEETING: PROCEEDINGS 2012, at 278–308 (2013); AM. L. INST., ANNUAL MEETING: PROCEEDINGS 2013, at 44–91 (2014); AM. L. INST., ANNUAL MEETING: PROCEEDINGS 2014, at 190–235 (2015); AM. L. INST., ANNUAL MEETING: PROCEEDINGS 2015, at 214–30 (2016); AM. L. INST., ANNUAL MEETING: PROCEEDINGS 2016, at 65–109 (2017); AM. L. INST., ANNUAL MEETING: PROCEEDINGS 2017, at 122–64 (2018); AM. L. INST., ANNUAL MEETING: PROCEEDINGS 2018, at 97–140 (2019).

<sup>85</sup> See sources cited *supra* note 84.

<sup>86</sup> For example, an early draft of the Principles would have provided that an insurer could not rescind a policy where a policyholder made a misrepresentation during the application process if any subsequent loss and claim for coverage was not related to the misrepresentation. This was subsequently changed to follow the prevailing rule that where a misrepresentation is material to the risk assumed under the policy, the insurer may rescind due a material misrepresentation even if the loss in question is not related to the misrepresentation.

approximately twelve-inch stack of hardcopy enclosures attacking the RLLI sections currently drafted.<sup>87</sup>

The Insurer Counsel package was distinguished by its strong tone, opposing many aspects of the Restatement and suggesting that the current draft was greatly at odds with American law and that the RLLI was not legitimate if it varied from the majority rule of the insurance issues it addressed. It was the first major shot across the bow of the RLLI (and the Institute) and presaged greater politicization surrounding the project. From that date onward, the RLLI saw many more comments posted to its website, mostly by insurer representatives.<sup>88</sup> The volume and intensity of criticism exceeded its legitimacy.

### 1. The Specious “Regulatory” Criticism of the RLLI

Insurers attacked the entire document on the ground that it constituted an impermissible intrusion on state regulation. A perhaps even less persuasive argument against the RLLI was made by some insurance regulators and legislators suggesting that it undermined regulatory goals. One state regulator requested that any approval of the RLLI be deferred because he had only recently become aware of the project and thought that other regulators would have similar concerns.<sup>89</sup> In a complex legal world marked by division of labor within the profession, any of us can occasionally be caught unaware by legal developments. But it is more than a little disheartening to think that an insurance regulator would not in 2017 be aware of ALI activity regarding insurance that began in 2010.

#### *a. The NCOIL Attacks*

Sounding the same note in more shrill tone was commentary from the National Conference of Insurance Legislators (“NCOIL”) which argued that the Restatement Project “Violates ‘Legislative Prerogative.’”<sup>90</sup> The NCOIL position was that the RLLI has in several instances made “significant changes to current law” and that “[s]uch matters are the primary prerogative of the legislative branch of government”

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<sup>87</sup> See Letter from General Counsel and Corporate Officers of ACE, AIG, Allstate, Chub, Hartford, Liberty Mutual, State Farm, Travelers, USAA, and Zurich to ALI Reporters and Advisers (Mar. 24, 2014) (on file with author).

<sup>88</sup> See *supra* notes 82–85 and accompanying text.

<sup>89</sup> See Letter from Dean L. Cameron, Dir., Idaho Dep’t of Ins., to Richard Revesz, Dir., Am. L. Inst. (April 5, 2017) (“The Idaho Department of Insurance respectfully requests that the finalization of the Restatement, Liability Insurance project be delayed to a date later than May 2017, allowing state regulators the opportunity to weigh in on important issues raised by the proposed Restatement. This topic has just now come to the attention of our legal department which requires time to delve into this complicated topic in order to advise and submit an opinion.”) <https://perma.cc/Q7PE-DUAQ>.

<sup>90</sup> See Press Release, NCOIL Voices Concerns with the American Law Institute’s Proposed Liability Insurance Restatement: Violates “Legislative Prerogative” (May 8, 2017) (accompanying Letter from Thomas B. Considine, CEO, Nat’l Conf. of Ins. Legislators, to Richard Revesz, Director, Am. L. Inst., and Stephanie Middleton, Deputy Director, Am. L. Inst. (May 5, 2017) [hereinafter NCOIL Letter]), <http://ncoil.org/wp-content/uploads/2017/05/ALI-final-Press-Release-1.pdf> [<https://perma.cc/KJT9-NHDH>].

consisting of elected officials who “must consider all relevant policy considerations such as the impact of proposed law changes on the availability and affordability of insurance.”<sup>91</sup> The NCOIL letter implied that the RLLI provisions would undermine both state insurance regulation and insurance markets.<sup>92</sup> But NCOIL specifically noted only four supposedly bad aspects of the then 51-section 2017 RLLI.<sup>93</sup>

Space limitations prevent a point-by-point refutation of the NCOIL assertions but some ink should be spilled correcting the more egregious claims. The RLLI position on contract construction in the 2017 draft was not the radical departure asserted by NCOIL but was consistent with a substantial amount of case law, which reflects courts taking policy text seriously but utilizing extrinsic evidence, intent, purpose, and function of policies – approach to ambiguous terms set forth in RLLI Section 4.<sup>94</sup> Nonetheless, the ALI responded to insurer criticisms that the 2017 draft was not sufficiently deferential to insurance policy text and revised the portion of the RLLI.<sup>95</sup>

The NCOIL contention that the 2017 RLLI makes insurers liable for a judgment in excess of policy limits if they “reasonably refuse a settlement demand” is also just plain wrong in that it is a gross distortion of the RLLI, which provides that insurers

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<sup>91</sup> *Id.* at 2.

<sup>92</sup> NCOIL seems to suggest that the RLLI approach to many issues was so unduly unfavorable to insurers that it would undermine the very nature of insurance markets and the insurance business and would interfere with state regulatory efforts. NCOIL also suggests that legislatures are better able to conduct an empirical and public policy inquiry into the wisdom of proposed legal rules. But the NCOIL letter offers no empirical evidence or public policy information to support its opposition to the Restatement provisions with which it takes issue.

<sup>93</sup> NCOIL argued against:

Section 3(2), which NCOIL read as providing that “[i]nsurance contracts do not need to be enforced as written.”

Section 19 because it means the “[i]nsurers in breach of a defense obligation may be forced to pay uncovered claims”;

Sections 24 and 27, which NCOIL asserted provides that “[i]nsurers that reasonably refuse a settlement demand are liable for damages in excess of limits and punitive damages, irrespective of law or public policy to the contrary”; and

“Policyholders – but not insurers – can shift attorneys’ fees” in that Sections 48(3), 49(3) and 51(1) permit fee shifting in some circumstances.

NCOIL Letter, *supra* note 90, at 2. All of these assertions are ill-taken. See MANILOFF & STEMPEL, *supra* note 77.

<sup>94</sup> In addition to the treatises previously cited in this Section and RLLI, *supra* note 4, at §§ 3–4 reporters notes; see also Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 532 n.4 (1996) (finding contra proferentem principle to be a cornerstone of insurance policy construction, addressed in more than 4,000 cases between 1980 and 1995, with courts frequently also employing waiver, estoppel and reasonable expectations analysis).

<sup>95</sup> See RLLI, *supra* note 4, at § 3 (adopting a “plain meaning” approach with more limited use of extrinsic evidence than predecessor drafts).

are responsible only if they fail to make reasonable settlement decisions.<sup>96</sup> By definition, a reasonable rejection of a settlement demand is a reasonable settlement decision. Contrary to NCOIL's assertion, insurers that act reasonably have nothing to fear from the RLLI.

NCOIL's objection to 2017 RLLI § 19 is odd in that, as discussed below, the Section originally provided a strict rule stripping insurers of coverage defenses when the insurer breaches the duty to defend. Under the final version of RLLI § 19, the insurer may breach the duty to defend and still be permitted to contest coverage (a result considerably more pro-insurer than earlier drafts (pre-2017) of the Section, which would have completely barred insurers who breached the duty to defend from contesting coverage).<sup>97</sup> NCOIL describes the 2017 version of the Section as a providing a "bad faith penalty" but that is a bit misleading. In many states, an insurer's unreasonable conduct in failing to defend an insured is already considered bad faith.<sup>98</sup> One might therefore describe 2017 RLLI § 19 as providing that insurers breaching defense obligations lose coverage defenses only if the breach was in bad faith, which is hardly a pro-policyholder rule.

But regardless of the merits of the 2017 RLLI § 19, the issue was effectively mooted by changes made to the Section at the behest of insurers. Current RLLI § 19 merely states that an insurer breaching its duty to defend loses the right to control defense and settlement of the action, which is but a truism. The ALI has now completely accommodated (some would say caved in to) insurer objections to earlier versions of § 19. Presumably, NCOIL no longer objects to the Section. Yet the organization continues to lobby hard for either further pro-insurer changes to the RLLI or rejection of the document.

NCOIL's objection to the possibility of fee shifting set forth in RLLI §§ 48, 49 and 51 also seems misplaced.<sup>99</sup> As discussed below, the 2017 RLLI endorsed fee-shifting

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<sup>96</sup> See *id.* § 24(1)–(2) (“[T]he insurer has a duty to the insured to make *reasonable* settlement decisions [as if it bore] the sole financial responsibility for the full amount of the potential judgment.”) (emphasis added).

<sup>97</sup> See Jeffrey W. Stempel, *Enhancing the Socially Instrumental Role of Insurance: The Opportunity and Challenge Presented by the ALI Restatement Position on Breach of the Duty to Defend*, 5 U.C. IRVINE L. REV. 587, 591–92 (2015).

<sup>98</sup> See, e.g., *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1036–38 (Cal. 1973); *Kirk v. Mt. Airy Ins. Co.*, 951 P.2d 1124, 1125 (Wash. 1998) (“In order to establish bad faith, an insured is required to show the breach was unreasonable, frivolous, or unfounded . . . .”); *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 400 (Ohio 1994) (adopting an objective “reasonable justification” standard for determining whether insurer acted in bad faith without need to consider the subjective state of mind of the insurer). Reporters’ Note b to Section 50 of the RLLI finds that “[t]he majority approach to determine whether an insurer acted in bad faith requires courts to evaluate the insurer’s conduct with both objective and subjective tests,” but notes the strong minority rule of a purely objective inquiry asking whether the insurer acted reasonably.

<sup>99</sup> RESTATEMENT OF THE L. OF LIAB. INS. § 48(4) (AM. L. INST., Proposed Final Draft No. 1, 2017) [hereinafter RLLI Proposed Final Draft No. 1] permitted fee shifting “[w]hen the insured substantially prevails in a declaratory-judgment action brought by an insurer seeking to terminate the insurer’s duty to defend under the policy, an award of a sum of money to the insured for the reasonable attorneys’ fees and other costs incurred in that action.” The March 2017 version of § 49 permitted fee shifting to reimburse a policyholder for the reasonable fees

in cases where an insurer commences a declaratory judgment action against its policyholder, forcing the insured to fight a “two-front” war and shoulder additional disputing costs. Insurers, as perhaps the ultimate institutional “repeat players” in litigation, usually can more successfully wage wars of attrition than can their policyholders. The insurer (who should be held to the standards of Rule 11 of the Federal Rules of Civil Procedure<sup>100</sup>) initiates a declaratory judgment action and ordinarily should fight only battles it expects to win rather than fighting simply for leverage against a policyholder. Where the insurer loses, the 2017 RLLI position – which permits, but does not require, courts to shift counsel fees – was fair and reasonable.<sup>101</sup>

Notwithstanding its weakness, the NCOIL position was accommodated by the ALI. Current RLLI § 47(3) provides that an insurer in breach of its obligations may be responsible for court costs or counsel fees “when provided by state law or the policy.” In essence, the ALI has “punted” in the issue by deferring to atomized state law rather than attempting to set forth a logical common law approach to the issue of fee-shifting as a remedy for breach. Once again, insurers have been heard and accommodated by the ALI.

As reflected in its ability to obtain the gubernatorial letter and pro-insurer changes that took place in the RLLI after 2017, NCOIL has proven itself to be an advocacy organization with more than a little clout. This makes its contention that it had in 2017 “just recently learned of” the RLLI and its arguably problematic provisions<sup>102</sup> difficult to accept at face value. On this point, as with professed state regulator ignorance, it is hard to imagine that a group purporting to carefully follow insurance matters could claim to have been unaware of the ALI Restatement project for a half-dozen years. A claim of being “surprised” by the RLLI rings particularly hollow when one considers the number of prominent insurer representatives who were involved in the projects as

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and costs insured to establish an insurer’s breach of the duty to defend or pay defense costs on an ongoing basis.” RLLI Proposed Final Draft No. 1, *supra*, at § 49(3). The March 2017 version of § 51 permitted recovery of counsel fees and costs the policyholder incurs to establish an insurer’s breach of the covenant of good faith and fair dealing. RLLI Proposed Final Draft No. 1, *supra*, at § 51.

<sup>100</sup> STEMPER & KNUTSEN, *supra* note 77, at § 14A-83.

<sup>101</sup> Further, to response to NCOIL’s concern that victorious insures cannot recover fees, it should be noted that where a policyholder’s opposition violates FED. R. CIV. P. 11, R. 37, or 28 U.S.C § 1927, or other rules or laws with the possibility of fee-shifting, the insurer may recover.

<sup>102</sup> See NCOIL Letter, *supra* note 90, at 1.

Advisers<sup>103</sup> or MCG members or who had written about the RLLI in the trade press<sup>104</sup> or who had given presentations about the RLLI at large gatherings of insurer attorneys.<sup>105</sup> Is it possible the NCOIL, which claims to be a voice of the insurance

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<sup>103</sup> As discussed earlier, roughly a fourth of the Advisers were persons connected to the insurance industry as employees or counsel, among them Vanita Banks of Allstate, Kim Brunner of State Farm, Robert Cusamano of ACE and insurer lawyers Michael Alward, William Barker, Sheila Birnbaum, Sean Fitzpatrick, Natasha Nye, and Robert Tomlinson. In addition, prominent insurer attorney Laura Foggan participated in the project as a liaison representative of the American Insurance Association (“AIA”). (There was no liaison appointed to represent a policyholder or broker organization). Among the MCG were many attorneys representing insurers in their practices. *See* RLLI, *supra* note 4, at VII-XII (listing Advisers and Members Consultative Group). This is not to suggest that these persons agreed with all or even most of the positions taken in the RLLI. Attorneys Aylward, Barker, and Foggan were frequently outspoken on behalf of pro-insurer positions at meetings and in comments submitted to the Reporters.

Consequently, NCOIL’s suggestion that insurers were somehow “ambushed” by the RLLI project is not credible in light of the very able articulation of insurer views presented throughout the process. Even if there had been no insurer representatives involved in the project, it was nonetheless hardly a furtive enterprise. During the past seven years, the RLLI has had eleven (11) drafts, which were discussed at five ALI Council meetings and six Annual Meetings. There have also be a total nearly 20 Advisers and MCG meetings. As previously noted, the balance among the Advisers is evenly split between policyholder counsel and insurer counsel while the MCG membership has a higher proportion of insurer lawyers and includes several prominent insurer counsel. The RLLI did not sneak up on the insurance industry and its allies in the legal profession.

<sup>104</sup> *See, e.g.*, Randy Maniloff, *ALI Principles of Insurance Should Concern Industry*, LAW360 (Apr. 16, 2014), <https://www.law360.com/articles/528384/ali-principles-of-insurance-should-concern-industry>. Despite the long gestation period of the RLLI, the insurance industry did not mount what appears to be coordinated attack on the project until 2017. In addition to Motions like the AIG Omnibus Motion and adverse Comments submitted to ALI (e.g., NCOIL), insurer counsel took to the trade press with a vengeance to attack the RLLI. *See, e.g.*, A. Hugh Scott, *ALI’s Proposed Insurance Law Restatement: A Trojan Horse?*, LAW360 (Feb. 9, 2017), <https://www.law360.com/articles/889483>; A. Hugh Scott, *Why Criticism of ALI’s Insurance Restatement is Valid*, LAW360 (May 10, 2017), <https://www.law360.com/articles/922277/why-criticism-of-ali-s-insurance-restatement-is-valid>. Insurers were also remarkably successful in getting media outlets to take their criticisms more seriously than is deserved and in portraying the ALI’s deferral of formal approval of the RLLI until 2018 as more of a victory than was actually the cases. *See, e.g.*, Glenn G. Lammi, *Heeding Criticism, American Law Institute Pulls Liability Insurance Restatement Before Member Vote*, FORBES (May 25, 2017), <https://www.forbes.com/sites/wlf/2017/05/25/heeding-criticism-american-law-institute-pulls-liability-insurance-restatement-before-member-vote/?sh=2d063d4d3106> [<https://perma.cc/Z22S-FBH7>].

<sup>105</sup> For example, at an April 2016 Defense Research Institute seminar I attended along with hundreds of attorneys representing insurers (many staff counsel) and even some insurance company executives (as well as one of the Treatise authors), prominent attorney Richard Mason (of the Cozen law firm in Philadelphia, a very well-known insurer law firm) gave a presentation in which he criticized aspects of the RLLI, described it as very pro-policyholder and advised/warned his colleagues that the RLLI was likely to be influential.



industry, had none of its members in any communication with any of these people for six years?

*b. The Dinallo/Slattery/Debevoise Attacks*

In a related vein, Attorneys Eric Dinallo (a former New York State Insurance Commissioner) and Keith Slattery of New York's Debevoise & Plimpton law firm submitted a lengthy letter requesting that ALI postpone consideration of the 2017 RLLI or perhaps even abandon the project on the ground that it was duplicative of or in conflict with state insurance regulation.<sup>106</sup> Law professors Peter Kochenburger, Jeffrey Thomas and Daniel Schwarcz authored a response to the Dinallo/Slattery submission that carefully refuted its contentions and revealed them to be misplaced.<sup>107</sup> They concluded that the Dinallo/Slattery letter (which Professor Kochenburger discovered was funded by the National Association of Mutual Insurance Companies ("NAMIC")) "fundamentally mischaracterizes both the wording and effect of multiple sections in the Restatement and important aspects of insurance regulation."<sup>108</sup>

In some detail, the Kochenburger Letter pointed out that the Dinallo/Slattery contention that the area of insurance policy construction was already sufficiently regulated to protect policyholders, even individual consumers,<sup>109</sup> was incorrect and that policyholder rights pursuant to an insurance policy were not adequately protected by rate and form regulation and other regulator activity as asserted in the Dinallo/Slattery Letter.<sup>110</sup> The Kochenburger Letter also outlined why the rules set forth in the RLLI did not pose any threat to insurer solvency<sup>111</sup> and refuted the contention that RLLI was inconsistent with model legislation such as the Unfair Claim

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<sup>106</sup> See Letter from Eric J. Dinallo and Keith J. Slattery, Debevoise & Plimpton, to ALI Leadership and RLLI Reporters (Jan. 17, 2017) [hereinafter Dinallo/Slattery Letter], <https://perma.cc/DAB3-HXK4>.

<sup>107</sup> See Letter from Peter Kochenburger, Deputy Dir., Ins. L. Ctr., Daniel Schwarcz, Univ. of Minnesota L. Sch., and Jeffrey Thomas, Univ. of Missouri-Kansas City Sch. of L., and joined by Jay Feinman, Rutgers L. Sch., Jeffrey W. Stempel, Univ. of Nevada Las Vegas L. Sch. & Amy Bach, Exec. Dir., United Policyholders, to Richard L. Revesz, Dir. Am. L. Inst. & Stephanie A. Middleton, Deputy Dir., Am. L. Inst. (May 18, 2017) [hereinafter Kochenburger Letter], <https://perma.cc/ME2E-PGS3>.

<sup>108</sup> *Id.*

<sup>109</sup> The Dinallo/Slattery Letter argued:

Contrary to the [RLLI] presumption regarding the vulnerability of the insurance consumer, comprehensive regulatory oversight, extensive insurance laws and regulations, well-developed case law and competitive market forces are already in place to protect the consumer. Therefore, the highlighted Draft rules [with which Dinallo and Slattery disagree] are unnecessary and overreaching. Those rules also depart from case law and attempt to displace the role of the regulator.

Dinallo/Slattery Letter, *supra* note 106, at 38.

<sup>110</sup> See Kochenburger Letter, *supra* note 107, at 2–4.

<sup>111</sup> *Id.* at 4.

Settlement Practices Act.<sup>112</sup> The Kochenburger Letter also refuted the assertions of the NCOIL letter.<sup>113</sup>

## 2. Heavy Commentary on the RLLI, Mostly by Insurers and Allies

Insurance defense panel counsel continued to produce anti-RLLI commentary after the 2017 Annual Meeting as well as producing a media spin that the ALI was in some retreat on the RLLI because it had postponed final approval to the 2018 Annual Meeting. Near-meeting or post-meeting comments included submissions from the American Insurance Association Liaison,<sup>114</sup> insurer attorney and Washington Law

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<sup>112</sup> *Id.* at 5–6.

<sup>113</sup> *Id.* at 6–8.

<sup>114</sup> See Memorandum from Laura A. Foggan to Tom Baker and Kyle Logue (June 11, 2017) (on file with author) (regarding RLLI § 45 and arguing that there should at a minimum be more citation to cases in which courts enforce policy terms as written and reject public policy-based objections to enforcement); Note from Laura Foggan to Tom Baker and Kyle Logue (not dated) (on file with author) (attacking RLLI § 13(3) permitting use of extrinsic evidence to supplement four corners of plaintiff's complaint to create a potential for coverage and duty to defend and attaching case of *Ciber, Inc. v. ACE Am. Ins. Co.*, 261 F. Supp. 3d 1119 (D. Colo. 2017) to support the point).

Foundation contributor Kim Marrkand,<sup>115</sup> ATRA activist Victor Schwartz,<sup>116</sup> former law professor and insurer attorney Malcom Wheeler,<sup>117</sup> Pennsylvania insurance defense attorneys,<sup>118</sup> and other insurance industry allies.<sup>119</sup> Some ALI Members not

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<sup>115</sup> See, e.g., Letter from Kim V. Marrkand to Tom Baker and Kyle Logue (June 28, 2017) (on file with author) (advocating elimination of Comment *d* to RLLI § 27, which takes that position that where an insurer's failure to make reasonable settlement decisions results in a judgment against the policyholder in excess of policy limits, the insurer is responsible for the entire judgment even if portions of the judgment include a punitive award). Insurers oppose this approach in states where punitive damages are uninsurable as a matter of public policy and can cite one particularly prominent (but in my view very wrongly decided) case: *PPG Indus., Inc. v. Transamerica Ins. Co.*, 975 P.2d 652, 654 (Cal. 1999); see also STEMPER & KNUTSEN, *supra* note 77, at § 9.05(d) criticizing *PPG v. Transamerica*). However, RLLI Comment *d* correctly rejects the insurer view, noting that in cases like *PPG v. Transamerica*, there were powerful dissents that the Reporters found more persuasive.

[The RLLI] follows the approach of the dissenting judges in those cases for several reasons. First, this approach furthers the public policy in favor of encouraging reasonable settlement decisions by insurers. Second, the incentive argument in favor of the contrary approach . . . is implausible because insureds will not base their conduct on a speculative possibility their insurer might later breach the duty to make reasonable settlement decisions. . . . Finally, the contrary approach would create a conflict of interest in the defense of the claim that might increase the frequency of cases in which independent counsel would be required under §16, reducing liability insurers' ability to manage defense costs. See § 16, Comment *d*.

RLLI, *supra* note 4, at § 27 cmt. *e*; see also *id.* § 27 reporters note *d* ("The insurer should be liable for all damages proximately caused by its breach of duty [to make reasonable settlement decision]."); Jennifer A. Emmaneel, Note, *Hiding Behind Policy: Confusing Compensation with Indemnification*, 30 GOLDEN GATE U. L. REV. 637, 677 (2000) (concluding after extensive analysis of *PPG v. Transamerica* that the dissent position is superior); Letter from Kim V. Marrkand, RLLI Reporter to Tom Baker and Kyle Logue, RLLI Reporters (June 28, 2017) (attacking RLLI § 1(8) regarding mandatory rules) (on file with author); Letter from Kim V. Marrkand, RLLI Reporter, to Tom Baker and Kyle Logue, RLLI Reporters (June 14, 2017) (criticizing RLLI § 8 regarding misrepresentation) (on file with author).

<sup>116</sup> See Letter from Victor E. Schwartz and Christopher E. Appel to Tom Baker and Kyle Logue, RLLI Reporters (June 28, 2017) (attacking fee-shifting as a remedy and proposing revisions of §§ 48, 49 and 51 to defer to existing state-by-state law) (on file with author).

<sup>117</sup> See Letter from Malcolm E. Wheeler to Tom Baker and Kyle Logue, RLLI Reporters (June 19, 2017) (urging revision of RLLI §§ 24, 25, and 35 to add additional requirements before a policyholder may settle a matter without an insurer's consent and urging approach similar to *Travelers v. Stresscom*, 370 P.3d 140 (Colo. 2016), on which the insurer prevailed in an unauthorized settlement case) (on file with author).

<sup>118</sup> See Letter from Louis C. Long, President, Pennsylvania Def. Inst., to Tom Baker and Kyle Logue, RLLI Reporters (May 24, 2017) ((criticizing §§ 3, 12, 13, 10 and "numerous other sections" (by which we think he means §§ 48, 49 and 51) regarding fee shifting)) (on file with author).

<sup>119</sup> See Letter from Parks T. Chastain to ALI Reporters (May 15, 2017) (urging postponement of vote on RLLI) (on file with author); Letter of Enrique Martinez, President, Ass'n of Def. Counsel of N. California & Nevada, to Richard L. Revesz, Director, ALI (May 12, 2017) (referencing and adopting DRI criticism) (on file with author); Letter from Swift Currie (self-

described insurer firm writing “on behalf of several insurance company clients”) to Richard L. Revesz, Director, ALI, and Stephanie Middleton, Deputy Director, ALI (May 22, 2017) (arguing RLLI lacks caselaw support and particularly criticizing § 12(2) as imposing vicarious liability on insurers for conduct of defense counsel, which is an inaccurate description of the provision) (on file with author); Letter from David T. Moran to Richard L. Revesz, Director, ALI, and Stephanie Middleton, Deputy Director, ALI (May 16, 2017) (arguing that RLLI § 3 regarding extrinsic evidence and the duty to defend is not supported by caselaw (an incorrect assertion in our view)) (on file with author); *see also* Letter from Thomas D. Hughes, Greater N.Y. Ins. Co., to Richard L. Revesz, Director, ALI, and Stephanie Middleton, Deputy Director, ALI (May 19, 2017) (on file with author); Letter from Carmello Puglisi, Am. Family Mut. Ins. Co. et al. to ALI Reporters (May 19, 2017) (on file with author); Letter from Carl Pernicone, Wilson Elser to Richard L. Revesz, Director, ALI, and Stephanie Middleton, Deputy Director, ALI (May 18, 2017) (on file with author); Letter from William T. Russell, Jr. to ALI Reporters (May 18, 2017) (on file with author); Letter from William A. Bossen to Richard L. Revesz, Director, ALI, and Stephanie Middleton, Deputy Director, ALI (May 17, 2017) (on file with author); Letter from R. Mark Miffelin, Ill. Ass’n of Def. Trial Counsel, to Richard L. Revesz, Director, ALI, and Stephanie Middleton, Deputy Director, ALI (May 12, 2017) (on file with author); Letter from Todd A. Strother, EMC Ins., to Richard L. Revesz, Director, ALI (May 12, 2017) (on file with author); Letter from Ellen D. Melchionni, New York Ins. Ass’n, to Richard L. Revesz, Director, ALI (May 15, 2017) (on file with author); Letter from Bonnie L. Guth, Munich RE, to Richard L. Revesz, Director, ALI, and Stephanie Middleton, Deputy Director, ALI (May 16, 2017) (on file with author); Letter from A. Hugh Scott to ALI Reporters (May 17, 2017); Letter from Am. Ins. Ass’n to ALI Reporters (May 11, 2017) (on file with author).

In a letter to Reporters, the Illinois Department of Insurance Director criticized the RLLI as deviating from settled law and quoting Justice Scalia’s concurrence in *Kanas v. Nebraska*, 574 U.S. 445, 475–76 (2015), in which he accuses ALI and Restatements of advocating new law rather than distilling existing law as well as opposing RLLI § 19(2) and § 24. Letter from Jennifer Hammer, Director, Illinois Dep’t of Ins., to ALI Reporters (May 19, 2017) [hereinafter Hammer Letter]; *see also* Letter from Patrick M. McPharlin, Director, Michigan Dep’t of Ins. & Fin. Servs., to Richard L. Revesz, Director, ALI (May 15, 2017) (incorrectly arguing that RLLI provisions on use of extrinsic evidence for insurance policy construction creates “subjective exception to the plain meaning rule” and that RLLI “could significantly alter the environment in which insurance contracts are interpreted in a way that would create instability for insurers and higher prices for consumers”).

The Hammer Letter, *supra*, should be deeply troubling to anyone interested in the political and regulatory process. An insurance regulator in the nation’s fifth largest state writes not out of concern that the RLLI will hurt policyholders, consumers, or the public generally but instead acts to protect the interests of the insurance companies she is supposed to be regulating. The letter is evidence in support of the “agency capture” theory of modern regulation. *See generally* Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (noting and largely agreeing with critique that agencies exercise their power in favor of the organized and regulated interests).

The Hammer Letter, *supra*, is also a bit shocking coming from an official who is supposed to be knowledgeable about insurance in her state. Director Hammer asserts that RLLI, *supra* note 4, at § 19, which provides that an insurer who breaches the duty to defend without a reasonable basis loses the right to contest coverage is “a clear departure from the common law rule.” Hammer Letter, *supra*. That may be technically true (but also a tautology in that the RLLI rule is a hybrid rather than adoption of either the majority or minority rule of the cases). However, in Illinois, the state with which one would presume the Commissioner Hammer is most familiar, the common law rule is in fact much more favorable to policyholders than the RLLI § 19 that she criticizes (specifically, RLLI Proposed Final Draft No. 1, *supra* note 99, at § 19(2)). Illinois law provides that where a liability insurer breaches the duty to defend (with or without

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reasonable basis), the insurer is precluded from contesting coverage. *See* *Emps. Ins. of Wassau v. Ehlco Liquidating Tr.*, 708 N.E.2d 1122, 1135 (Ill. 1999) (“Once the insurer breaches its duty to defend . . . the estoppel doctrine has broad application and operates to bar the insurer from raising policy defenses to coverage, even those defense that may have been successful had the insurer not breached its duty to defend.”). *Ehlco Liquidating* is probably the leading national case on the topic as well as an approach more favorable to policyholders than the RLLI approach criticized by Director Hammer. Illinois insurers have lived under this rule for more than 15 years and survived, perhaps even thrived. Some of the world’s largest insurers (e.g., State Farm, Allstate) are Illinois companies.

Director Hammer’s lack of knowledge about her own state’s law provides a window into the weakness of state insurance regulation and the pliability of regulators when lobbied by insurers. Her letter to the ALI must have been hurriedly written or she and her staff must be incredibly weak intellectually to have so clearly placed a figurative foot in the metaphorical mouth in decrying an RLLI rule that is weaker than the one in their own state. With even a little scrutiny and thought, the letter would presumably at least have acknowledged *Ehlco Liquidating* and, one would think, have criticized it if the milder RLLI § 19(2) is so bad. But this did not happen, either through oversight or because the Illinois Insurance Department cannot muster any information to suggest that *Ehlco Liquidating* has created problems.

More troubling than even the apparent lack of knowledge is the Director’s willingness to ask “how high” when insurers say “jump.” The letter was clearly fired off in a hurry on the eve of the ALI Annual Meeting, most likely in response to insurer complaints and lacks any real reflection as to the actual state of the law or whether the insurers had legitimate beefs with the RLLI. The letter may even have been ghost-written in part by insurers. Does any reasonable reader really think that Director Hammer came up with the reference to the Scalia concurrence in *Kansas v. Nebraska* off the top of her head? Or is the more likely scenario that she was fed this talking point by insurers and ate it very willingly. And this is the same Insurance Department that testified on behalf of State Farm in the famous *Campbell v. State Farm* Litigation (questionable in itself as one would think regulators would not see their role as helping insurers in private civil actions) and was embarrassed on cross-examination when forced to admit that it performed very few market conduct examinations of even the major insurers in its jurisdiction. *See* JEFFREY W. STEMPER, LITIGATION ROAD: THE STORY OF *CAMPBELL V. STATE FARM* 399–401 (2008) (Richard Rogers, Deputy Director of the Illinois Department of Insurance, testifies as a friendly witness for State Farm in its defense during the famous punitive damages trial that yielded a \$145 million award against the insurer).

Letters like those from the Illinois, Idaho, and Michigan insurance departments refute the contention of insurer allies that the RLLI should not intrude on areas of potential state regulatory activity or that state regulators are adequately policing insuring practices and protecting policyholders and the public. On the contrary, it appears that regulators in some states are as likely to be pliable servants of the insurance industry rather than zealous guardians of policyholders or the public.

affiliated with the insurance industry also submitted commentary,<sup>120</sup> as did some policyholder counsel.<sup>121</sup> But roughly 80% or more of the commentary was from the insurer side. The tone of the commentary was different as well. Policyholder counsel or academics targeted specific aspects of the RLLI for criticism but did not denounce the entire project or suggest its postponement or abandonment. In contrast, many insurers or their advocates appear to not only have condemned the RLLI and sought delay but also attacked the ALI as a whole and the long-established concept that Restatements do more than merely count and summarize cases but also make assessments as to better rules of law.

Sometimes joining insurers were corporations. The thinking of RLLI critics from the non-insurer business community seems decidedly contradictory. It of course

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<sup>120</sup> See Letter from Guy Miller Struve to Tom Baker and Kyle Logue, RLLI Reporters (June 30, 2017) (titled “A New Low in the Opposition to the Liability Insurance Project,” in which he takes issue with an opinion piece in the WALL STREET JOURNAL: Tiger Joyce, Opinion, *Tort Lawyers Take over the American Law Institute*, WALL. ST. J., (June 29, 2017), <https://www.wsj.com/articles/tort-lawyers-take-over-the-american-law-institute-1498776033>) (on file with author). Struve succinctly makes his point: “Every ALI member owes it to the Institute to defend it publicly against this sort of distortion” and

[t]his observation applies with particular force to those ALI members who are asking the ALI to make changes favored by the insurance industry . . . . Whether such members like it or not, the barrage of pressure against the American Law Institute inevitably creates the risk (and the perception) that any changes made [to the RLLI] form this point forward may be the result of pressure, not the result of changed convictions on the merits. This will be especially true if the members supporting such changes have not publicly disavowed the pressure barrage.

*Id.* As Struve points out, the allegation that the Institute is particularly pro-plaintiff is belied by the facts. For example, while I was on the floor at the May 2017 Annual Meeting, a motion (made by Struve) that narrowed the scope of liability for battery in the Torts Restatement was adopted by the Membership over fairly uniform opposition from the law faculty members on the floor.

Somewhat surprising and hard to characterize is the Letter from Robert L. Bradley et al., General Counsels of Companies to David Levi, Incoming President, ALI, and Richard L. Revesz, Director, ALI (May 19, 2017) (on file with author). The letter is signed by the general counsels of TAMKO Building Products, ConocoPhillips, Brunswick Corporation, Eli Lilly, Novartis, RPM International, Shell Oil, and GlaxoSmithKline as well as Johnson & Johnson. This is a group that presumably buys a lot of insurance. Presumably, it would welcome an RLLI that was as pro-policyholder as claimed by the insurance industry. But instead, these general counsels implicitly criticize RLLI §§ 3 and 4 (without being specific) on the ground that the RLLI gives insufficient deference to the text of contract documents. This is bad, they say because “all of the undersigned seek to use words in our contracts that are clear and coherent. We expect courts will follow the ‘plain meaning’ of these words.” *Id.* at 1. “The [RLLI] departs from this most basic ‘plain meaning rule’ to allow extrinsic evidence to be considered even when a contract is clear. This provision would set a troubling precedent with respect to the interpretation of insurance policy terms, and possibly terms in other types of contracts.” *Id.*

<sup>121</sup> See, e.g., Letter from Lorelie S. Masters to ALI Reporters (May 28, 2017) (noting extensive insurance industry participation in or awareness of the RLLI project for years and questioning attack on RLLI at such a late stage of the project) (on file with author); Letter from John G. Buchanan III et al. to ALI Reporters (April 11, 2016) (seeking stronger version of RLLI §13 more protective of policyholders) (on file with author).

makes sense that insurers would rather have a legal regime more favorable to insurers. But why would non-insurers – a/k/a policyholders – oppose the RLLI on the ground (erroneous in my view) that it is unduly favorable to policyholders? Insurance policies are contracts purchased for risk management and protection. A rule that promotes recovery when policyholders suffer a loss or face a claim should be welcomed by business advocates regardless of whether the business is an individual or a commercial entity.

One possibility is that non-insurer businesses have inexplicably forgotten that they may someday be policyholders in coverage litigation with insurers rather than defendants in contract litigation brought by customers or vendors, in which case, they might well prefer doctrines of contract construction, duty to defend, bad faith, fee-shifting, and remedies for breach at odds with those advocated by insurers. More likely, in the frontal lobes of business is concern that a less formalist or textualist contract construction regime in the RLLI could spill over into the pending *Restatement of the Law of Consumer Contracts*, thereby providing ALI support for contract construction that reduces the importance of the “fine print” of standard forms in favor of consumer expectations and notions of fairness.

#### B. *The Puzzling DRI Opposition to the RLLI*

Adding to the insurer onslaught, the Defense Research Institute (“DRI”) announced that it was officially “opposed to the adopting of the Proposed Final Draft” of the RLLI because it had “grave concerns over several portions of this body of work,” contending that “[m]any provisions contained therein are at odds with the common law of insurance, and their adoption will impede the ability of our members to represent policyholders.”<sup>122</sup> The DRI also speculated that “the proposed draft may engender more insurance coverage controversies and litigation,”<sup>123</sup> a perhaps self-fulfilling prophecy in light of the insurance industry’s apparent intent to oppose the RLLI at every turn.

Although many DRI members are what might be termed pure “insurer side” lawyers who are always representing insurers in coverage actions, business transactions or the like, much if not the majority of DRI attorney practice involves defending policyholders being sued by third parties. These lawyers are classic “insurance defense attorneys,” as the term has traditionally been used by layperson – to indicate defending policyholders who are defendants rather than insurers disputing coverage, although that latter group apparently had the ear of DRI leadership.

In the defense of claims against a policyholder, insurers may look like the clients because they control disposition of the case and compensation of counsel and normally determine selection of counsel as well. But insurers are merely third-party payers or what might be termed “secondary” clients. Although a majority of states appear to adopt the “two-client model” or “tripartite relationship” view of defense counsel’s role when selected by an insurer to defend a policyholder facing a lawsuit, every two-client model state also makes clear that where there are conflicts between the insurer and the

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<sup>122</sup> See Letter from John E. Cuttino, President, DRI, to Richard L. Revesz, Director, ALI (May 5, 2017) [hereinafter Cuttino Letter] (on file with author).

<sup>123</sup> *Id.*

policyholder, defense counsel's first duty is to the policyholder.<sup>124</sup> This, of course, is the only sensible means of applying a two-client model rather than the more analytically sound one-client model. For example, if defense counsel investigates and discovers information that could undermine a policyholder's argument for coverage, it is not permitted to disclose this information to the insurer.<sup>125</sup>

Under these circumstances, it is demoralizing to see an organization of lawyers siding so strongly with the insurers that pay their fees (albeit at comparatively low rates and often with annoying fee audits and delays) rather than policyholders, who under the law in all states are DRI's primary or main clients, even if many also consider the insurer to be a "client." In a dozen or so states that clearly embrace a one-client model, the policyholder is the only "client" and the insurer is a third-party payer, albeit one with substantial contract rights.

Although DRI can argue that portions of the RLLI will actually hurt policyholders, the argument is not persuasive. What has insurers upset is not the prospect that the RLLI will hurt policyholders. Quite the contrary. Insurers are upset that the RLLI may make it difficult for insurers to prevail against policyholders in coverage litigation, bad faith lawsuits, unfair claims practices actions, and regarding defense, settlement, and payment obligations. But it hardly follows that attorneys hired by insurers to defend policyholders should be similarly opposed to coverage. On the contrary, the potential for coverage is what triggers an insurer's duty to defend and results in the employment of DRI members. In effect, DRI as an organization is acting against the interests of many of its members and the policyholders that are their clients.

As with ATRA and any lawyers being compensated by insurers to oppose the RLLI (because this may create a positional conflict in violation of Rule 1.7 if other lawyers in the firm represent policyholders in coverage matters), DRI would appear to have a positional conflict of interest in supporting insurer opposition to the RLLI to the extent the RLLI contains provisions helpful to policyholders who are supposed to be the primary clients of DRI defense attorneys. Presumably, insurers have placed some pressure on DRI members to join their fight against the RLLI. Even though the policyholders are the primary clients of DRI lawyers, most DRI lawyers are chosen by and paid by insurers, which gives the insurers powerful leverage over the DRI and defense counsel generally.<sup>126</sup>

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<sup>124</sup> See STEMPEL & KNUTSEN, *supra* note 77, at § 9.03 (discussing degree to which insurers are "clients" of counsel representing policyholders in litigation).

<sup>125</sup> *Id.*

<sup>126</sup> See Cuttino Letter, *supra* note 122. The letter is long on general allegations that the RLLI is not sufficiently grounded in law but gives few examples. More specifically, it attacks RLLI § 12 as "creating new direct liability on the part of the insurer to the insured for acts of defense counsel" without apt support in the caselaw. RLLI § 12 states that an insurer may be "subject to liability for the malpractice of insurer-selected counsel if the defense attorney is "an employee of the insurer acting within the scope of employment" or the insurer "negligently selects or supervises defense counsel, including by retaining counsel with inadequate liability insurance." It is hard-cum-impossible to see what DRI sees as so wrong with this approach, which does not endorse strict or even very broad liability for insurers. Rather, the insurer is liable for counsel's malpractice only if counsel is the insurer's own employee or the insurer has engaged in what might be termed "active" negligence by inadequately supervising counsel or selecting an attorney without the means to compensate a policyholder client injured by malpractice.



C. *The May 2017 ALI Annual Meeting and Subsequent Developments*

At the 2017 Annual Meeting (which was aware of an ALI leadership decision to defer final consideration and approval of the RLLI until the 2018 Annual Meeting), insurer motions were debated and rather strongly rejected by the membership. Motions by insurer counsel regarding the duty to defend were rejected by a wide margin<sup>127</sup> as was a motion by insurer counsel to remove a Comment and accompanying Reporters argued to § 24.<sup>128</sup> On the policyholder side, a motion was made to have 2017 RLLI Section 44 amended to eliminate allocation of coverage responsibility in long-tail torts consecutively triggering policy years to only years in which insurance was

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Regarding the conflict of interest point, it is hard to believe that defense attorneys who could perhaps be sued for malpractice would oppose having insurers available as a potential co-defendant – in particular a co-defendant with a deep pocket better able to compensate an injured policyholder client and who would be perhaps even less sympathetic to a jury than the average lawyer. Although it is perhaps noble for the DRI president to care so much about insurers, it appears to run counter to the interests of the membership and to the primary clients of DRI.

In addition, the authority of Mr. Cuttino as president to speak so broadly for the DRI membership is not at all clear, even if the organization normally delegates policymaking to its top elected officials. The DRI has thousands of members, many of whom might appreciate not being sacrificial lambs when tight litigation guidelines set by insurers, who often seek to restrict the legal work of defense counsel, result in a bad outcome and engender a policyholder's malpractice suit. For example, I am a DRI member. Had I been polled on the subject (there appears to have been no such effort to broadly survey the membership), I would have opposed the Cuttino Letter and any DRI effort to defeat or demonize the RLLI.

For further discussion of the professional responsibility issues raised by attorney participation in law reform activity on behalf of clients or with compensation from clients. *See generally* Jeffrey W. Stempel, *Legal Ethics and Law Reform Advocacy*, 10 ST. MARY'S J. ON LEGAL MALPRAC. & ETHICS 244 (2020).

<sup>127</sup> *See* William T. Barker, *An Insurer Need Not Defend if Undisputed Facts Note at Issue or Potentially at Issue in the Underlying Action Establish as a Matter of Law That the Legal Action is Not Covered*, Proposed Amendment to Restatement of the Law of Liability Insurance Proposed Final Draft; Anastasia Markakis Nye, *Conditions Under Which the Insurer Must Defend*, Proposed Amendment to Restatement of the Law of Liability Insurance, Proposed Final Draft (March 27 [sic], 2017) (seeking similar changes to permit insurers to refuse to defend based on facts outside the complaint known to insurers).

<sup>128</sup> *See* Michael Aylward, *Proposed Amendment to Restatement of the Law, Liability Insurance*, Proposal Final Draft (March 28 [sic], 2017), Section 24 – The Insurer's Duty to Make Reasonable Settlement Decisions (seeking to delete Comment *e* and related portions of Reporters' Note). Comment *e* sets forth as factors that a judge or jury may consider in determining whether an insurer acted in a reasonable manner in addressing a claim).

available.<sup>129</sup> The Reporters took this motion and others as yet undebated insurer motions<sup>130</sup> under advisement.

Thus, by the close of the discussion session at the May 2017 Annual Meeting, the RLLI had been reviewed and discussed for the fifth time. Membership approved the RLLI subject to editorial revision by the Reporters in light of commentary and review of the RLLI again at the May 2018 Annual Meeting.<sup>131</sup> As a consequence, the RLLI could be considered as approved but not yet finalized ALI work product subject to change during the ensuing year or at the next meeting prior to formal final approval.

In the wake of the 2017 Annual Meeting, the RLLI Reporters issued a subsequent (August 2017) draft with editorial changes discussed at a September 2017 Advisers/MCG Meeting. There were then further revisions, resulting in a December 2017 RLLI Draft that was also accompanied by alternative language concerning the contract construction provisions of the RLLI. Then came the January 2018 ALI Council meeting, which resulted in a directive by the Council to adopt the alternative language more deferential to policy text and to revise pre-2017 RLLI Section 12 to provide for reduced insurer liability for failings of defense counsel.<sup>132</sup> These and other revisions were incorporated into the Proposed Final Draft of April 2018 submitted to the ALI Membership in May 2018.

Undeterred by the lukewarm to negative reception given insurer motions at the Annual Meeting, NCOIL (the pro-insurer group of legislators)<sup>133</sup> immediately issued

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<sup>129</sup> See Larry Stewart, Restatement of the Law, Liability Insurance, *Motion to Amend §42 by Adopting the "Unavailability Rule,"* (on file with author); Lorelie S. Masters, John G. Buchanan III & David Goodwin, Joinder in [Stewart] *Motion to Amend 42(b) Adopting the "Unavailability Rule,"* (on file with author) (joined by Amy Back, David H. Brown, Timothy W. Burns, Dennis R. Connolly, Mitchell F. Dolin, Jonathan M. Goodman, Timothy P. Law, Barry S. Levin, Meghan H. Magruder, Leo P. Martinez, J.W. Montgomery II, David L. Mulliken, Gita F. Rothschild, Jeffrey W. Stempel, and Jeffrey E. Thomas).

<sup>130</sup> See, e.g., Michael Aylward, *Notice-of-Claim Conditions*, Proposed Amendment to RESTATEMENT OF THE L. OF LIAB. INS., (AM. L. INST., Proposed Final Draft No. 1, 2017) § 36 & cmt. a (current version at RLLI, *supra* note 4, at § 35 & cmt. a); Michael Aylward, *Insurance of Known Liabilities*, Proposed Amendment to RESTATEMENT OF THE L. OF LIAB. INS., (AM. L. INST., Proposed Final Draft No. 1, 2017) § 47 (current version at RLLI, *supra* note 4, at § 46) (arguing that prospective insurers should be required to report without being asked all demands and claims known to them at the time of seeking insurance rather than only those claims where liability is certain); Anastasia Markakis Nye, *Insurance of Known Liabilities*, Proposed Amendment to RESTATEMENT OF THE L. OF LIAB. INS., (AM. L. INST., Proposed Final Draft No. 1, 2017) § 47 & cmt. g (current version at RLLI, *supra* note 4, at § 46) (seeking to delete Comment g to § 47, providing that known loss rules of the Section do not apply to claims-made policies); cf. RLLI, *supra* note 4, at § 46 (claims-made policy comment omitted).

<sup>131</sup> See STEMPEL & KNUTSEN, *supra* note 77, at § 14A.02.

<sup>132</sup> *Id.*

<sup>133</sup> Although NCOIL purports to be a "big tent" group of legislators interested in insurance policy, it also has elements of generally politically conservative state legislators with ties to the insurance industry and large corporations who have banded together to promote legislation favorable to insurers. See, e.g., Am. Prop. Cas. Ins. Ass'n, *News Release: PCI Praises NCOIL Capital Standard Resolution* (July 14, 2014), <https://www.apci.org/media/news-releases/release/38260/> [<https://perma.cc/2KFX-94AU>].

a press release after the Meeting taking credit for the Institute's decision to defer a final vote on the RLLI to May 2018.<sup>134</sup> Other elements of the insurance industry put the same spin on developments, as reflected in trade press coverage in the wake of the Annual Meeting.<sup>135</sup> Like any good propaganda campaign, this public relations effort appeared to have considerable potential for "poisoning the well" by convincing insurance professionals that the RLLI is highly problematic.<sup>136</sup> NCOIL and others

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<sup>134</sup> See Press Release, Nat'l Conf. of Ins. Legislators, NCOIL Pleased ALI Postponed Adoption of the Restatement (May 22, 2017) [hereinafter NCOIL Press Release], <http://ncoil.org/wp-content/uploads/2017/05/ali-statement-5-22-17.pdf> [https://perma.cc/5UWD-EM4B] ("NCOIL legislators are pleased that the ALI heeded our advice" said [NCOIL CEO Tom] Considine. "We continue to call for an immediate dialogue with the ALI to ensure their restatements do not creep into the realm of legislative prerogative."").

<sup>135</sup> See, e.g., Andrew G. Simpson, *Update: Insurers Sound Alarm Over Liability Law Restatement; Vote Delayed*, INS. J. (May 22, 2017), <https://www.insurancejournal.com/news/national/2017/05/22/451699.htm> [https://perma.cc/247Q-JYFK] (quoting Tom Karol, general counsel for the National Association of Mutual Insurers ("NAMIC"); Tom Considine, CEO of NCOIL; and Stephen Zielenzienski, General Counsel and Senior Vice President of the American Insurance Association, all in opposition to the RLLI and pleased at the postponement but promising to continue to oppose the RLLI unless changed). In particular, these spokespersons continued to stress the insurance industry talking point that the RLLI was somehow at odds with prevailing contract law, statements made prior to subsequent revisions to the RLLI that resulted in current § 3 stressing a "plain meaning" textual approach to insurance policy interpretation.

<sup>136</sup> For example, posted comments to the Simpson article suggested that readers were convinced that the RLLI and perhaps even the ALI were evil things. Once asked:

Why would a committee of non elected individuals have this much power. [sic] Last I checked in a republic such as The USA there are 3 separate and distinct bodies who are to enact, enforce and adjudicate the laws. This group [ALI] is not of those 3.

This smells like tyranny to me!!!!

mrbbob, Comment to Simpson, *supra* note 135 (May 29, 2017, 10:18 AM), <https://www.insurancejournal.com/news/national/2017/05/22/451699.htm?comments> [https://perma.cc/2T95-8Rclear exmXY].

Although ALI members would perhaps like to be this powerful, the statement is of course inaccurate but reflects the type of anti-ALI, anti-RLLI sentiment that insurers have been able to engender. In a similar vein, another commentator wrote:

I'm not fond of some insurance companies and the way they pay claims, but these things would turn our industry on it's head [sic]. Apparently, it would leave insurers with little defenses. How can you have no policy limits [sic]. What is this, Obamacare? How could you rate for this? Absurd! At the very least agents would have to become determiners of character of their clients and potential clients. Prices would jump through the roof. You would have far fewer insurers. Who are these guys [ALI] anyways? There [sic] acting like legislators. Not good.

Lou, Comment to Simpson, *supra* note 135 (May 22, 2017, 4:48 PM).

Reading these comments confirms that people believe what they hear or read from their business, political, social, vocational, or familial allies – and that this can give disinformation

affiliated with insurers took the position that they had achieved a great victory in avoiding final approval of the Restatement through their many attacks on it in the weeks and months before the May 2017 Annual Meeting.<sup>137</sup> And there certainly were attacks on the RLLI both through the official channels of commentary and motions as well as in the trade press.

As the May 2018 Annual Meeting approached, ALI Leadership seems solidly behind the project. So, too, did most ALI members without ties to the insurance industry. Policyholder counsel and consumer groups still appeared to support the RLLI, but with reduced enthusiasm in light of the most recent revisions tending to favor insurers. As previously discussed, the May 2017-April 2018 time period saw significant movement toward insurers regarding several Sections of the RLLI, which were revised to be more favorable to insurers. The Reporters and the Institute had during the June 2017-April 2018 period attempted to address insurer concerns found meritorious. But insurers – despite their victories of the past two years – continued to lobby for changes and even to scuttle the project.

*D. Continuing Assault on the RLLI by Insurer Interests Approaching the 2018 Annual Meeting*

In the wake of the 2017 ALI Annual Meeting and approaching the May 2018 Annual Meeting, insurers continued to flex political muscle. Perhaps the most dramatic example is the previously discussed gubernatorial letter described at the outset of this Article.<sup>138</sup> The gubernatorial letter was part of comprehensive lobbying, that included letters to the Chief Justices of each U.S. state that sought their involvement in aiding insurers<sup>139</sup> or opposing the RLLI as well as threats to legislatively “overrule” the RLLI before it could be used by courts.<sup>140</sup>

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or “fake news” quite a bit of power. Portions of the insurer-led public relations activity against the RLLI appear to be designed to have the effect of creating fear in some quarters that the RLLI is some sort of elitist hostile takeover of insurance law – or it at least appears to be having that effect on some of the insurance public.

<sup>137</sup> See NCOIL Press Release, *supra* note 134 (quoting NCOIL CEO Thomas B. Considine) (“NCOIL legislators are pleased that the ALI heeded our advice . . . . We continue to call for an immediate dialogue with the ALI to ensure their restatements to not creep into the realm of legislative prerogative.”).

<sup>138</sup> See Gubernatorial Letter, *supra* note 8; see also Letter from David F. Levi in Reply to the Governors (Apr. 26, 2018).

<sup>139</sup> See Press Release, NCOIL, NCOIL Writes to State Chief Judges Urging Action on ALI’s Proposed Liability Insurance Restatement from Thomas B. Considine, CEO, NCOIL to Thomas A. Balmer, Chief Justice, Or. Sup. Ct., at 1–3 (Feb. 27, 2018) (arguing that RLLI is impermissible intrusion on state legislative authority and urging lobbying against the RLLI).

<sup>140</sup> See Resolution Encouraging the American Law Institute to Materially Change the Proposed Restatement of the Law of Liability Insurance, NCOIL (Jan. 5, 2018) [hereinafter Breslin & Seward Resolution], <http://ncoil.org/wp-content/uploads/2018/01/ALI-Res-1-8-18.pdf> [<https://perma.cc/KD8P-UCAY>] (resolution sponsored by Sen. Neil Breslin (N.Y.) and Sen. James Seward (N.Y.)). This resolution takes the position that if the RLLI is not revised to accommodate NCOIL/insurance industry preferences: the RLLI

Second, insurers themselves weighed in, although through their attorneys in firms for which the insurers' business was a significant portion of law firm revenue. Third, organizations that were not specifically composed of insurance companies, lobbied to change or block the RLLI. Perhaps the best example of this sort of anti-RLLI activist, which presents itself as an organization of concerned legislators but in reality operates much more like a front group supporting insurer interests was NCOIL, which consistently sided with insurers rather than policyholders, something that should seem odd if the organization were genuinely concerned with the public interest surrounding insurance rather than the fiscal health of insurance companies.<sup>141</sup>

To be fair, in spite of NCOIL's favoritism toward insurers regarding legal doctrine, it does consistently support an arguably non-partisan purpose: state regulation of insurance. Toward that end, NCOIL has predictably and consistently opposed

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should not be afforded recognition by the courts as an authoritative reference regarding established rules and principles of insurance law, as Restatements traditionally have been afforded; and

. . . state legislators across the country [should] adopt declaring that this Restatement should not be afforded such recognition by courts . . .

*Id.* at 2; accord NCOIL CEO Statement on ALI "Restatement" of Liability Insurance Law, NCOIL (May 25, 2018), <http://ncoil.org/2018/05/25/ncoil-statement-on-ali-restatement-of-liability-insurance-law/> [<https://perma.cc/2RYR-DTDJ>] (quoting NCOIL President, Sen. Jason Rapert (D - Ark) as stating "NCOIL will not allow the constitutionally protected legislative prerogatives in each state to be infringed upon by an unelected body."); *NCOIL Expresses Renewed Concerns About ALI Restatement of the Law of Liability Insurance*, NCOIL (Dec. 1, 2017), <http://ncoil.org/2017/12/12/4681/> [<https://perma.cc/BX6J-MNYK>] (reporting support for the Breslin & Seward Resolution, *supra*).

<sup>141</sup> Although NCOIL leadership is a mix of Republican and Democratic legislators, NCOIL's policy slant is distinctly conservative and more in line with traditionally Republican resistance to regulation of business. For example, NCOIL has opposed the U.S. Department of Labor's "fiduciary rule" concerning financial advisers, submitted amicus briefs advocating reduced or no insurer liability, exemption from state and local taxes for ride share companies such as Uber. Press Release, Nat'l Conf. of Ins. Legislators, NCOIL Executive Committee Adopts Resolution Urging the ALI to Change Proposed Liability Insurance Restatement, <http://ncoil.org/2018/01/10/ncoil-executive-committee-adopts-resolution-urging-the-ali-to-change-proposed-liability-insurance-restatement/> [<https://perma.cc/BQ4Y-BYZW>].

In addition, NCOIL has not dealt with a seeming contradiction in that if one is "pro-business," this does not necessarily mean favoring insurers. Frequently, the policyholders locked in litigation with their insurers are commercial entities, ranging from Fortune 100 corporations to "Mom and Pop" small businesses.

In addition, the biographies of NCOIL activists reflect considerable political conservatism and ties to the insurance industry. Of the 81 NCOIL member legislators serving on Committees of the Organization, 62 are Republicans and 21 are Democrats. Twenty-three work in the insurance industry – by far the largest vocational category of the group. See *Committee Memberships*, NCOIL, <http://ncoil.org/articles-of-organization-bylaws-revision/> [<https://perma.cc/TK9S-LL3V>] (last visited Feb. 19, 2021).

national, unitary, and federal regulation of insurance.<sup>142</sup> But in an extension of this philosophy most reasonable American lawyers would regard as extreme, NCOIL argues that the RLLI (and by implication, any effort at national principles regarding insurance adjudication) constitutes an impermissible attack on state and legislative prerogatives.

For example, in its communications directed at both the 2017 and 2018 ALI Annual Meetings, NCOIL argued that RLLI provisions regarding policy interpretation, consequences of breach of the duty to defend, unreasonable failure to settle, or fee-shifting

represent clear examples of where the [RLLI March 2017] draft proposes significant changes to current law. Such matters are the primary prerogative of the legislative branch of government, which consists of publicly elected and accountable individual who must consider all relevant policy consideration such as the impact of proposed law changes on the availability and affordability of insurance.<sup>143</sup>

Writing to Chief Justices, NCOIL stated that the RLLI “proposes to change basic and settled tenets of insurance law, including in ways that directly conflict with existing state statutory provisions.”<sup>144</sup> Consequently, NCOIL sought “input as a State Judicial Presiding Jurist” in favor of restraining or revising sections of the RLLI with which NCOIL disagreed, specifically Sections 8, 27, 36, 48, 49(3), 51(1) as well as Sections 3, 13(3), and 19.<sup>145</sup> As early as Spring 2017, NCOIL has been flexing its political muscle with the ALI, stating, for example, that:

[S]hould the ALI refuse our invitation for a dialogue and proceed towards seeking approval of the proposed Restatement from ALI membership at its annual meeting, NCOIL will be forced to consider passing a Resolution that opposes the proposed Restatement as a misrepresentation of the law of liability insurance, and as a usurpation of lawmaking authority from State insurance legislators. NCOIL will circulate the Resolution to all State legislators. NCOIL will circulate the Resolution to all State legislative bodies and State regulators across the country to alert them of the problems

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<sup>142</sup> *NCOIL Ramps Up Opposition to Optional Federal Charter*, NAT’L ASS’N OF PRO. INS. AGENTS (Jan. 18, 2006), <http://m.pianet.com/issues-of-focus/modernization/2006/ncoil-ramps-up-opposition-to-optional-federal-charter> [https://perma.cc/KUL8-YN27].

<sup>143</sup> See Letter from Thomas B. Considine, CEO, Nat’l Conf. of Ins. Legislators, to Richard L. Revesz, Dir., ALI, and Stephanie Middleton, Deputy Dir., ALI, at 2 (May 5, 2017) [hereinafter Considine May 5 Letter to ALI] (on file with author).

<sup>144</sup> Press Release, NCOIL, NCOIL Writes to State Chief Judges Urging Action on ALI’s Proposed Liability Insurance Restatement (Feb. 27, 2018) [hereinafter NCOIL Press Release to State Chief Judges], <http://ncoil.org/2018/02/28/ncoil-writes-to-state-chief-judges-urging-action-on-alis-proposed-liability-insurance-restatement/> [https://perma.cc/7Z2L-XYEF] (attaching, as example of correspondence, Letter from Thomas B. Considine, CEO, NCOIL, to Hon. Thomas A. Balmer, C.J., Oregon Sup. Ct. (Feb. 27, 2018) as well as NCOIL Draft Resolution critical of RLLI).

<sup>145</sup> *Id.*

associated with the proposed Restatement and urge them to join in opposition.<sup>146</sup>

As part of its campaign against the RLLI, NCOIL adopted a model “Resolution Encouraging the American Law Institute to Materially Change the Proposed Restatement of the Law of Liability Insurance” that it has suggested be introduced in all state legislatures if NCOIL’s demands are not met by the ALI.<sup>147</sup> The model resolution states that NCOIL urges the ALI to effect meaningful change to the proposed Restatement so that it is consistent with well-established insurance law and respectful of the role of state legislators in establishing insurance legal standards and practice; and:

[S]hould such meaningful change not occur prior to its final approval, NCOIL urges that the Restatement of the Law of Liability Insurance should not be afforded recognition by courts as an authoritative reference regarding established rules and principles of insurance law, as Restatements traditionally have been afforded; and

[Urging] state legislators across the country to adopt resolutions declaring that this Restatement should not be afforded such recognition by courts; and

NCOIL shall develop and promulgate, as appropriate, model legislation intended to maintain the viability, predictability and optimal functionality of the insurance market and its practices.<sup>148</sup>

The model resolution also expressed

NCOIL’s concern that the Restatement does not afford proper respect to the expertise and jurisdiction of state insurance legislators and that the Restatement of the Law of Liability Insurance should not be afforded recognition as an authoritative reference, shall be sent to state chief justices, state legislative leaders and members of the committees with jurisdiction over insurance public policy, as well as to all state insurance regulators.<sup>149</sup>

An arguable fourth distinction between anti-RLLI lobbying and prior such efforts is that insurers appear not only to have themselves weighed in but to have leaned on their lawyers to oppose the RLLI or to seek pro-insurer changes.<sup>150</sup> The large number

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<sup>146</sup> See Considine May 5 Letter to ALI, *supra* note 143, at 4.

<sup>147</sup> See NCOIL Press Release to State Chief Judges, *supra* note 144.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> The closest parallel is attorney activity surrounding the ALI Principles of Corporate Governance Project. Even though that was a “Principles” project rather than a “Restatement,” many corporation leaders were opposed to aspects of the projects viewed as according shareholders and other constituencies (e.g., governments, employees) too much power relative to corporate management. When Corporate Governance was being debated at the several ALI meetings in which it was on the agenda, the number of Institute members on the floor surged. After the debate and voting on the Project, many of the attorneys left. It was, as one ALI insider put it to me at the time, as if the attorneys (many from large, prestigious law firms) “took the

of submissions making the same “talking points” against the same RLLI provisions – including the veritable “dead give-away” of so many submissions quoting Justice Scalia’s criticism of Restatements in a single concurring opinion<sup>151</sup> – supports the inference of a coordinated lobbying effort rather than a serendipitous organic uprising by concerned attorneys.

It is unlikely that attorneys became this organized due to personal ideological commitment. The more likely scenario is that insurers and interest groups got organized and brought counsel along. To the extent that this took place, it should be disturbing not only to the Institute but to the entire American legal profession, which prides itself on its commitment to independent thinking and ability to support the public good when not zealously advocating for clients. A core premise of organizations like the ALI is that decisions will be made based on independent collective judgment of the Institute’s membership regarding the merits of issues under consideration rather than based on pressure from outside interests.

Although there is of course some room for debate, many of the arguments against sections of the RLLI disliked by insurers have bordered on the disingenuous, and sometimes crossed the line. This appears to be the opinion held by insurance experts in the legal academy. The nation’s insurance law professors have supported the RLLI project with virtual unanimity.<sup>152</sup> Although this group may not agree regarding every provision of the RLLI, all appear to support the project as a whole and none have publicly supported insurer-led criticisms.

With one exception, I am not aware of any full-time law professor teaching insurance law who opposes the RLLI or agrees with insurer critique in any significant way. This is a telling, perhaps even conclusive piece of evidence. If the RLLI were as bad as purported by insurers, one would expect a significant proportion of the professoriate to agree.<sup>153</sup> But this has not occurred. Essentially, no one in the legal academy agrees with the broad insurer critique alleging that the RLLI is radical,

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shuttle down to Washington just to vote for corporate management and then took the first shuttle back after the vote.” This was a widespread perception of many in the ALI that reportedly led to the Institute being more interested in diversifying its membership so that “Wall Street lawyers” would have reduced power as a voting bloc.

<sup>151</sup> See *supra* note 43, discussing Scalia concurrence in *Kansas v. Nebraska*, 574 U.S. 445, 475 (2015), which has been frequently cited in the submissions of RLLI opponents.

<sup>152</sup> In addition to top scholars at the pinnacle of the project (Virginia Law professor Kenneth Abraham and Reporters Tom Baker (Penn) and Kyle Logue (Michigan), several prominent U.S. insurance law professors (Michelle Boardman (George Mason); Robert H. Jerry, II (Florida); Leo Martinez (California-Hastings); Adam Scales (Rutgers); Daniel Schwarcz (Minnesota); Jeffrey Thomas (University of Missouri-Kansas City)) were Advisers to the project, as was Cambridge University Professor Malcolm Clarke, perhaps England’s most prominent authority on insurance contracts. In addition, the MCG included law professors Jo Carrillo (California-Hastings), Jay Feinman (Rutgers), Jill Fisch (Penn); Larry Garvin (Ohio State), Michael Green (Wake Forest), Peter Kochenburger (Connecticut), Anthony Sebok (Cardozo), S.I. Strong (Missouri), and Jennifer Wriggins (Maine).

<sup>153</sup> To be sure, there is always the chance that I am unaware of some critics. But because I regularly review legal literature and news about insurance, I can say it is highly unlikely that any full-time law professor has submitted anti-RLLI comments to the ALI.



lawless, or lopsidedly pro-policyholder.<sup>154</sup> To be sure, there are select aspects with which some full-time law professors disagree,<sup>155</sup> but this is a far cry from the sweeping, overblown opposition to the RLLI express by insurers and their allies.

The one exception is George Priest of Yale Law. Priest is a prominent figure in American law and has been for 40 years, beginning with an early and much cited article regarding the economics of litigation.<sup>156</sup> He has taught and written about insurance, including a particularly good article,<sup>157</sup> albeit one now 35 years old. He is primarily known as a law and economics expert but frequently appears as an expert witness for insurers in coverage disputes and has done so for 20 years or more. He has

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<sup>154</sup> A sustained scholarly discussion of the RLLI has taken place in the context of a symposium devoted to the project. *See generally* Symposium, *The Restatement of the Law of Liability Insurance as a Restatement: An Introduction to the Issue*, 68 RUTGERS U. L. REV. 1 (2015). The issue contained a range of articles, some critical of portions of the RLLI or arguably even the RLLI as a whole. But all of the anti-RLLI articles were authored not by full-time law professors but by lawyers who regularly represent insurers. *See, e.g.*, Laura A. Foggan & Karen L. Toto, *The Draft ALI Restatement of the Law of Liability Insurance: Consequences of the Breach of the Duty to Defend Are Not and Should Not Become the Automatic Forfeiture of Coverage Defenses*, 68 RUTGERS U. L. REV. 65 (2015); Kim V. Markand, *Duty to Settle: Why Proposed Sections 24 and 27 Have No Place in a Restatement of the Law of Liability Insurance*, 68 RUTGERS U. L. REV. 201 (2015); Victor E. Schwartz & Christopher E. Appel, *Encouraging Constructive Conduct by Policyholders in the Restatement of the Law of Liability Insurance*, 68 RUTGERS U. L. REV. 455 (2015).

<sup>155</sup> *See, e.g.*, Jeffrey W. Stempel, *An Analytic "Gap": The Perils of Robotic Enforcement of Payment-by-Underlying-Insurer-Only Language in Excess Insurance Policies*, 52 TORT, TRIAL & INS. L.J. 807, 807–08 (2017); Charles Silver & William T. Barker, *The Treatment of Insurers' Defense-Related Responsibilities in the Principles of the Law of Liability Insurance: A Critique*, 68 RUTGERS U. L. REV. 83, 83–84 (2015) (full-time law professor and prominent insurer counsel level discrete criticisms at settlement provisions of RLLI); George M. Cohen, *Liability of Insurers for Defense Counsel Malpractice*, 68 RUTGERS U. L. REV. 119, 119 (2015) (full-time law professor taking issue with some aspects of RLLI section expanding insurer responsibility for attorney error); Leo P. Martinez, *The Restatement of the Law of Liability Insurance and the Duty to Settle*, 68 RUTGERS U. L. REV. 155, 155 (2015) (full-time law professor questioning aspects of RLLI provision on insurer's duty to make reasonable settlement decisions); Jeffrey E. Thomas, *The Standard for Breach of a Liability Insurer's Duty to Make Reasonable Settlement Decisions: Exploring the Alternatives*, 68 RUTGERS U. L. REV. 229, 229–30 (2015) (same); *see also* Kenneth S. Abraham, *The Liability Insurer's Duty to Settle Uncertain and Mixed Claims*, 68 RUTGERS U. L. REV. 337, 337–38 (2015) (backing the RLLI approach to insurer settlement duties); Mark A. Geistfield, *Interpreting the Rules of Insurance Contract Interpretation*, 68 RUTGERS U. L. REV. 371, 371–72 (2015) (backing RLLI approach to insurance policy construction); Jeffrey W. Stempel, *Enhancing the Socially Instrumental Role of Insurance: The Emerging Opportunity Presented by Treatment of Breach of the Duty to Defend*, 5 U.C. IRVINE L. REV. 587, 587 (2015) (praising prior RLLI draft providing that insurer in breach of duty to defend could not contest coverage, a provision subsequently withdrawn in response to insurer protest).

<sup>156</sup> *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEG. STUD. 1, 4 (1984).

<sup>157</sup> *See* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1986).

been highly critical of the RLLI.<sup>158</sup> Despite Priest's prestige and pedigree, his article is beyond unconvincing in its criticisms.

The Priest article attacking the RLLI prompted a response from RLLI Reporters Baker and Logue that rather thoroughly eviscerates all of Priest criticisms.<sup>159</sup> A full discussion of the Priest criticisms and the Baker/Logue response, like a full analysis of the substance of the RLLI, is beyond the scope of this Article. But to my reading, the Baker/Logue response is devastating to Priest's anti-RLLI arguments. As Baker and Logue summarize, Priest

claims that the Restatement will undermine the stability of insurance markets. The basic structure of his argument can be summarized as follows:

- (1) In drafting the Restatement, Baker and Logue have chosen many new rules that radically depart from existing case law.
- (2) These radical new rules have a clear "pro-policyholder" bias, a bias that is misguided because it is premised on mistaken assumptions about how insurance markets work and fails to take into account well-known principles of the "economics of insurance."
- (3) The radical pro-policyholder rules that Baker and Logue have proposed will harm policyholders by causing liability insurance premiums to skyrocket and the availability of coverage to evaporate, harming all policyholders but especially the poor.<sup>160</sup>

Baker and Logue then summarize their seriatim responses to Priest as follows:

- (1) All of the rules adopted by the Restatement are grounded in existing case law. In that sense, none of them are new, and certainly none are radical. Most of the rules in the Restatement have in fact been adopted by a majority of the U.S. jurisdictions that have considered them. The Restatement follows a minority rule in only a few instances and only when the minority rule is better reasoned and will likely lead to better consequences than the alternatives. This is a common practice among ALI Restatement projects.
- (2) Like the law on which it is based, the Restatement is not premised on mistaken assumptions about how insurance markets work; nor does it fail to take account of basic principles of insurance economics. Instead, it is Priest who either misunderstands or intentionally ignores basic facts about insurance markets. Specifically, Priest ignores the insights, accumulated over many decades now by psychologists and empirical economists, regarding

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<sup>158</sup> See George L. Priest, *A Principled Approach Toward Insurance Law: The Economics of Insurance and the Current Restatement Project*, 24 GEO. MASON L. REV. 635, 636–37 (2017).

<sup>159</sup> See Tom Baker & Kyle D. Logue, *In Defense of the Restatement of Liability Insurance Law*, 24 GEO. MASON L. REV. 767, 768 (2017) (responding to Priest's "aggressive and somewhat meandering attack" on the RLLI; finding many of Priest's assertions to be "groundless and unsubstantiated").

<sup>160</sup> *Id.* at 768.

how people actually behave, facts that are contrary to the largely discredited perfectly-rational-actor model on which Priest's arguments are premised.

(3) Therefore, expanding the geographical application of the rules that the Restatement follows, thereby creates greater national uniformity in liability insurance law, and supports, not disrupts, insurance markets.

(4) Finally, Priest provides no evidence to the contrary. Because all these rules, or some variant of them (in some cases, a more pro-policyholder alternative rule), have been adopted in some jurisdiction in this country, if those rules were disruptive to the market, there should be evidence of that fact in those jurisdictions. So far as we know, there is no such evidence.<sup>161</sup>

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<sup>161</sup> *Id.* at 768–69. Baker and Logue then support their critique in the remainder of the article by citing to case law in many jurisdictions following the RLLI approach, demonstrating both that the RLLI for the most part follows majority rules and that in cases where the more pro-policyholder approaches disliked by Priest hold sway, insurance markets appear to continue to function well. *See id.* at 778–96. This latter fact demonstrates the ridiculousness of the “sky is falling” arguments made by critics of the RLLI, an argument made particularly aggressively by insurers regarding the pre-2018 RLLI draft regarding contract construction, a draft that essentially adopted California law, the law of a state that has a thriving insurance market. *See 2019 CA Property & Casualty Market Share*, Cal. Dep’t of Ins., <http://www.insurance.ca.gov/01-consumers/120-company/04-mrktshare/2019/> [<https://perma.cc/78YD-SFTJ>] (reflecting more than \$78 billion in written premium 2019 for six lines of insurance and \$75 billion in 2018 with respective loss ratios of 71.5 percent and 52.73 percent. These are excellent loss ratios indicating substantial profitability in that any loss ratio of less than one reflects underwriting profit without consideration of investment income (albeit without consideration of administrative overhead as well. *See* JEFFREY W. STEMPEL, ERIK S. KNUTSEN & PETER N. SWISHER, *PRINCIPLES OF INSURANCE LAW* 88–90 (5th ed. 2020) (explaining loss ratio and insurer business operations).

This is not to say that insurers, like many businesses, would not rather be subject to the more company-friendly law of New York. *See* Geoffrey Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 *CARDOZO L. REV.* 1475, 1478 (2010) (arguing that greater prevalence of New York choice of law clause demonstrates businesses regard it as superior body of law). But despite greater policyholder/consumer protections in California law and its greater receptivity to extrinsic and contextual evidence, California remains a state where insurers want to do business, profit, and win more than a few coverage disputes. *See* Jeffrey W. Stempel & Erik S. Knutsen, *Rejecting Word Worship: The Integrative Approach to Insurance Policy Construction* (May 2018) (unpublished manuscript) (on file with author) (discussing California approach to contract construction and finding it not to be adverse to enforcement of bargains and efficient operation of insurance and other commercial markets).

Baker and Logue's point No. (3) above is particularly well taken and refutes not only Priest but also groups like NCOIL that essentially are arguing that it would be a bad thing to have a Restatement that attempts to collect and synthesize the nation's law of insurance or that this would be an undue attempt to impose national legislation on a traditionally state-centered area of law. As discussed *supra*, the argument is weak to the point of being frivolous. *See supra* notes 8–20, 89–105 and accompanying text. Restatements have addressed traditionally state-centered bodies of law such as Contracts, Torts, and Property for decades and this has hardly displaced state lawmaking prerogative, by both common law courts and state legislatures.

To the contrary, the Restatements, even when not adopted by courts, appear without question to have improved the analysis and jurisprudence surrounding these areas of law. The RLLI is

Even if a neutral reader is not fully convinced by every aspect of the Baker/Logue article, it nonetheless demonstrates (at least to the fair-minded) that the RLLI cannot be as bad as Priest – and his insurance industry funders – contend. Add to this that Priest appears to stand alone among the professoriate and it becomes hard to regard the insurer attack – particularly its ferocity – as well-grounded in case law or the actual operation of insurance litigation.<sup>162</sup>

The insurer attacks on the RLLI also reflect an ongoing hypocrisy in much of the insurer opposition: insurers complain that select pro-policyholder portions of the RLLI are illegitimated because they do not follow the majority of judicial decisions; but insurers simultaneously attempt to achieve pro-insurer provisions that are not the majority rule.

An example is RLLI Section 24, which essentially says that if an insurer rejects a reasonable settlement offer and the policyholder is then hit with a judgment in excess of policy limits, the insurer is liable to the policyholder for the entire judgment because its failure to settle caused the policyholder to become subject to this excess liability. The Section, entitled (one would think non-controversially) “The Insurer’s Duty to Make Reasonable Settlement Decisions” provides:

- (1) When an insurer has the authority to settle a legal action brought against the insured, or the insurer’s prior consent is required for any settlement by the insured to be payable by the insurer, and there is a potential for a judgment in excess of the applicable policy limit, the insurer has a duty to the insured to make reasonable settlement decisions.

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likely to have that effect as well. In addition, its extensive Reporters’ Notes to the 50-section, 464-page document not only serves as a valuable research resource for attorneys and judges but also collects case law refuting the Priest/insurance industry contention that the RLLI provisions are new, “radical,” unduly pro-policyholder, out of the mainstream, or lacking in judicial support. *See generally* RLLI, *supra* note 4.

<sup>162</sup> *See* Baker & Logue, *supra* note 159, at 768 (Priest’s attack “goes on at length about basic principles of insurance economics that anyone who took microeconomics in college will remember, thereby not-so-subtly seeking to create the (erroneous) impression that the Restatement is somehow inconsistent with, and written in ignorance of, those economic principles”).

Regarding case law and the Restatement, treatises appear to be in accord with the Baker/Logue contention that the RLLI largely follow the majority rule. For example, MANILOFF & STEMPEL, *supra* note 77, contains 10 chapters surveying state-to-state law on issues addressed the RLLI and finds the RLLI in accord with the majority rule on all of them: Late Notice (Chapter 3); Duty to Defend (Chapter 5); Policyholder Right to Independent Counsel (Chapter 6); Insurer Right to Reimbursement of Defense Costs for defending uncovered claims (Chapter 7); Policyholder Right to Counsel Fees (Chapter 8) (at least in the April 2017 Proposed Final Draft; earlier versions of the RLLI provided policyholders with additional opportunity for fee shifting); Number of Occurrences (Chapter 9); Trigger-of-Coverage for Latent Injury and Damage Claims (Chapter 16); Allocation of Latent Injury and Damage Claims (Chapter 18); Insurability of Punitive Damages (Chapter 20); Bad Faith Standards (Chapter 21) and consideration of policyholder Reasonable Expectations (Chapter 22). *See also id.* at ch. 22 (providing general overview of RLLI).

(2) A reasonable settlement decision is one that would be made by a reasonable insurer that bears the sole financial responsibility for the full amount of the potential judgment.

(3) An insurer's duty to make reasonable settlement decisions includes the duty to make its policy limits available to the insured for the settlement of a covered legal action that exceeds those policy limits if a reasonable insurer would do so in the circumstances.<sup>163</sup>

Insurers have complained that § 24(2) is unfair to insurers and argue that insurers should be liable for the excess judgment only if the decision to reject the offer was unreasonable – and then argue that such rejection can be reasonable, even when a claimant's damages dwarf policy limits, if there was a nontrivial chance of avoiding liability for those policy-dwarfing damages.<sup>164</sup> This insurer argument is staggering in its bold incorrectness.

First, underscoring the hypocrisy of the insurers, § 24(2) states the majority rule. Nearly every state applies the “excess judgment” measure of damages,<sup>165</sup> and the approach has been widely (really universally) supported by commentators. One might rhetorically ask how insurers can argue that the RLLI must follow the majority judicial

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<sup>163</sup> See RLLI, *supra* note 4.

<sup>164</sup> See, e.g., Letter from Laura A. Foggan to ALI Reporters (Mar. 24, 2018) (concerning § 24) (on file with author).

Typical of attacks, which display both a misunderstanding of the insurer's duties and hysteria about the potential impact of the section is A. Hugh Scott, *Why Criticisms of ALI's Insurance Restatement is Valid*, *supra* note 104:

The policy limits are one of the fundamental elements of the insurance bargain. A policyholder pays a set premium for the insurer to assume a specified amount of risk – defined as the policy limits. [The RLLI] would strip the insurer of its policy limits if a jury, after the fact, were to decide that the insurer had unreasonably rejected a settlement offer. . . .

[The RLLI will likely] increase as insurers either pay inflated settlement demands or settle cases where they perceive any risk that a jury might second-guess them about the reasonableness of the demand.

This insurer argument – that it leaves the “poor” insurer vulnerable to 20-20 hindsight – has been made for decades. And courts have for the most part rejected it for decades in adopting a view in accord with the RLLI. The insurer argument falters on a key point in that it seeks to place all risk of an erroneous failure to settle on the policyholder and none on the insurer by limiting insurer liability for insurer errors but not policyholder liability for insurer errors.

<sup>165</sup> See, e.g., *McNally v. Nationwide Ins. Co.*, 815 F.2d 254, 259 (3d Cir. 1987) (applying Delaware law and finding insurer's failure to accept a settlement offer at or below policy limits makes insurer responsible for paying full amount of judgment, including that exceeding policy limits, so that policyholder will not be injured by insurer's failure to accept reasonable settlement demands); *Whitney v. State Farm Mut. Auto. Ins. Co.*, 258 P.3d 113, 117 (Alaska 2011) (finding the same); *Hamilton v. Md. Cas. Co.*, 41 P.3d 128, 132 (Cal. 2002) (finding the same); *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 846 (Tex. 1994) (finding the same).

rule on pro-insurer issues but then be free to reject it in areas where the caselaw clearly favors policyholders.

Second, the rule sought by insurers would unreasonably encourage insurers to gamble with the fate of their policyholders. Consider an automobile accident where there is some question as to fault of the defendant driver, but the plaintiff teenager hit by the defendant driver has been rendered quadriplegic and suffers catastrophic brain injury as well. If prevailing on the liability question, plaintiff's damages will be millions of dollars. The automobile liability policy limit is \$100,000 and plaintiff demands that amount, reasoning that the defendant has few assets. The insurer refuses to settle, wanting to test its view that the severely injured plaintiff was more at fault and that a defense verdict can be obtained from the jury, which will be viewing a severely injured plaintiff in the courtroom for the entire week of trial. Unsurprisingly, the jury renders a plaintiff's verdict and finds damages of \$10 million, perhaps more.

Pursuant to the approach of RLLI § 24(2), the insurer is responsible for this entire verdict because the insurer failed to accept a reasonable settlement offer. A defendant bearing full financial responsibility in a multi-million-dollar case if found liable would never, even if convinced of lack of fault, flatly turn down a \$100,000 settlement opportunity with no counter-offer simply to test its view that it was not sufficiently at fault. An uninsured defendant, even one with considerable wealth, might grumble but would never take the risk.

The reasoning underlying many of the pro-insurer comments has also been weak, perhaps surprisingly so in view of the quality of counsel making submissions, perhaps proving that even good lawyers are limited by bad facts and circumstances. In opposing portions of the RLLI, critics have been more than a little shrill. Examples include: suggesting that adoption of the RLLI would destroy the predictability of contract law (e.g., various attorney, corporate, and trade group submissions); cause economic harm (e.g., the Governors' Letter, NCOIL, the U.S. Chamber of Commerce); routinely impose extra-contractual liability on insurers (e.g., various attorney submissions); improperly invade state prerogatives in a federal system (e.g., NCOIL; Dinallo/Slattery/Debevoise submission), and invade the legislative function (e.g., NCOIL). A full analysis of all of these sky-is-falling arguments cannot be contained in a single law review article. But the examples noted above are enough to give the reader a flavor of the insurer criticism out of all proportion to the actual content of the RLLI.

A striking aspect of much of the RLLI criticism is the relative disregard for separation of powers and the judicial function shown by critics. Critics naturally fear that provisions with which they disagree in a Restatement could become influential. But RLLI critics talk as though the RLLI would rigidly govern judicial decisions or that judges would blindly defer to the RLLI. In reality, although Restatements have been influential, they have often not been adopted by courts. As is noted in the RLLI itself, the "contextual" approach to document interpretation favored by the ALI's *Restatement (Second) of Contracts* has been embraced by less than half the states. Judges have a rather consistent habit of making up their own minds and are unlikely to follow a RLLI provision unless persuaded by it.

In that sense, critics of the RLLI tend to misstate the nature of soft law. By its very essence, soft law attempts to provide a guiding code or model or doctrine, something that will be seen as useful and therefore adopted (e.g., in choice of law clauses) or applied (as a source of analysis for disputes before a tribunal). But as the name implies "soft" law is not coercive. Individual courts or judicial systems follow soft law only if persuaded.

For that reason, critiques like that of NCOIL are overstated to the point of absurdity. What is coercive, however, is the type of response advocated by NCOIL – a law or legislative resolution forbidding or discouraging use of Restatements. If the RLLI is as bad as asserted by critics, one would expect the RLLI to have only minimal following. Why then, one may ask, are groups like NCOIL entertaining coercive action against soft law that is supposedly so bad that no one would follow it? Answering the question requires one to at least consider the depressing possibility that NCOIL – a supposedly neutral organization that operates more in the nature of a mouthpiece for the insurance industry – recognizes that the RLLI is persuasive and therefore must be throttled by insurers seeking to profit from the application of inferior insurance doctrine.

During the 2017–2018 review and revision period, insurer advocates were not quiet. In addition to comments directly from the industry or trade groups<sup>166</sup> and

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<sup>166</sup> See, e.g., Letter from Harold Kim, Exec. Vice President, U.S. Chamber of Com. Inst. for Legal Reform, to ALI Council (Apr. 6, 2018) (on file with author) (criticizing Sections 3, 4, and 12); Letters from Thomas B. Considine, CEO, NCOIL, to David F. Levi & Robert Cooper Ramo, ALI (Dec. 12 & Nov. 28, 2017) (on file with author); Letter from J. Stephen Zielenzienski, Am. Ins. Ass’n, and Tom Karol, Nat’l Ass’n of Mut. Ins. Cos., to David F. Levi, ALI (Sept. 2017) (on file with author) (criticizing August 2017 RLLI Draft as not having moved sufficiently in the direction of insurers in the wake of May 2017 Annual Meeting; accusing RLLI Section 12 of “eviscerating” attorney rules of professional conduct, creating a “judicial watchdog” over the insurance industry, and creating new remedies for breach of contract); see also Letter from Carmelo A. Puglisi, Assoc. Gen. Couns., Am. Fam. Mut. Ins. Co. to Richard Revesz, Dir., ALI, and Stephanie Middleton, Deputy Dir., ALI (May 20, 2017) (on file with author); Letter from Thomas D. Hughes, Exec. Vice President & Gen. Couns., Greater New York Mut. Ins. Co., to Richard Revesz, Dir., ALI (May 19, 2017) (on file with author); Letter from J. Stephen Zielenzienski, Senior Vice President & Gen. Couns., Am. Ins. Assoc., and Thomas Karol, Gen. Couns., Nat’l Ass’n of Mut. Ins. Cos., to Richard Revesz, Dir., ALI (Jan. 31, 2014) (on file with author) (attacking RLLI generally, contending that it adopts position without case law support and that Reporters have been dismissive of insurer criticisms); Letter from John E. Cuttino, President, Def. Res. Inst., to Richard Revesz, Dir., ALI (May 5, 2017) (on file with author) (attacking RLLI provisions on insurer liability for negligence of insurer-selected and directed counsel and fee-shifting as well as arguing ALI unsupported by existing law); Letter from Randy Cigelnik, Senior Vice President, Corp. Sec’y & Gen. Couns., Prop. Cas. Ins., Ass’n of Am., to Richard Revesz, Dir., ALI (May 1, 2017) (on file with author) (criticizing RLLI and concurring in commentary of AIA Attorney and Representative Laura Foggan (“The Reporter’s opinion of ‘better’ outcomes does not necessarily result in rules that align with the risks that insurers have agreed to undertake based on actuarially sound underwriting.”)).

Also on the eve of the 2017 Annual Meeting there was a comment by a broker (Guy Carpenter, Senior Vice-President Malcolm Rowland) criticizing the RLLI for containing “material deficiencies and adoptions of minority positions that will cause confusion in the courts and increase uncertainty and litigation, in contravention of the goals and purpose of the ALI” but containing no specifics. See Letter from Malcolm Rowland to ALI (undated) (received May 2017) (on file with author). Mr. Rowland also suggests (quite amazingly in light of the then seven-year history of the project) that the RLLI was being “brought hurriedly” before the ALI and that “opinions of all experts in this field need to be heard and considered prior to adoption.” *Id.* at 1.

The Rowland submission is more than a little surprising. First, the conventional wisdom is that brokers align with policyholders on insurance matters. Apparently not. And that

corporate America,<sup>167</sup> there was a continued stream of commentary criticizing aspects of the RLLI deemed too favorable to policyholders to come from insurer attorneys<sup>168</sup>

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conventional wisdom was probably always overstated in view of the fact that many brokers receive a substantial amount of their income in the form of commissions from insurers as a reward for placing their policies with the brokers' clients (or supposed clients). Second, the Rowland submission ignores that the RLLI emerged from a process in which drafts were reviewed by a balanced group of Advisers and an Members Consultative Group ("MCG") that was if anything weighted toward insurers.

<sup>167</sup> See, e.g., Letter from Harold Kim, Exec. Vice President, U.S. Chamber Inst. for Legal Reform, to ALI (Jan. 5, 2018) (on file with author) (criticizing Sections 3, 12, 18, 47, 48, and 50 of December 2017 RLLI Draft); Letter from General Counsel, TAMKO Building Products, Inc., ConocoPhillips, Brunswick Corp., Eli Lilly & Co., Novartis Corp., RMP Int'l Inc., Shell Oil Co., GlaxoSmithKline, Johnson & Johnson, to David F. Levi, President-Designate, ALI (May 19, 2017) (on file with author) (attacking RLLI as excessively pro-consumer and insufficiently supported in case law but not citing cases; also opposing fee-shifting to policyholders "[a]lthough we . . . might benefit from such a provision in our capacity as corporate policyholders" as it is not "inherently an insurance law issue.").

<sup>168</sup> See, e.g., Letter from Laura A. Foggan, Crowell & Moring, to Thomas E. Baker and Kyle D. Logue, ALI, (Apr. 25, 2018) (on file with author) (listing complaints about sections or subsections of the Proposed Final Draft RLLI); Letter from David W. Rivkin, Debevoise, to Richard Revesz, Dir., ALI, and Stephanie Middleton, Deputy Dir., ALI (Apr. 9, 2018) (on file with author) (seeking further narrowing of potential insurer liability for attorney error in Section 12 and noting that only one state requires attorneys to carry professional liability insurance; arguing from this that insurer selection of counsel without adequate such insurance should not result in insurer liability if counsel is negligent); Letter from Peter Solmssen to Tom Baker and Kyle Logue, Reporters, ALI (Apr. 7, 2018) (on file with author); Letter from Jackson & Campbell (multiple signatories) to Tom Baker & Kyle Logue, Reporters, ALI (Apr. 6, 2018) (on file with author); Letter from Laura A. Foggan, Crowell & Moring, to Tom Baker & Kyle Logue, Reporters, ALI (Apr. 4, 2018) (on file with author) (proposing revisions of RLLI Sections 3, 4, & 12); Letter from Michael Alyward & Morrison Mahoney to Tom Baker & Kyle Logue, Reporters, ALI (Apr. 6, 2018) (on file with author) (suggesting revision of commentary regarding RLLI contract construction); Memorandum from William T. Barker, Dentons, to Tom Baker & Kyle Logue, Reporters, ALI; Letter from Thomas F. Segall to Tom Baker & Kyle Logue, Reporters, ALI (Jan 13, 2018) (on file with author) (criticizing December 2017 Council Draft provisions on fee shifting); Letter from Malcolm E. Wheeler, Wheeler Trigg O'Donnell, to Tom Baker & Kyle Logue, Reporters, ALI (Jan. 6, 2018) (on file with author) (criticizing settlement provisions of December 2017 RLLI); Letter from Peter Solmssen to ALI Council (Jan. 4, 2018) (on file with author) (co-signed by 20 lawyers from firms generally representing insurers and in-house counsel for State Farm Insurance and Liberty Mutual Insurance); Letter from Victor E. Schwartz & Christopher Appel, Shook Hardy, to Tom Baker & Kyle Logue, Reporters, ALI (Dec. 29, 2017) (on file with author) (taking issue with RLLI position on fee shifting); Letter from John E. Cuttino, President, Def. Res. Inst., to Richard Revesz, ALI (Oct. 6, 2017) (on file with author) (attacking August 2017 RLLI Draft provisions regarding contract construction, insurer liability for errors of counsel); Letter from Malcolm E. Wheeler, Wheeler Trigg O'Donnell, to Tom Baker & Kyle Logue, Reporters, ALI (Sept. 11, 2017) (on file with author) (urging revisions of §§ 25 & 35 regarding settlement to strengthen insurer prerogatives); Letter from Jackson & Campbell Law Firm to Tom Baker & Kyle Logue, Reporters, ALI (Aug. 31, 2017) (on file with author) (criticizing RLLI settlement provisions); Letter from Laura Foggan, Alliance of Am. Insurers, to Tom Baker & Kyle Logue, Reporters, ALI (July 11, 2017) (on file with author) (criticizing RLLI); Letter from Malcolm E. Wheeler, Wheeler Trigg O'Donnell, LLP., to Tom Baker & Kyle Logue, Reporters, ALI (June 19, 2017) (on file with



(and one letter submitted on behalf of the plaintiff/policyholder aligned America Association for Justice (“AAJ”).<sup>169</sup> To the extent this represented the actual personal views of the commentators, this is advocacy consistent with the ALI’s “check your clients at the door” ethical standard.<sup>170</sup> But the frequency with which some insurer

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author) (criticizing RLLI provisions regarding settlement without insurer consent); Letter from Kim V. Marrkand, Mintz Levin, to Tom Baker & Kyle Logue, Reporters, ALI (June 14, 2017 (on file with author) (criticizing RLLI sections regarding misrepresentation); *see also* A. Hugh Scott, *Why Criticisms of ALI’s Insurance Restatement is Valid*, *supra* note 104 (insurer attorney from prominent Boston firm attacking what is now Section 24 (and other provisions of the RLLI) on the eve of the 2017 Annual Meeting); Letters from Kim V. Marrkand, Mintz Levin, to ALI (June 28, July 14, Aug. 4, Oct. 16, Oct. 20, Dec. 27, 2017) (all on file with author); Letters of Memoranda from Laura Foggan, All. of Am. Insurers, to ALI (July 19, Aug. 28, Sept. 26, Nov. 12, Nov. 13, Dec. 21, Dec. 28, Dec. 29, 2017) (all on file with author); Letters from Jackson & Campbell Law Firm to ALI (Aug. 31, Sept. 1, Sept. 6, Dec. 29, 2017) (all on file with author); Memoranda from William Barker to ALI (Fall 2017, Dec. 22, 2017, Apr. 14, 2018) (all on file with author); Chart of State Law Regarding Attorney Fee Shifting from Victor Swartz & Christopher Appel to ALI (2018) (on file with author).

I am not quite sure how to characterize the Letter from Victor E. Schwartz & Christopher E. Appel, Shook Hardy & Bacon, to Reporters Baker and Logue, ALI (June 28, 2017) (on file with author) (criticizing fee shifting provisions, since modified, in RLLI). The letter is offered in their capacity as attorney ALI members. But Mr. Schwartz is well known as a long-time representative of the American Tort Reform Association (“ATRA”) and the letter may have been the result of his retention by ATRA or another interest group.

Another comment resisting characterization is that of California Superior Court Judge (and ALI Council Member) Carolyn Kuhl (Memorandum of January 9, 2018 to Reporters Baker & Logue) proposing changes to RLLI Section 12 regarding insurer liability for errors of defense counsel. It is not clear whether these comments – ultimately acted upon by the Council and incorporated into the April 2018 Proposed Final Draft – were made in her capacity as a Council Member, judge, or based on experience as an attorney (Munger Tolles & Olsen).

<sup>169</sup> *See* Letter from Jacob R. Cox, Chair, Am. Ass’n for Justice Ins. L. Section, to Tom Baker & Kyle Logue, RLLI Reporters, ALI (Mar. 14, 2018) (on file with author) (supporting RLLI provisions requiring insurers to make reasonable settlement decisions but criticizing RLLI for moving away from earlier rule stripping insurers of coverage defenses for breach of the duty to defend and failing to routinely require losing insurers to pay policyholder counsel fees).

<sup>170</sup> As examples, insurer attorneys William Barker (Denton’s) and Michael Aylward (Morrison Mahoney) frequently submitted comments. But both are also frequent contributors to the legal literature, with much of their writing predating the RLLI project. *See, e.g.*, William Barker et al., *Is an Insurer a Fiduciary to its Insureds?*, 25 TORT & INS. L.J. 1 (1982); Michael Aylward et al., *Extra-Contractual Liability and the Restatement on Liability Insurance Law*, AM. COLL. OF COVERAGE & EXTRA-CONTRACTUAL COUNS. 101–04 (on file with author). Consequently, I regard the Barker and Aylward submissions as falling within the ALI’s tradition of member commentary, although one could characterize their efforts as marketing even if they were unpaid. *See also* Douglas R. Richmond, *Trust Me: Insurers Are Not Fiduciaries to Their Insureds*, 88 KY. L.J. 1, 5 (1999) (adviser on RLLI project who represents brokers essentially agrees with Barker position on the issue).

In addition, one cannot help but notice a difference in the thrust of attorney comments versus those of corporations and interest groups. Attorneys, for the most part, address their criticisms of the RLLI to the Reporters, which is the preferred process in that it provides the Reporters with the opportunity to consider making revisions in response to the comments (all written

counsel submitted comments suggests either that they were being compensated to lobby the Institute or that their law firms had made an institutional commitment to seeking revisions of the RLLI as part of law firm “client development” – attempting to win the favor of insurers in hopes that they would send more business to the firm or become clients of the firm.<sup>171</sup>

To some extent, the aggressiveness of some insurer counsel or groups could be described as merely an extension of traditional advocacy by attorneys who cared deeply about jurisprudential issues. But even if this is assumed and attorney advocates were not billing insurer clients or marketing their services, the lobbying approaching the 2018 Annual Meeting was different in quality and kind from traditional ALI advocacy.

The campaign against the RLLI involved considerable trade association advocacy that was different in kind and magnitude from the sort of doctrinal discussion that accompanies most Restatements. Organizations specifically of insurers or aligned with insurers as well as lawyers for these groups registered their objections to RLLI drafts and sought pro-insurer changes.<sup>172</sup> This is different than hearing from members of the Institute who, through representation of insurers, were aware of industry concerns. Rather, it was industry trade organizations themselves that weighed in on the RLLI.

In addition, commentary was directed not solely to the Reporters or to the ALI as a deliberative body but to ALI leadership in an attempt to induce the leadership to adopt positions that had been rejected by the Reporters after – and I cannot stress this enough – years of ongoing consultation with a balanced group of Advisers, a largely pro-insurer Members Consultative Group, the ALI Council, and the insurance and

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comments to the Reporters are also archived on the ALI website and are available for review by ALI leadership and members). Corporations and interest groups by contrast address their comments to the ALI leadership, particularly the President and Director. While this may reflect misunderstanding of the ALI process and a corporate penchant for top-down decision making, it in my view also reflects that these entities are less committed to the deliberative process and seek to bypass the expertise of the Reporters and Advisers in an effort to influence top management, perhaps coercively with threats regarding the influence of the ALI. It looks more like bare knuckles lobbying and less like a conversation on the merits regarding legal principles and doctrine.

<sup>171</sup> For example, American Insurance Association (“AIA”) liaison Laura Foggan, who frequently represented insurers in coverage disputes as well as before the ALI, submitted comments with such frequency and length that it seems impossible that she would have invested this amount of time in the absence of payment. Somewhat less active as a commentator was Boston attorney Kim Marrkand (Mintz, Cohen). Both submitted not only many comments but also comments of length and scope suggesting the help of associates, law clerks or legal assistants at their respective firms. At the very least, this seems like intensive marketing for insurer clients, which is something other than mere personal expression of views. And if they were billing insurer clients for their time, this is clearly inconsistent with the “leave your clients at the door” standard of independent deliberation. Regarding the propriety of counsel engaging in law reform activity on behalf of clients or for purposes of marketing and business development, see Jeffrey W. Stempel, *Legal Ethics and Law Reform Advocacy*, 10 ST. MARY’S J. ON LEG. MALPRACTICE & ETHICS 244, 251 (2020).

<sup>172</sup> See, e.g., *supra* notes 127–34, describing comments submitted by insurer organizations.

legal community in general. In effect, the pro-insurer interest groups sought to defeat the RLLI as it would defeat legislation in the political arena – not only in committee and on the floor of the legislative body, even with floor amendments or riders to appropriate bills as well as seeking an executive veto – rather than being confined to making arguments on the merits in the normal course of the deliberative process.

Also notable in addition to NCOIL's clout (how many organizations can get six governors to sign a letter at their behest?) is NCOIL's sense of entitlement. It expected the ALI to accord it the deference it apparently gets from state legislators and some governors. When the RLLI was not changed to its liking, NCOIL expressed pique that its concerns "have gone largely ignored"<sup>173</sup> and stated:

Should there not be meaningful change in the Proposed Restatement, NCOIL will be forced to oppose the proposed Restatement project as a misrepresentation of the law of liability insurance and as a usurpation of lawmaking authority from State insurance legislators.<sup>174</sup>

*E. The "Final" RLLI Emerging From the 2018 Annual Meeting*

In spite of the sustained criticism from insurers and allies, the RLLI was adopted by the ALI at its 2018 Annual Meeting by an overwhelmingly positive vote.<sup>175</sup> Given that the Institute was concerned enough in May 2017 to postpone final adoption of the RLLI, the ease of adoption in May 2018 came as a surprise to many. It was almost eerily without bellicosity in light of the strong lobbying that preceded the Meeting.

As was the case with earlier meetings, insurers or insurer counsel brought the bulk of the written motions submitted. Only one motion was submitted by policyholder counsel seeking a clarification of the circumstances in which an insurer might rescind a policy due to failure to disclose a known loss.<sup>176</sup> It passed by a roughly 9:1 ratio.

In response to one of the motions made by prominent insurer counsel, the Reporters were persuaded to increase the requirements of disclosure to insurers if a

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<sup>173</sup> See Letter from Thomas B. Considine, CEO, NCOIL, to David F. Levi, President, ALI (Dec. 12, 2017) (on file with author).

<sup>174</sup> See Letter from Thomas B. Considine, CEO, NCOIL, to David F. Levi & Roberta Cooper Ramo, Presidents, ALI (Nov. 28, 2017), at 4 (on file with author).

<sup>175</sup> The ALI parliamentary tradition is to use voice votes on matters that are expected to pass easily (e.g., a motion to call the question) or fail easily (a motion made at the first session to cancel the rest of the Annual Meeting).

For most issues of consequence at the 2018 Annual Meeting, the ALI took votes by show of hands. Where the winner of the vote was obvious, a final tally was not taken, as was the case with all of the 2018 votes surrounding the RLLI.

Based on my observation while attending the meeting, I have estimated the rough ratio of the votes. In all cases surrounding the RLLI, votes were very one-sided – roughly 9:1 in favor of the winning position. I did not see any votes that could credibly be characterized as less than 80 percent support for the winning position.

<sup>176</sup> See David Goodwin et al., Motion to Amend § 46 by Deleting Subsection 46(2)(a) (submitted on May 17, 2018) (on file with author). I was one of the five signers of the Goodwin Motion.

policyholder was to settle a claim without insurer consent.<sup>177</sup> This friendly or hybrid motion passed by a similar 9:1 vote.

Motions favored by insurers lost by similar lopsided votes, including two motions designed to bar courts from considering industry custom and practice in construing policy language unless the policy text was facially ambiguous.<sup>178</sup> Comment *c* to RLLI §3 provides that courts may consider such evidence as part of the background or context used to understand the words in the policy – and that this does not count as permitting extrinsic evidence to countermand clear policy text.<sup>179</sup> These motions lost, again by a very lopsided, 9:1 vote.

One significant insurer motion sought to strike the word “substantial” from the portion of the RLLI dealing with rescission of an insurance policy due to material misrepresentation. The Section provided that a “material” misrepresentation of fact was one that, if known, would have caused the insurer not to have issued the policy in question or to have issued it on “substantially” different terms or for a “substantially” higher premium. The motion argued that this was too demanding a definition of materiality that would unduly hinder insurers in rescinding policies in cases where they had been given incorrect information. The motion failed by a 9:1 ratio.

Another significant motion involved an effort to delete commentary in §27, Comment *e*, which dealt with the issue of whether an insurer that had unreasonably failed to settle a case that then resulted in both compensatory and punitive damages against the policyholder could limit its liability to the policyholder to only the compensatory damages liability in states where public policy prohibits insurance for punitive damages.<sup>180</sup> Although case law, in the form of decisions in California, Colorado, and California was to the contrary, the RLLI Reporters noted that two of these cases were decided on 4-3 votes,<sup>181</sup> with strong dissents that the Reporters (and the bulk of the Advisers) found persuasive.<sup>182</sup> The ALI membership rejected the

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<sup>177</sup> See Tom Baker & Kyle Logue, Comments and Motions on RLLI Settlement Sections (24, 25, 27) (submitted May 18, 2018)) (on file with author); see also Malcom E. Wheeler, Revised Proposed Amendment to RESTATEMENT OF THE L. OF LIAB. INS. (AM. L. INST., Proposed Final Draft No. 2, 2017) § 27 (received May 17, 2018) (on file with author) (member motion on which the Reporters’ Motion was based in part).

<sup>178</sup> See Vanita M. Banks, Proposal to Amend Section 3 to delete Comment *c*, *Custom, Practices and Usage*, and Illustrations 1 and 2 (received May 17, 2018) (on file with author); Michael Aylward, Proposed Amendment to Restatement, Section 3 – *The Plain-Meaning Rule* (submitted May 17, 2018) (on file with author).

<sup>179</sup> See RLLI, *supra* note 4, at § 3 & cmt. *c*.

<sup>180</sup> See Victor E. Schwartz, Proposed Amendment to § 27 & cmt. *c* (submitted May 17, 2018) (on file with author).

<sup>181</sup> See PPG Indus., Inc. v. Transam. Ins. Co., 975 P.2d 652, 654, 658–60 (Cal. 1999); Lira v. Shelter Ins. Co., 913 P.2d 514, 517, 521, 522–23 (Colo. 1996); see also Soto v. State Farm Ins. Co., 635 N.E.2d 1222, 1223–24 (N.Y. 1994) (finding no insurer responsibility for punitive damages component of excess judgment; no dissents).

<sup>182</sup> See RLLI, *supra* note 4, at § 27 cmt. *e* & reporters note *e*. In addition, as an Adviser to the RLLI project, I was present for discussion of this Section and comment and recall

insurer argument that a Restatement should not be adopting a dissenting, the amendment was defeated – also by the 9:1 ratio – implicitly concluding that the better rule of law can in some circumstances be contained in a dissent.

The nature of insurer complaints against the RLLI may have explained some of the Institute’s support for the Reporters and the project. As one cerebral insurer-side attorney put it, the ALI “responds to light, not heat.”<sup>183</sup> Many of the insurer attacks on the RLLI had been long on heat (rather than light)<sup>184</sup> – e.g., claims that the RLLI was unsupported in law, announced many new rules of law, was lopsidedly pro-policyholder, violated states’ rights or separation of powers, would endanger the financial health of the insurance industry, and would result in a large increase in premiums. These criticisms were so outlandishly wrong that they may have operated as the thirteenth chime of the metaphorical clock, making it hard to credit the better arguments made by insurers.

In addition, the manner in which some insurer advocates pressed their case ran more toward the heat side of the light-heat continuum. Rather than having sustained, reflective discussion over segments of the project with which they disagreed, insurers campaigned against the RLLI as if they were trying to capture a contested state senate or congressional seat. Insurer materials reflected a political script of talking points more in keeping with door-to-door campaigning or a town meeting of low information voters rather than the more academic analysis characteristic of the ALI. For example, multiple submissions contained the Justice Scalia quote critical of Restatements (discussed at the outset of this Article) even though it was clear that the commentators using the quotation almost certainly did not stumble upon this quotation themselves but merely parroted it based on an insurer form letter. It was reminiscent of an “attack ad” electoral campaign more than deliberation among lawyers.

It also displayed a tin ear for the audience. When lobbying Republican-dominated state legislatures such as those of South Carolina, Iowa, Nebraska, Texas or Utah (whose governors signed the anti RLLI letter discussed at the beginning of this Article), invoking Antonin Scalia may operate as an effective signaling device because it has become an article of faith on the American Right that Scalia was the best modern Supreme Court Justice.<sup>185</sup> Mere incantation of his name may be all that is needed to persuade the average Republican politician.

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comparatively little controversy regarding Comment *e*. While not all Advisers supported the Reporters, the clear bulk did and those in disagreement did not debate the issue at any length.

<sup>183</sup> Attributed to William Barker (Denton’s USA) by Douglas Richmond, counsel to insurance broker Aon. Conversation of May 22, 2018 at ALI Annual Meeting.

<sup>184</sup> The term is “used to say that something or someone causes anger without making something (such as an issue under discussion) better understood.” *More Heat Than Light*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/more%20heat%20than%20light> [https://perma.cc/979K-7FME].

<sup>185</sup> For example, when asked during the 2016 presidential campaign who he would nominate to the Supreme Court, then-candidate Donald Trump repeatedly used Justice Scalia as a model. In ultimately appointing Tenth Circuit Judge Neil Gorsuch, Trump largely followed through in that Gorsuch, like Scalia, is highly credentialed and very conservative.

The ALI, by contrast, although a mostly judge-friendly organization, has avoided having favorite or outcast judges. It respects Supreme Court Justices of all ideological stripes (for example, conservative Chief Justice John Roberts was warmly received at the May 2018 Annual Meeting just as were liberal Justices Sonia Sotomayor and Elena Kagan). But it does not reflectively idolize them or embrace them as heroes over a single issue such as abortion or school prayer. ALI Members undoubtedly respect Justice Scalia – but that did not automatically translate into deference or the reflexive view that his criticism was well-taken. Politically liberal ALI members will not agree to something merely because it was said by Ruth Bader Ginsburg, Sonia Sotomayor, or Elena Kagan. Conservative ALI members will not agree to something simply because it was said by John Roberts, Samuel Alito, Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, Amy Coney Barrett – or Antonin Scalia. But elements of the insurance industry appear to have wrongly assumed that the same sort of litmus tests, dog whistles, and signaling devices that work among the state officials or the electorate at large would work with the ALI membership and leadership. Hence, the continued references to the Scalia criticism of Restatements, relentless to the point of comedy or boredom.

Irrespective of the substantive positions espoused in its black letter, the RLLI contains extensive scholarship about insurance reflected not only in the comments but also in the Reporters' Notes. The Notes in particular collect cases and commentary both supporting and opposing the RLLI black letter. As a consequence, the RLLI can serve as a valuable legal research tool for lawyers and courts, even those who disagree with some of its black letter provisions or commentary or illustrations. For the most part, the 50-section RLLI (totaling almost 500 pages with Comments and Reporters' Notes) adopts uncontroversial prevailing insurance doctrine. The RLLI at times adopts what might be termed "minority" rule positions that are held by less than a majority of American courts. But it does not appear that the RLLI in any instance adopts a position that has no supporting legal authority. Where the RLLI departs from a majority rule in favor of a minority rule or different, hybrid, or customized rule, it does so with at least some support in the case law and scholarly analysis.

That said, does the RLLI lean in the policyholder's direction? On some issues. The duty to defend provisions<sup>186</sup> and attitude toward contract construction and the role of extrinsic evidence and reasonable expectations analysis<sup>187</sup> can be described as more favorable to policyholders than the approaches of many courts. But on other issues – some of them affecting billions of dollars in coverage liability, the RLLI takes a decidedly pro-insurer tilt. Most prominently, it adopts pro-rata allocation of insurer

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<sup>186</sup> See RLLI, *supra* note 4, at §§ 12–23. For example, RLLI § 12 can be regarded as perhaps a modest expansion of insurer liability for negligence in selecting or supervising defense counsel. RLLI § 13 takes a fairly strong "four corners" approach supplemented by an insurer's responsibility to defend if it knows of facts outside the complaint that create a potential for coverage, which is an approach more favorable to policyholders than some jurisdictions but is followed in many states and is hardly a new or novel approach. Also, § 13 does not require the insurer to dig for facts that might create a potential for coverage. RLLI § 21 disfavors recoupment of defense costs spent on uncovered claims and is thus predictably disliked by insurers but this is a mainstream and perhaps even the majority view of the courts.

<sup>187</sup> See *id.* §§ 2–4. But recall that RLLI § 3 creates a presumption in favor of the "plain meaning" of policy text.

responsibility in the case of long-tail mass torts rather than the “all sums” approach.<sup>188</sup> RLLI § 39 regarding attachment of excess insurance permits insurers to avoid coverage even for claims reaching the excess layer and even if the full amount of an underlying limit has been paid simply because the payment was by the policyholder rather than an underlying insurer, a development that in many cases does not increase the excess insurer’s risk and does not justify the windfall of letting the excess insurer walk away without payment.

In sum, the RLLI is a document that largely tracks existing law, which prompts two questions: (1) Is it worthwhile? (2) Why is the insurance industry so upset about it? As to the first question, there is no doubt that the RLLI is a valuable addition to insurance scholarship. It operates as something of a “super treatise” in that it provides – in the familiar ALI Restatement format that has proven useful for decades – rather clear black letter rules, followed by explanatory Comments and helpful illustrations as well as Reporters’ Notes that provide further explanation and ample citation to case law and secondary authority. It collects in one place an awful lot of good information about liability insurance.

It also carries with it the authority of a document years in the making that has benefitted from the involvement of not only the Reporters (two standout academics) but also from collaboration with a group of Advisers that included other law professors, judges, policyholder counsel, and insurer counsel and even insurer executives as well as review by a Members Consultative Group that included both policyholder and insurer counsel, more heavily the latter. Just as important, the RLLI has been repeatedly reviewed by the ALI Council and then by the Membership at five Annual Meetings. No treatise receives this sort of scrutiny from such a wide audience, either before or after its publication.

As a result, the RLLI provides authoritative guidance that an ordinary treatise could not hope to match. What might be termed “individual” treatises still have a vital role to play, as do multi-volume treatises such as Appleman and Couch that now are written by a variety of authors differing per chapter rather than a single author as was the case with their original editions. But the ALI process provides a type of validation for the document as a whole that no individual treatise can match. It will provide judges and lawyers with a handy and authoritative reference, which may be particularly valuable for counsel and courts that are not particularly familiar with insurance issues. It is perhaps a truism that soft law is not controlling. Courts will apply portions of the RLLI only if they agree with a given position and its rationale. But the document is sure to aid and inform even those who disagree with its positions.

#### *F. Attempting to Understand Insurer Opposition to the RLLI*

The vehemence with which insurers have opposed the RLLI may appear perplexing to a neutral observer. The RLLI largely reflects well-settled insurance doctrine, occasionally embracing minority rules where it finds the minority analysis sounder. It certainly is not a radical document. So why are insurers (who are ordinarily reasonable on most issues, most of the time), so upset about what is not a particularly pro-policyholder or trailblazing document? One trial hypothesis posits that insurers oppose the RLLI not so much for its content but because they wish there were no

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<sup>188</sup> See *id.* § 42.

Restatement at all regarding liability insurance – or any type of insurance, regardless of the content of the Restatement.<sup>189</sup>

Insurance in the United States has long been state-centered not only in regulation but also regarding adjudication, a practice enshrined in the McCarran-Ferguson Act and reflected in resistance by insurers and state regulators to efforts to nationalize insurance regulation or law. The current state-centered regime, whatever its other pluses and minuses, coupled with the dispersion of cases and adjudicatory authority throughout the justice system provides substantial advantage for insurers relative to policyholders, particularly consumers or less sophisticated small business or government policyholders.

Insurers – who are the ultimate well-organized, sophisticated, “repeat players” of litigation – can engage in a good deal of forum shopping and “pick their battles” in litigation. In addition to state-to-state variance, there are many courts within a state and non-resident insurers can readily remove to federal court when sued by policyholders in state court. Insurers can either wait to see if they are sued or take the initiative of a declaratory judgment action. Insurers thus have an inventory of cases that can be settled or litigated in their discretion and a variety of forums that they may select.

Any greater centralization of insurance law – which would likely be encouraged by a Restatement – is likely to reduce that of the traditional insurer advantage in shaping law irrespective of the content of the Restatement itself. Consequently, some insurers and counsel may oppose the RLLI simply to preserve their current case and forum selection advantages. This theory may seem a bit counter-intuitive in that insurers are often defendants, which means that policyholders or their assignees are often commencing litigation and thus selecting the litigation forum. But the opportunity for forum shopping by policyholders, particularly individuals and small businesses firmly located in one home state, is limited. And insurers in most states often have at their disposal an avenue of partial forum shopping in that they can frequently remove a case filed in state court to federal court, which is generally seen as a more favorable situation for insurers.<sup>190</sup>

Even when defendants, insurers have a good deal of discretion in seeking to obtain favorable precedents. When a given lawsuit involves bad facts (e.g., an internal memo or email showing disrespect for the policyholder or self-serving behavior by an adjuster hoping to get a promotion by being tough on claims) or the policyholder has strong counsel or the case has been assigned to a judge seen as favoring policyholders or will have an urban jury more likely to provide a large bad faith award, the insurer can settle such cases, perhaps even “overpaying” as necessary to avoid risking unfavorable precedent or generating adverse publicity.

By contrast, when a case involves favorable facts, less competent or effective counsel, or a sympathetic judge or jury, insurers can make their stand on this ground, hoping to generate favorable precedent. For example, before a favorable judge opposed by weak counsel, an insurer may be able to prevail through a Rule 12(b)(6)

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<sup>189</sup> See generally STEMPEL & KNUTSEN, *supra* note 77, at § 14A.

<sup>190</sup> Regarding the strategy and tactics of forum selection, personal jurisdiction, venue and civil procedure generally, see generally STEVEN S. GENSLE, *FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY* (2018); ROGER S. HAYDOCK ET AL., *FUNDAMENTALS OF PRETRIAL LITIGATION* (11th ed. 2020).



or summary judgment motion and obtain a ruling that “as a matter of law” it owed no duty to defend or to provide coverage or that there was no bad faith, that its construction of the policy, even if incorrect, was “fairly debatable” and so on.

Because of the availability of a declaratory judgment action regarding duty to defend and coverage, insurers can also of course take an even more proactive approach and do affirmative forum shopping by filing suit in the court viewed as most favorable for their positions. This will be limited to a degree by requirements of personal and subject matter jurisdiction but is nonetheless a powerful tool for insurers.

And as part of forum selection and strategic case resolution, insurers are able to avoid decisions by judges they do not like (e.g., the former policyholder counsel) and seek decisions by judges they do like (the former panel counsel or insurer-side coverage counsel). Alternatively, an insurer seeking a favorable opinion may be happy to litigate before a judge with little insurance background such as a former prosecutor or criminal defense attorney. Judges with little insurance background from practice (and who probably did not take Insurance Law in law school) no matter how bright, will need to learn insurance on the fly in the context of the particular case. This in turn makes the court vulnerable to being led astray if the quality of advocacy is uneven or a law clerk’s research incomplete or substandard.

Faced with a neutral but relatively uninformed-about-insurance judge and lackluster policyholder counsel, insurers have an advocacy advantage that can be used to obtain more favorable precedent. And because insurance is state-centered, there may often be a lack of authoritative precedent within the state in question. Or the precedent from a state high court or appeals court that has been affected by previous insurer efforts may be in error because it stemmed from a trial court decision that was affected by the asymmetries discussed above. Appellate courts tend to defer to trial court decisions, which can give an erroneous trial court analysis more influence than it deserves.

Thus, under the current system of fragmented insurance law, insurers have a significant relative advantage over policyholders. Although there are treatises attempting to harmonize the law, many are written by policyholder or insurer counsel, which gives them less authoritative stature than would be accorded a Restatement. Treatises by full-time academics, as discussed above, are not afflicted with the same sorts of conflicts but reflect the particular perspective of their authors<sup>191</sup> and also lack the authority of a document promulgated by the ALI.

For these reasons, a substantial portion of the insurer resistance to the RLLI may be taking place not because of the substantive content of the document itself, but because a Restatement on this topic will limit the strategic and tactical advantages traditionally enjoyed by insurers. There may also be a bit of “turf battling” behind the opposition in that some of the most shrill criticisms of the RLLI have come from state regulators or legislators (or those purporting to represent their perspectives). They may fear losing influence once a national compendium of the common law has been promulgated by an influential national group. There is, in other words, profit to be

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<sup>191</sup> For example, this Treatise sees some issues differently than does the Jerry & Richmond treatise, even though both aspire to be accurately reporting the state of insurance law, policy, and operation as well as fair in assessing disputes. Both also differ to some degree from similar treatises such as MANIHOFF & STEMPEL, *supra* note 77, and the multi-volume APPLEMAN and COUCH treatises, *supra* note 78. The differences are exacerbated because different portions of the treatises have different primary authors.

made in the chaos. After all, is that not what is at the heart of the very business of insurance?

*G. Judicial Reaction to the RLLI*

Although the RLLI passed with ease, it remains to be seen whether it will be well received by courts. Even prior to formal approval, different draft versions of the RLLI had been cited with approval in several courts. Ordinarily, adoption of the final draft of a Restatement increases reference to a Restatement by advocates, law clerks, and ultimately courts – resulting in more citations and influence. But if the insurer campaign to discredit the RLLI succeeds more in litigation than it did before the Institute’s membership, insurers may have the ultimate victory.

To date, the evidence is mixed. The RLLI has been cited roughly 30 times in judicial decisions, including citations to drafts.<sup>192</sup> It is too early to engage in precise empiricism regarding the impact of the RLLI. Early returns suggest relatively low visibility in that scores of insurance cases are decided each day so the potential for use of the RLLI is potentially vast but as of yet unrealized. But neither has the RLLI been met with strong judicial opposition. In many or perhaps even most of these cases, the RLLI was not a determinative factor or even influential in the court’s decision but was cited only in passing for a proposition of law or as part of a supporting citation for a

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<sup>192</sup> The earliest citation appears to be *Wis. Pharm. Co. v. Neb. Cultures of Cal., Inc.*, 876 N.W.2d 72, 88 (Wis. 2016) (applying Wisconsin and California law), in which the Court found that incorporation of a defective ingredients into probiotic supplement tablets manufactured by the policyholder did not constitute covered “property damage” caused by an “occurrence.” In a scorching dissent, Chief Justice Shirley Abramson attacked the majority’s conflation of the economic loss doctrine of tort law with insurance coverage issues of property damage and noted in passing that the RLLI “discussion drafts on this project do not address the economic loss doctrine” but implicitly hoped that “other drafts might.” *See id.* at 95 n.21 (Abramson, C.J., dissenting). The most recent as of March 12, 2021 is *Inn-One Home v. Colony Specialty Ins. Co.*, No. 19-CV-00141, 2021 U.S. Dist. LEXIS 33451 (D. Vt. Feb. 23, 2021) (agreeing with RLLI §35(2) that prejudice from late notice reporting a claim not required for claims-made policy as would be the case with an occurrence policy).

decision already made by the court.<sup>193</sup> But in several decisions, the RLLI received serious focus, with courts adopting an RLLI position<sup>194</sup> or rejecting it.<sup>195</sup>

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<sup>193</sup> See, e.g., *Otra, LLC v. Am. Safety Indem. Co.*, No. 20-CV-01063, 2020 U.S. Dist. LEXIS 217933, at \*1 n. 1 (D. Ore. Nov. 20, 2020) (noting that RLLI §13 follows widely accepted “four corners” rule of determining insurer’s duty to defend according to face of complaint); *Evanston Ins. Co. v. Desert State Life Mgmt.*, 434 F. Supp. 3d 1051 (D.N.M. 2020) (citing RLLI treatment of exclusion as in accord with case law); *Scottsdale Ins. Co. v. Darke*, 424 F. Supp. 3d 638, 642–43 (N.D. Cal. 2019) (citing RLLI provisions on duty to defend in addition to consistent state law precedent); *Conway v. Northfield Ins. Co.*, 399 F. Supp. 3d 950, 959 (N.D. Cal. 2019) (same); *Mesa Underwriters Specialty Ins. Co. v. Blackboard Ins. Specialty Co.*, 400 F. Supp. 3d 928, 936 (N.D. Cal. 2019) (same); *Marcus v. Allied World Ins. Co.*, 384 F. Supp. 3d 115, 122–23 (D. Me. 2019) (citing RLLI as additional authority along with state precedent that exclusions from coverage are interpreted narrowly, with insurer holding burden of persuasion); *Country Mut. Ins. Co. v. Martinez*, No. CV-17-02974, 2019 U.S. Dist. LEXIS 69283, at \*41 n.15 (D. Ariz. April 24, 2019) (citing RLLI draft in footnote along with controlling state law for proposition that insurer is not liable for errors of panel counsel absent negligence in selection or active responsibility for counsel’s error); *Webcor Constr., LP v. Zurich Am. Ins. Co.*, 372 F. Supp. 3d 1061, 1070 (N.D. Cal. 2019) (citing RLLI draft in addition to controlling state law regarding duty to defend); *National Cas. Co. v. W. Express*, 356 F. Supp. 3d 1288, 1299 (W.D. Okla. 2018) (referring to RLLI draft discussion of history of the “effects” test for determining number of occurrences and its fall from favor); *Akorn, Inc. v. Fresenius Kabi AG*, No. 2018-0300, 2018 Del. Ch. LEXIS 325, at \*137 n.619 (Oct. 1, 2018) (citing RLLI section on trigger of coverage in passing); *Mid-Continent Cas. Co. v. Petrol. Sols., Inc.*, No. 09-422, 2016 U.S. Dist. LEXIS 182174, at \*11 n.28 (S.D. Tex. Dec. 16, 2016) (citing RLLI draft for uncontroversial description of duty to cooperate); *Nationwide Mut. Fire Ins. Co. v. D.R. Horton, Inc.*, No. 15-351, 2016 U.S. Dist. LEXIS 160148, at \*20 n.6 (S.D. Ala. Nov. 18, 2016) (RLLI draft cited in passing case where insurer breached its duty to defend a party but the court focused on procedural issues); *Morden v. XL Specialty Ins.*, 177 F. Supp. 3d 1320, 1340 (D. Utah 2016) (citing RLLI discussion draft for proposition regarding existence of defense cost indemnity policies in addition to more common duty to defend policies); *Nadkos, Inc. v. Preferred Contractors Ins. Co.*, 132 N.E.3d 568, 580 (N.Y. 2019) (Wilson, J., dissenting) (citing RLLI sections on waiver and estoppel in passing); *W. Hills Dev. Co. v. Chartis Claims, Inc.*, 385 P.3d 1053, 1055 (Or. 2016) (citing RLLI draft for uncontroversial position that most courts determine duty to defend by comparing “four corners” of complaint and face of insurance policy); *Cannon Elec. v. Ace Prop. & Cas. Co.*, No. BC 290354, 2019 Cal. Super. LEXIS 8, at \*23 (Jan. 9, 2019) (RLLI as “see also” citation after Court makes decision as to amount of information independent counsel must provide to insurer).

<sup>194</sup> See, e.g., *Burka v. Garrison Prop. & Cas. Ins. Co.*, No. 20-CV-172, 2021 U.S. Dist. LEXIS 32447, at \*19 (D. Me. Feb. 22, 2021) (following RLLI §18 regarding termination of insurer’s duty to defend, remanding to magistrate judge for further fact finding); *Hayes v. Wis. & S.R.R., LLC*, No. 18-CV-923, 2021 U.S. Dist. LEXIS 10175 (E.D. Wis. Jan. 20, 2021) (following RLLI §21 in rejecting insurer claim of right to recoupment of counsel fees); *GGA, Inc. v. Kiewit Infrastructure W. Co.*, No. 18-00110, 2020 U.S. Dist. LEXIS 10151, at \*70 (D. Haw. Jan. 22, 2020) (reflecting influence of RLLI bar to insurer recoupment of defense costs absent specific policy language granting right to insurer); *Sapienza v. Liberty Mut. Fire Ins. Co.*, 389 F. Supp. 3d 648, 655–56 (D.S.D. 2019) (citing RLLI and relying in part on RLLI provisions regarding limited circumstances where insurer may be liable for errors of counsel to dismiss claim against insurer); *Selective Ins. Co. of Am. v. Smiley Body Shop, Inc.*, 260 F. Supp. 3d 1023, 1033 (7th Cir. 2017) (relying in part on RLLI draft in concluding that insurer not entitled to recoupment of portion of defense expenditures related to claims outside potential coverage); *Twin City Fire Ins. Co. v. Hartman*, No. 13-CV-1608, 2017 U.S. Dist. LEXIS 227524, at \*16 (N.D. Ga. Feb. 28, 2017) (relying in part on RLLI draft to conclude that insurer

At this juncture, it seems safe to say that the RLLI has not been the sweeping anti-insurer force alleged by the insurance industry nor has it been a boon to policyholders. Rather, as one might expect, the RLLI has had impact akin to a well-regarded treatise or the guidelines issued by a respected bar association. It remains possible that the RLLI will gather momentum that may place it in the more influential category of the Contract and Tort Restatements but early signs are not that encouraging even if the RLLI appears safe from judicial rejection notwithstanding the torrent of insurer criticism.

#### IV. CONTINUED INSURER OPPOSITION TO THE RLLI AND ITS IMPLICATIONS

It may be that citation to the RLLI in 2019 and 2020 has been suppressed by insurer success in enacting anti-RLLI legislation in several states. Insurers have – as threatened during the RLLI drafting process – taken their fight against the RLLI to state legislatures, introducing anti-RLLI resolutions or bills in roughly a dozen states (among them Arizona Arkansas, Idaho, Indiana, Kentucky, Louisiana, Michigan, North Dakota, Ohio, and Texas).<sup>196</sup> These efforts have succeeded in producing not

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not entitled to recoupment of portion of settlement purportedly outside coverage); *Century Surety Co. v. Andrew*, 432 P.3d 180, 186 (Nev. 2018) (adopting RLLI view that insurer in breach of duty to defend is responsible for resulting judgment, including amount in excess of policy limits, as a consequential damage flowing from the breach; bad faith not necessary); *Port Auth. of N.Y. & N.J. v. Brickman Grp. Ltd.*, 115 N.Y.S.3d 246, 261 (N.Y. App. Div. 2019) (citing RLLI and other authority in support of using duty to defend principles to assess responsibilities of insurer with policy providing for payment of defense costs); *see also Travelers Indem. Co. v. Mitchell*, 925 F.3d 236, 246 (5th Cir. 2019) (citing RLLI regarding use of “deemer clause[s]” by insurers and ruling against two insurers where policies lacked such language and insurers were arguing that date of injury should be regarded as taking place immediately upon liability-creating event).

<sup>195</sup> *See, e.g., Outdoor Venture Corp. v. Phila. Indem. Ins. Co.*, No. 16-CV-182, 2018 U.S. Dist. LEXIS 167986, at \*55–56 (E.D. Ky. Sept. 27, 2018) (rejecting RLLI position on when independent defense counsel required rather than insurer-selected panel counsel but largely on basis of existing Kentucky law rather than criticism of RLLI); *Nooter Corp. v. Allianz Underwriters Ins. Co.*, 536 S.W.3d 251, 271–72 (Mo. Ct. App. 2017) (adopting all sum approach to insurer coverage responsibility rather than pro-rata allocation by time on risk advocated by insurers; noting RLLI draft favors pro-rata); *Catlin Specialty Ins. Co. v. CBL & Assocs. Props.*, No. N16C-07-166, 2018 Del. Super. LEXIS 342, at \*7 nn.23–24 (Aug. 9, 2018) (disagreeing with RLLI position on recoupment of defense costs and favoring recoupment by insurer); *see also Progressive Nw. Ins. Co. v. Gant*, 957 F.3d 1144 (10th Cir. 2020); *Progressive Nw. Ins. Co. v. Gant*, No. 15-926, 2018 U.S. Dist. LEXIS 163624, at \*16 (D. Kan. Sept. 25, 2018) (finding RLLI position on insurer liability for conduct of defense counsel inapplicable because insurer not negligent in retaining attorney and did not direct conduct of counsel in manner that created violation of professional standards).

<sup>196</sup> *See, e.g., H.B. 2644*, 54th Leg., 2d Sess. (Ariz. 2020) (passed Arizona House Feb. 27, 2020; consideration pending in Arizona Senate); *S.B. 565*, 92d Gen. Assemb., Reg. Sess. (Ark. 2019) (codified as ARK. CODE ANN. § 23-60-112 (2019)); *S.B. 1176*, 65th Leg., 1st Sess. (Idaho 2019); *H. Con. Res. 62*, 121st Gen. Assemb., 1st Sess. (Ind. 2019); *H. Res. 86*, 121st Gen. Assemb., 1st Sess. (Ind. 2019); *H. Res. 222*, Gen. Sess. (Ky. 2018); *S. Res. 149*, Reg. Sess. (La. 2019); *MICH. COMP. LAWS* § 500.3032 (2020); *H.B. 1142*, 66th Leg. Assemb. (N.D. 2019) (codified at N.D. CENT. CODE § 26.1-02-34 (2019)); *OHIO REV. CODE ANN.* § 3901.82 (LexisNexis 2018) (amended via language inserted in appropriations bill July 30, 2018); *H.B.*

only resolutions expressing disapproval of the RLLI but also in actual laws purporting to restrict judicial consideration of the RLLI. For example, in Michigan state courts “shall not apply a principle from the American Law Institute’s ‘Restatement of the Law of Liability Insurance’ in ruling on an issue in the case unless the principle is clearly expressed in a statute of this state, the common law, or case law precedent in this state.”<sup>197</sup> In North Dakota, no “person” can “apply, give weight to, or afford recognition to, the American Law Institute’s ‘Restatement of the Law, Liability Insurance’ as an authoritative reference regarding interpretation of North Dakota laws, rules, and principles of insurance law.”<sup>198</sup> Ohio’s legislature declared that the RLLI “does not constitute the public policy of this state and is not an appropriate subject of notice.”<sup>199</sup> A typical resolution states that the RLLI is “inconsistent” with the law of the state in question and admonishes courts not to rely on the RLLI an “authoritative reference regarding established rules and principles of law.”<sup>200</sup>

The level of “scrutiny” applied to anti-RLLI legislation is something less than brief in favor of state legislatures. Anti-RLLI legislation, when successful, is often enacted with minimal examination, which become all the more troubling in light of the language of the resolutions and bills, which makes broad statements about the content of a 50-section, 400-page document that the legislators, including sponsors, have obviously never read. Ohio, for example, enacted its anti-RLLI law as a floor amendment to a highway naming and appropriations bill. There were no analyses by legislative staff, no committee hearings and apparently no floor discussions of the proposal. Where hearings have been held, they have been limited in time and scope and appear to lack professional staff input. Although witnesses are heard, the process has a rushed feel and the votes appear to be along straight party lines. Republicans appear uniformly in favor of anti-RLLI legislation and Democrats push back, at least to the point of questioning the wisdom of an edict purporting to control judicial decision making even if not taking a pro-RLLI position.<sup>201</sup>

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2757, Reg. Sess. (Tex. 2019) (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (West 2019)); H. Con. Res. 58, Reg. Sess. (Tex. 2019) (committee report distributed May 2, 2019); see also TENN. CODE ANN. § 56-7-102 (2019) (codifying traditional state rules regarding insurance policy status as contract, traditional rules of construction and four corners rule on duty to defend, legislation that appears to have been prompted by RLLI in spite of not directly attacking RLLI).

<sup>197</sup> See MICH. COMP. LAWS § 500.3032 (2020).

<sup>198</sup> N.D. CENT. CODE § 26.1-02-34 (2019).

<sup>199</sup> OHIO REV. CODE ANN. § 3901.82 (LexisNexis 2018).

<sup>200</sup> See, e.g., H. Con. Res. 58, Reg. Sess. (Tex. 2019); S.B. 1176, 65th Leg., 1st Sess. (Idaho 2019); H. Res. 222, Gen. Sess. (Ky. 2018); H. Con. Res. 62, 121st Gen. Assemb., 1st Sess. (Ind. 2019). The basic language and contention of these resolutions is similar to the model resolution threatened by NCOIL in its attacks on the RLLI prior to its approval by the ALI. See *supra* notes 89–105 and accompanying text.

<sup>201</sup> Hearings in Arizona and Florida are illustrative. See, e.g., *House Floor Session*, ARIZ. LEGISLATURE, at 6:18–37:50 (Feb. 27, 2020), [http://azleg.granicus.com/MediaPlayer.php?view\\_id=13&clip\\_id=24038](http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=24038) [https://perma.cc/6HJW-KR5P]; *Insurance and Banking Subcommittee*, FLORIDA HOUSE OF

Insurers may be opposing the RLLI in spite of its moderate content because the presence of nationally recognized soft law for insurance will make it more difficult for insurers to continue to succeed with a litigation strategy that historically has sought to establish favorable precedent by shrewd selection of cases for litigation and the ability to use informational advantage over policyholders and their attorneys in the early stages of litigation over a disputed policy term or concept, thus establishing precedential momentum.

But my thesis as to the vehemence of insurer opposition, even if correct, does not explain (at least not as well or particularly well) political opposition to modern Restatements addressing Torts, Restitution and Unjust Enrichment, Corporate Governance, Consumer Contracts, or other topics. The overall resistance to Restatements appears to reflect a growing politicization or even partisanship regarding Restatements, the ALI, and law in general.

Current journalism is awash in discussion of a “post-truth” world in which the public has difficulty agreeing on basic facts and in which a winner-take-all tribalism increasingly dominates U.S. politics and world events.<sup>202</sup> One need not agree entirely with the most negative assessments of this trend but there seems no doubt as to the trend. Civility has declined dramatically in the behavior of public officials, candidates and commentators. Organized political parties and their most active supporters have become increasingly extreme in their views, to the point that moderates of either left or right have difficulty obtaining party nominations in primary elections.

With this greater division of extremes, the ability to compromise or conduct debate with restraint has ebbed. In its place has come a modern creed that values winning above all else without regard to the means and whether those means undermine the institutions in question. Against this backdrop, it is not surprising that legal doctrine itself has become more overtly politicized and partisan. Overt political resistance to ALI Restatements is arguably but another extension of the heightened politics law during the past 50 years.

In addition, some of the seeming backlash against the Restatements may be a reflection of America’s revolt against expertise and reasoned deliberation during the past two decades. This may also have been exacerbated and heightened by social and political tribalism in American politics and government. Law reform activity that was traditionally the domain of calm, civil rationality marked by fair play and compromise has begun to more closely resemble raw politics.

Whether the trend continues hinges both on the success of interest group lobbying and whether groups like the ALI will continue to be willing to embark on potentially controversial projects that may foment lobbying attacks on the organization. This makes the stakes significant regarding the RLLI. Although insurers have not dealt a death blow to the RLLI, the ALI, or the concept of neutral soft law developed by experts, it is not for lack of effort. Unless attaining total victory in the more

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REPRESENTATIVES, at 7:30–45:30 (Jan. 15, 2020), [https://myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804\\_2020011093](https://myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2020011093).

<sup>202</sup> RICHARD SAMBROOK, *DELIVERING TRUST: IMPARTIALITY AND OBJECTIVITY IN THE DIGITAL AGE* 3 (2012), <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2017-11/Delivering%20Trust%20Impartiality%20and%20Objectivity%20in%20a%20Digital%20Age.pdf> [<https://perma.cc/HHY9-UG42>].

deliberative realm of scholarship, adjudication, or policymaking, insurers appear to be seeking victory via the brute force of legislative clout. In the past, disagreements over Restatement provisions have largely been fought out in the courts or academic literature, both of which constitute better forums for deliberate, reflective, less partisan assessment than harried legislative sessions lacking sufficient time for education of voting members and reflection on the policy choices at issue.

Contrast this with an effort to legislatively contradict or bar the use of a Restatement. The typical state legislature has only a few attorneys in the body, most of whom will have relatively little expertise in a particular area of law such as insurance. The overworked legislative staff will be approached by lobbyists well-armed with “facts” spun in the manner most favorable to the self-interested, interest group. The interest group will often have provided campaign contributions or other support to members in the past and increase or decrease that support in the future based on the member’s support for the group’s anti-ALI efforts. The interest group may have the support of a powerful political organization, perhaps even the member’s own political party.<sup>203</sup> Because of the press of legislative business and longstanding structural defects of the legislative process in many states, those who disagree with the interest groups are unlikely to be heard, even if they have obviously greater expertise and neutrality than the interest group.<sup>204</sup>

Legislative efforts to bar or overrule Restatements or particular Restatement provisions are a bad way to conduct legal policymaking. Far better to follow the traditional approach of allowing courts on a case-by-case basis to determine the fate of Restatement provisions. Those that make rational sense and good legal policy will

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<sup>203</sup> For example, it is probably no accident that the six governors signing the April 6, 2018 Letter attacking the RLLI are all Republicans. In the U.S., the Republican Party has generally enjoyed substantial support from insurers and has been identified as the friendlier of the two major parties toward big business. And insurance is very big business. *See generally* RICHARD ERICSON ET AL., *INSURANCE AS GOVERNANCE* (2003); ANDREW TOBIAS, *THE INVISIBLE BANKERS* (1982).

<sup>204</sup> This is a structural and institutional shortcoming well beyond the scope of this Article but bears mentioning. In the typical legislative session, interest group lobbyists come with an agenda for legislation favoring the interest group. Although their proposed legislation may be vetted by legislative staff, these staffers are typically overworked and overwhelmed by many demands on their time during the legislative session.

In addition to normally lacking time to conduct a thorough vetting of interest group contentions and proposals, these staffer and the members typically do not draw upon potentially available expertise on the issues before the legislature unless the issues are very high profile (e.g., a ban on abortion; school vouchers), the high profile typically being the result of interest group activity and media interest rather than the importance of the issue per se. Seldom are professors or accomplished professionals sought for comments and testimony unless already affiliated with an interest group or suggested by an interest group. Although legislators themselves often have expertise, term limits and the press of other business make it unlikely that legislator competence can correct the problems of information asymmetry and insufficient scrutiny of interest group attacks on the RLLI and other Restatements.

As a result, the factual and analytic inputs received by a state legislature are almost guaranteed to be inferior to that received by the ALI during the Restatement process. *See supra* notes 80–81, 103 (describing the process and the particular composition of the RLLI Reporters, Advisers, and MCG).

enjoy judicial favor. Those that do not will wither in application, be revised, or both. But current attacks on the RLLI suggest that insurers will continue to wage war via brute force when they cannot prevail in a more cerebral and reflective analytical environment.

The ALI process has traditionally been one of assembling expertise directed toward a non-partisan analysis of legal issues. Although buffeted by criticisms in the past, the Restatement process and its products has largely remained intact. However, increased interest group activity in both attacking Restatements and seeking to “overrule” them legislatively poses a grave danger to the process of dispassionate, merits-based law reform activity. Years of careful analysis and deliberation by very talented experts may be wiped out in a single afternoon of voting effectively controlled by the interest group with the most electoral muscle.

There is more than a little about which to be distressed when viewing the insurance industry attack on the RLLI. First, it was a blatant effort to politicize a process that historically was marked by deliberation relatively unmoored from special interests. Second, by attempting to circumvent the traditional common law methodology that absorbs, rejects or modifies soft law, insurers attempted to supplant a process that has worked well with one that surely will provide for less reflection about law and policy as well as greater dominance by the nation’s most powerful socioeconomic interest groups – regardless of the correctness of their position. Third, the insurer attack sowed the legal wind with disinformation that will impede careful analysis of the RLLI positions (and perhaps those of other Restatements) by courts, commentators and policy makers. Fourth, by inducing some attorneys to depart from the “check your clients at the door” traditional ethos of the ALI, insurer allies (at least those being compensated for their work opposing the RLLI or using it as a means of business development or feel compelled by law firm client relations politics to join the attack), the insurer assault has eroded the foundation of what has for nearly a century been a most useful American legal institution. Fifth, in advancing insurer client interests in partisan fashion, some insurer advocates have in (at least in my view) violated rules and norms of conflict of interest by seeking Restatement provisions favorable to insurers that will, if adopted, hurt policyholder clients of the same law firms.

#### V. CONCLUSION

In short, the hard insurer attacks on the soft law of the RLLI are troubling. Where a powerful interest group such as the insurance industry loses intellectual battles over legal content, it may be able to reverse those losses on the less reflective field of raw politics. Despite the attacks, Restatements continue to exert substantial influence on courts. What is unclear is the magnitude of reduction in Restatement influence and the likely future trend. Current attacks have probably taken a toll but it is unclear whether this will be a temporary phenomenon or whether Restatements and the ALI can be sufficiently de-legitimized by special interests to lose their traditional role of providing helpful soft law to courts.