



News

Scott Seaman Provides Expert Analysis on American Law Institute's Latest Draft Restatement of the Law, Liability Insurance

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Hinshaw attorney Scott Seaman, a Chicago-based partner and co-chair of the firm's national Insurance Services Practice Group, provides expert analysis on the American Law Institute's latest draft Restatement of the Law, Liability Insurance to *Law360* in an article entitled "ALI Draft Restatement Misstates Key Insurance Law Issues."

Seaman provides expert analysis of the fourth preliminary draft of the "restatement" project, which was released by AIL on August 4 and debated earlier this month. Although some improvements were made in the latest draft (e.g., clarifying that "legal uncertainty" does not give rise to a duty to defend), it still fails on many significant points of law – often evincing at least subtle pro-policyholder bias in various portions of its "black letter" law, comments, and reporters' notes. Such instances run the gamut from policy interpretation principles (e.g., watering down the "plain meaning rule" to a "presumption" that can be overcome by a "plainer" meaning), insurer liability for conduct of defense counsel, duty to defend, and duty to settle issues among others areas. On many topics, the draft "restatement" subtly (and sometimes not so subtly) deviates from the long-standing precedent of many states and at many points evinces pro-policyholder bias.

Seaman points out that the "restatement" is correct on many principles of insurance law. For example, it rightfully endorses a pro rata allocation for long-tail claims implicating multiple policy periods and declines to endorse an "unavailability of insurance" exception to the general rule that policyholders are responsible for periods of no insurance, self-insurance, or periods in which insurance for whatever reason is unavailable.

The analysis explains that liability insurance law does not lend itself to the uniformity ALI seeks to interject. Liability insurance law largely has developed on a state-by-state basis and there are meaningful differences among the states on several points of law. It also is an area of the law that the United States Congress has left to regulation by the several states under the McCarran-Ferguson Act of 1945. Changing a given principle in isolation for the sake of interposing uniformity among the states on that principle can produce unfair and unworkable results because of the interrelationship among principles, precedent, and regulatory scheme within a given state.

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Many of the topics addressed in the "restatement" involve high stake issues that remain subject to extensive litigation, competing views, and conflicting authority. By putting a heavy hand on the policyholders' side of the scale on some issues, the draft "restatement" would not advance the law in an appropriate manner. This is the first time a "restatement" has targeted a single industry and, in the current form, the draft "restatement" is decidedly inferior to other restatements.

ALI appears poised to push out a "restatement" on the law of liability insurance next year. The road to adoption of the "restatement" has two remaining scheduled stops: ALI Council approval in January 2018 and a vote by the ALI membership at its next annual meeting in May 2018.

He urges for interested persons to continue providing input to ALI, for ALI to make improvements in the draft, and to educate the public and courts about the limitations of a "restatement" on liability insurance law.

Read "[ALI Draft Restatement Misstates Key Insurance Law Issues](#)" (PDF, *republished with permission*)