

## ALI Liability Insurance Restatement - Final Approval Delayed: What It Means

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It had been expected by many that, after seven years of arduous work, the American Law Institute's (ALI) "Restatement of the Law, Liability Insurance" would be approved on Tuesday, May 23 at the Institute's annual meeting at the Ritz-Carlton Hotel in Washington, D.C. But, despite expectations, no white smoke bellowed from the luxury hotel's chimney.

Instead, in a surprise announcement, the ALI stated that another year of work would take place on the project. The plan now is to present a final draft to the ALI membership at the next annual meeting in May 2018.

For those not closely following the ALI Liability Insurance Restatement, the project, and its process, can seem mysterious. This decision by the ALI, to delay the final vote, hardly solves this problem. So, what does all this mean?

First, while the ALI delayed the final vote on the Restatement, the membership still voted to approve all eleven of the new sections that were presented, as well as two revised sections. These sections included provisions on such topics as notice and reporting, allocation in long tail claims, known liabilities and bad faith. Thus, the text of the Restatement has been approved. However, the necessary final vote of the membership, on the entire Restatement as a collective body of provisions, did not take place.

In an effort to work toward such a vote a year from now, the ALI will hold meetings in the fall with its Advisors and Members Consultative Group (disclosure – I am a member of the MCG). As part of this process, changes to the text will be proposed and debated.

Expect to see this debate become, well, spirited. The ALI Liability Insurance Restatement has been a contentious project since its inception in 2000. The insurance industry has generally felt that it offers more benefits for policyholders than insurers – in some cases adopting minority positions, and, hence, not being a "restatement" of the law. For the past several years the industry has mounted an aggressive effort to push back on some of the provisions in this category. They made some progress, but not enough to change their overall belief that the Restatement tilts the field in favor of policyholders. ALI, for its part, maintains that a Restatement is not simply a scorecard of the law, but must also consider various other factors, including trends.

Despite how "us versus them" the Restatement process has been, it reached Coke and Pepsi levels in the run-up to the annual meeting and its expected final vote. Motions seeking changes were filed. Insurance industry representatives and trade associations offered up white papers discussing the problems that the Restatement could cause. Supporters of the draft responded with papers of their own that the sky is not falling. Insurance legislators and regulators weighed in, stating that the Restatement vote should be delayed so that its impact on their interests could be considered. Surely all of this was at the heart of the ALI's decision to delay the final vote.

There is little doubt that both sides are loaded for bear over the next year. This is probably the insurance industry's last chance to chip away at some of the Restatement provisions to which it objects. Those on the policyholder-side will be looking to stand their ground.

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Despite the ALI Liability Insurance Restatement having been in the oven for seven years, details of it (and, in some cases, its very existence) have not achieved wide-spread awareness in the insurance industry. Ironically, delaying the final vote on the ALI Insurance Restatement, and setting up an intense battle over the next year, may do more, in the short-term, to raise the project's profile than if white smoke had hovered over 22nd Street N.W. this week.

If you have questions or would like more information, please contact Randy Maniloff ([maniloffr@whiteandwilliams.com](mailto:maniloffr@whiteandwilliams.com); 215.864.6311) or another member of our Insurance Coverage and Bad Faith Group.

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