

ALI Liability Insurance Restatement: Latest Happenings

Participants Meeting In Philadelphia On Thursday; Courts Already Citing It; White and Williams Hosting Major Industry Event

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While the American Law Institute (ALI) postponed the vote on final approval of its "Restatement of the Law, Liability Insurance" until May 2018, at least seven courts have not let the lack of a bow on it stop them from citing it. In a few instances, the Restatement was relevant in the court's decision. Translation: there is good reason to become familiar with the Restatement, even if it's not officially in the books.

As part of the work toward next year's final vote, the ALI will hold a meeting on Thursday, September 7th, at its offices in Philadelphia, with the project's Reporters, Advisors and Members Consultative Group (MCG). [Disclosure – I am a member of the MCG and will be in attendance.]

Participants at the meeting will discuss the current draft of the Restatement, including the revisions made by the Reporters following the May 2017 postponement of the final vote. The revisions, released in early August, were summarized by the Reporters – Professors Tom Baker (Penn Law) and Kyle Logue (Michigan Law) – in an accompanying memorandum: "As promised, we have gone through the entire draft, considering the comments and motions presented during the period leading up to and following the Annual Meeting. We have made a few changes to black letter, a larger number of changes to Comments, and many changes to Reporters' Notes. In all cases, our intent has been to clarify and improve the statement of the rules, the explanation of the reasons for the rules, and the description of the legal authority upon which the rules are based."

In other words, the postponement of the final vote resulted in very few changes to the actual rules themselves. The changes made were to the explanatory comments. While admittedly important, they are the fine print. These changes, or, as some see them, lack thereof, will be discussed in Philadelphia on Thursday.

Courts Already Citing the ALI's Liability Insurance Restatement

As mentioned above, some courts are not waiting till the plus-sized lady croons before citing the ALI's Liability Insurance Restatement in their opinions. The most recent example is *Mid-Continent Casualty Company v. Petroleum Solutions, Inc.*, 2017 U.S. Dist. LEXIS 107603 (S.D. Tex. July 12, 2017). Among many issues, the court addressed Mid-Continent's argument that it was entitled to a new trial because the court improperly charged the jury on the meaning of the policy's cooperation clause. The court rejected Mid-Continent's argument. It did so based on its conclusion that its definition of "cooperate" was tied to longstanding Texas law. However, in further support of its conclusion, the court cited to Tentative Draft No. 1, § 29 ("The Insured's Duty to Cooperate"), Comment b, of the ALI's Restatement of the Law, Liability Insurance.

The ALI's Restatement of the Law, Liability Insurance, also played a part not long ago in *Selective Insurance Company of America v. Smiley Body Shop, Inc.*, 2017 U.S. Dist. LEXIS 81007 (S.D. Ind. May 26, 2017). Here an Indiana federal court addressed an insurer's right to reimbursement of defense costs. There was no Indiana authority and the court ultimately did not need to answer the question. But the court seemed skeptical that the insurer had a right of reimbursement. In support of its skepticism, the court cited the Draft of Section 21 of the Restatement of the Law of Liability Insurance, which rejects an insurer's right to reimbursement of defense costs, unless stated in the policy or agreed to by the insured.

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White and Williams Hosting Major Industry Event on the ALI's Restatement of the Law, Liability Insurance

With the Restatement now squarely upon the liability insurance industry, the question on everyone's mind is the same – how may it impact claims handling?

That question will be at the forefront of a panel discussion being held on Thursday, October 26th at the 11th Annual White and Williams Coverage College in Philadelphia. White and Williams Managing Partner Patricia Santelle will moderate a discussion between two of the most important participants in the ALI's Restatement of Liability Insurance – Professor Tom Baker, one of the Reporters for the Restatement, and Laura Foggan, the American Insurance Institute's Liaison for the Restatement.

Patti will guide Tom and Laura through a discussion of the "Life of a Claim," as seen through the lens of the Restatement. The topics will include duty to defend, reservation of rights letters, settlement, declaratory judgment actions and bad faith.

This is a must-attend event for everyone whose work could be affected by the Restatement, which is to say every adjuster and lawyer – in-house and outside counsel – who handles liability claims.

More information about the White and Williams Coverage College and the Restatement panel is available at coveragecollege.com.

If you have questions or would like additional information, please contact Randy Maniloff (maniloffr@whiteandwilliams.com; 215.864.6311) or another member of our Insurance Coverage Group.

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