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THE RESTATEMENT OF THE LAW OF LIABILITY INSURANCE AS A RESTATEMENT: AN INTRODUCTION TO THE ISSUE

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The articles in this Issue of the *Rutgers University Law Review* result from a conference on the American Law Institute's Restatement of the Law of Liability Insurance ("RLLI") held on February 27, 2015 at Rutgers Law School in Camden, New Jersey. Sponsored by the Rutgers Center for Risk and Responsibility and co-sponsored by the Institute for Professional Education, the Conference engaged academics and practicing lawyers in a discussion of the issues raised by the Restatement. The timing of the Conference was fortuitous; only a few months earlier, the ALI Council changed the project, then underway for four years, from a Principles project into a Restatement.

This Introduction first describes the articles in the Issue, the topics into which they fall, and those speakers who participated in the Conference but who were unable to write for this Issue. Many participants in the Conference framed their analysis in light of the project's new status as a Restatement. In addition to conceptual and technical analysis of insurance law issues, participants discussed whether the project's drafts accurately represented the state of the law

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and the extent to which, as elements of a Restatement, they were required to do so. Part II of the Introduction highlights this feature of the articles and briefly discusses the nature of a Restatement and the ALI process that produces Restatements.

I. THE RUTGERS CONFERENCE AND THIS ISSUE

The Rutgers Center for Risk and Responsibility explores the ways in which society makes choices about risk, its proper allocation, and compensation for the harm caused when risks materialize. One of the aims of the Center is to sponsor conferences that are broadly interdisciplinary, involving legal academics, social scientists, practicing lawyers, industry executives, and government officials, as appropriate. The Conference on the RLLI met this goal admirably; by invitation and in response to a call for papers, speakers included academics, attorneys who represent policyholders, attorneys for insurance companies, and the general counsel of a major insurance brokerage. Other participants in the Conference included in-house counsel for insurers, staff of a leading insurance consumer advocacy organization, and regulators. Restatement Reporter Tom Baker[1] and Associate Reporter Kyle Logue[2] participated in the discussion and demonstrated a willingness to take it into account in future drafts of the Restatement.

The American Law Institute's project began as the Principles of the Law of Liability Insurance in 2010.[3] In late 2014 the ALI Council reconsidered the nature of its projects and clarified that projects directed primarily at courts, such as the liability insurance project, were more properly treated as Restatements.[4]

> 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.

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1. William Maul Measey Professor of Law and Health Sciences, University of Pennsylvania Law School.

2. Wade H. and Dores M. McCree Collegiate Professor of Law, University of Michigan Law School.

3. RESTATEMENT OF THE LAW OF LIAB. INS. intro. at ix (AM. LAW INST., Discussion Draft 2015).

4. *Id.* foreword at xiii.

. . . .

> 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.[5]

Accordingly, in October 2014 the liability insurance project was reclassified as a Restatement.[6] The two Tentative Drafts of the Principles were reviewed by the Reporters and replaced with Preliminary Draft No. 1 of the newly designated Restatement of the Law of Liability Insurance, dated March 3, 2015 but released online a few days before the Rutgers Conference was held. Thus, the Conference occurred as the project was in midstream but with heightened importance as it shifted to the more authoritative form of a Restatement.[7]

The papers at the Conference and the resulting articles in this Issue discuss four general topics: the defense of claims, the duty to make reasonable settlement decisions, insurance contract interpretation, and policyholders, brokers, and more.

Liability insurance policies typically are more than policies of indemnity; they also are litigation-risk policies because insurers have the duty to defend litigation and the power to control the litigation. Timothy Law and Lisa Szymanski, in their Article, suggest that "[t]he duty to defend may be the most important obligation of a liability insurance company."[8] The duty often generates conflicts between insurer and insured—conflicts that the RLLI addresses in a number of sections.

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5. AM. LAW INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 4, 13 (rev. ed. 2015), https://www.ali.org/media/filer_public/65/25/6525b3d0-0ac1-4dba-b2bb-5b0eb022fd55/style manual.pdf [hereinafter CAPTURING THE VOICE].

6. RESTATEMENT OF THE LAW OF LIAB. INS. foreword at xiii (AM. LAW INST., Discussion Draft 2015).

7. Subsequently the ALI release a Discussion Draft dated April 30, 2015, to be discussed at the 2015 Annual meeting, and Council Draft No. 1, to be considered at the October 15–16, 2015 meeting of the Council of the ALI. Most of the articles in this Issue cite to the Discussion Draft.

8. Timothy P. Law & Lisa A. Szymanski, *Reserving the Right to Contest Coverage Under the Proposed Restatement of the Law of Liability Insurance*, 68 RUTGERS U. L. REV. 29, 29 (2015).

Law and Szymanski focus on the RLLI provisions addressing an insurance company's reservation of the right to contest coverage. Section 15 states when and how an insurer can issue a reservation of rights letter and, in combination with other sections, the consequences of doing so in certain cases and the consequences of a breach of the duty to defend.[9] Law and Szymanski conclude that "[t]he Restatement does an admirable job of distilling the essential principles of law relating to the duty to defend, especially as it pertains to reservations of rights."[10] That conclusion is contested by two other articles. One of the consequences of failing to properly reserve rights is forfeiture of defenses to coverage; Laura Foggan and Karen Toto address that issue in their Article, arguing that the consequences for breach of the duty prescribed by the Restatement are "a major departure from settled insurance law" and fly in the face of "compelling considerations" that favor a more limited damage rule.[11] Charles Silver and William T. Barker similarly criticize RLLI provisions on the duty to defend as attempting to "rewrite [insurance] bargains by conferring benefits and imposing burdens the parties neither agreed to nor, heretofore, took into account when pricing coverage" and potentially "throw[ing] sand in the gears of defensive representations."[12]

The final author on the duty to defend is George Cohen. He is in an academic's bad news-good news position; the Article included in this Issue on the vicarious liability of insurers for defense counsel malpractice had to be rewritten from his original draft because the Reporters were so taken with his criticism that they changed their approach to the issue. His Article explains and defends the Restatement's current position on vicarious liability only for the actions of non-employee defense counsel.[13]

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9. RESTATEMENT OF THE LAW OF LIAB. INS. §§ 15–17, 19 (AM. LAW INST., Discussion Draft 2015).

10. Law & Szymanksi, *supra* note 8, at 63.

11. Laura A. Foggan & Karen L. Toto, *The Draft ALI Restatement of the Law of Liability Insurance: Consequences of Breach of the Duty to Defend Are Not and Should Not Become the Automatic Forfeiture of Coverage Defenses*, 68 RUTGERS U. L. REV. 65, 66 (2015). Foggan has an additional contribution examining the RLLI's approach to the recoupment of defense costs. Laura A. Foggan, *Insurer Recoupment of Defense Costs: Why the Restatement Adopts the Wrong Approach*, 68 RUTGERS U. L. REV. 193 (2015).

12. 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, 118 (2015).

13. George M. Cohen, *Liability of Insurers for Defense Counsel Malpractice*, 68 RUTGERS U. L. REV. 119, 120 (2015).

Related to the liability insurer's duty to defend litigation is its duty to settle litigation brought against its insured. The RLLI aptly renames the duty as a duty to make reasonable settlement decisions; insurers are not required to settle but they are required to act reasonably in considering settlement. The duty is well established but the scope of the duty and the remedies for its breach remain in dispute, a dispute that is reflected in the articles in this section of the Issue. Section 24 defines a "reasonable settlement decision" as "one that would be made by a reasonable person who bears the sole financial responsibility for the full amount of the potential judgment."[14] Section 27 states that the measure of damages for breach includes the amount of the judgment in excess of policy limits and "other foreseeable loss."[15]

Kim Marrkand's Article title states the issue clearly: these sections "[h]ave [n]o [p]lace in a Restatement of the Law of Liability Insurance."[16] In her view, the Restatement provisions are at odds with settled law and sound policy.[17] The Articles by Leo Martinez[18] and Jeffrey Thomas[19] examine those claims in more detail. Martinez categorizes the sources of the duty, its scope, and the remedial options; in doing so, he sees the state of the law differently than Marrkand and suggests ways to broaden the RLLI provisions.[20] Thomas engages in an exhaustive examination of the duty to settle in the courts and concludes that some modification of the RLLI black letter or commentary is desirable to explain and justify the choices made.[21] Bruce Hay's Article takes an economic approach to make the counterintuitive suggestion that a no-fault rule for the duty to settle would not expand overall insurer liability and would in fact lower the joint costs of insurers and insureds.[22]

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14. RESTATEMENT OF THE LAW OF LIAB. INS. § 24(2) (AM. LAW INST., Discussion Draft 2015).

15. *Id.* § 27(2).

16. Kim V. Marrkand, *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, 201 (2015).

17. *Id.* at 202.

18. Leo P. Martinez, *The Restatement of the Law of Liability Insurance and the Duty to Settle*, 68 RUTGERS U. L. REV. 155 (2015).

19. 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 (2015).

20. Martinez, *supra* note 18.

21. Thomas, *supra* note 19.

22. Bruce L. Hay, *A No-Fault Approach to the Duty to Settle*, 68 RUTGERS U. L. REV. 321 (2015).

Kenneth Abraham's Article on the duty to settle recognizes that whatever the definition of the duty arrived at by the RLLI, some issues will remain unexplored and some problems incompletely solved.[23] He examines the application of the duty to claims in which it is uncertain whether all or part of the claims brought lie within the coverage of the policy.[24] In doing so he suggests that the insight underlying the duty to defend noted above—that liability insurance is litigation insurance as well as indemnity insurance—needs to be seen as more nuanced in this context; the problem of uncertain claims is more easily solved if the insurance is conceptualized as protecting against an adverse judgment and not against other financial or emotional risks associated with litigation.[25]

The sections of the RLLI most likely to have effect beyond the scope of liability insurance are those that deal with insurance policy interpretation. Although courts sometimes interpret liability policies differently than other insurance policies, they do so against a common background of interpretive principles. Issues about plain meaning, ambiguity, interpretation against the drafter, and reasonable expectations occupy much of the world of insurance litigation. Mark Geistfeld examines the RLLI's interpretation provisions, notes the need for theoretical underpinnings, and conceptualizes the expectations principle that underlies them.[26] He concludes that interpretation should "protect the ordinary policyholder's reasonable expectations of coverage" and that the Restatement should be read to do so.[27] Erik Knutsen's Article provides a comparative perspective, suggesting that the Canadian law of insurance policy interpretation is close to the middle ground between textualism and contextualism that the RLLI seeks to strike.[28]

Two other speakers participated in the Conference's panel on insurance contract interpretation. Patricia Santelle[29] addressed difficulties with the "reasonable policyholder" standard and the use of

23. Kenneth S. Abraham, *The Liability Insurer's Duty to Settle Uncertain and Mixed Claims*, 68 RUTGERS U. L. REV. 337 (2015).

24. *Id.*

25. *Id.* at 339.

26. Mark A. Geistfeld, *Interpreting the Rules of Insurance Contract Interpretation*, 68 RUTGERS U. L. REV. 371 (2015).

27. *Id.* at 373.

28. Erik S. Knutsen, *Patchwork Contextualism in the Anglo-Canadian Law of Insurance Policy Interpretation: Implications for the Restatement of the Law of Liability Insurance*, 68 RUTGERS U. L. REV. 415 (2015). Conferences at the Rutgers Center for Risk and Responsibility aim to include such comparative work. *See* James Davey, *Fracturing and Bundling Risks: The Coverage Expectations of the "Real" Reasonable Policyholder*, 11 RUTGERS J.L. & PUB. POL'Y 118 (2013).

29. Partner, White and Williams LLP.

extrinsic evidence in interpretation. Although she spoke from a practitioner's perspective on practical implications, her presentation was grounded in conceptual criticisms about the Reporters' approach to the Restatement process and to interpretation. Michelle Boardman[30] spoke about a range of interpretation issues, suggesting the need to carefully define what are interpretation issues and what are not, including when contra proferentem is properly applied, and what the policyholder's expectations actually were in applying a doctrine of reasonable expectations, and, indeed, whether the RLLI ought to use the term "reasonable expectations" at all.

The final panel at the Conference addressed a range of issues and perspectives. The Article by Victor Schwartz and Christopher Appel examines the nature of a Restatement and suggests that a number of the specific provisions as drafted have the potential for encouraging opportunistic conduct by policyholders.[31] As discussed below, although it addresses diverse subjects, it shares a perspective with the Articles by Marrkand and Foggan. Two other speakers provided different perspectives on the relations and incentives of the participants in the insurance process. Jeffrey Pollock[32] criticized the concept of a "large commercial policyholder" that was included in Tentative Draft No. 1 of the Principles of the Law of Liability Insurance, section 1(4). Among other problems, he suggested large commercial policyholders under the Principles definition often are not sophisticated purchasers of insurance deserving of less favorable interpretation principles. As the project transformed from Principles to Restatement, this definition dropped out, so Pollock's paper is not included in this Issue. Heather Steinmiller[33] added a different perspective on the purchase of insurance and sophistication of parties by describing the central role of the broker in commercial insurance.

II. RESTATEMENTS OF THE LAW

The Rutgers Conference was extraordinary—top-notch academics and practitioners discussing broad principles and detailed applications of insurance law in a setting of mutual respect and engagement. In particular, intense debates arose about whether the drafts of the RLLI

30. Associate Professor of Law, George Mason University School of Law.

31. 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).

32. Partner, Fox Rothschild LLP.

33. Senior Vice President and General Counsel, Conner Strong & Buckelew.

were sufficiently Restatement-like. Should the Restatement simply reflect a majority rule? If so, what is the majority rule on particular issues? If not, when and how far can it go in departing from a majority rule? How should it explain and justify the choices made?

At the Conference, participants whose practices or proclivities favored insurers several times cited Justice Scalia's recent criticism of Restatements: "[M]odern Restatements . . . are of questionable value, and must be used with caution. . . . 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."[34] By contrast, Professor Abraham, a member of the ALI Council, departed from his prepared text to offer an impassioned yet thoughtful explanation and defense of the Restatement form and the ALI process.

The authors in this Issue have taken advantage of the greater length and flexibility of the article format compared to oral presentations to offer more nuanced accounts and critiques of provisions of the RLLI and of Restatements in general. The articles represent the latest iteration of a longstanding conversation about the purposes and functions of Restatements.

The American Law Institute was founded in 1923 with the stated purpose "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."[35] What aspirations lay behind this lofty statement remains in dispute. In the traditional conception, the original Restatements were an attempt to preserve an enclave of classical legal thought, "perhaps the high-water mark of conceptual jurisprudence. . . . They took fields of living law, scalded their flesh, drained off their blood, and reduced them to bones."[36] N.E.H. Hull rejects this characterization of the ALI and its early products as "throwbacks to nineteenth-century formalist legal science" and proposes instead that the driving force behind the creation of the ALI was "reformist progressive-pragmatists who viewed the law as the means to achieving social ends, believers in the power of the legal profession to bring about positive change."[37] Even if that is true, Hull concedes, the reformers "faced an ongoing struggle to maintain their

34. Kansas v. Nebraska, 135 S. Ct. 1042, 1064 (2015) (Scalia, J., concurring in part and dissenting in part).

35. *Creation*, A.L.I., https://www.ali.org/about-ali/creation/ (last visited Nov. 14, 2015).

36. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 676 (2d ed. 1985); *see also* sources cited in N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55, 87–88 n.4 (1990).

37. Hull, *supra* note 36, at 83.

reformist objectives for the restatement in the face of their compromises with conservative elements of the practicing bar and within their own academic ranks."[38]

Whatever its true historical aims, the ALI completed the first Restatements in basic legal subjects and, driven by perceived need and institutional inertia, embarked on second and in some cases third and fourth rounds of Restatements along with new tasks. Currently it has twenty projects in process, twelve of which are Restatements.[39]

The concept of "Restating" the law with a capital "R" has always been controversial, in concept and in application. The substantive issues in controversy vary over time depending on the tenor of the times and whose intellectual and economic oxen are being gored. The controversy between Professors Samuel Williston and Arthur Corbin about the definition of consideration in the original Restatement of Contracts seems quaint in light of later developments.[40] The more recent and more heated debates about the Restatement of the Law Governing Lawyers and especially the Restatement (Third) of Torts: Products Liability are highly visible examples of controversies about the extent to which Restatements represent sound distillations of existing judicial authority, or are shaped by interest groups and politics, or whether it even makes sense to attempt an authoritative Restatement. The literature on the controversy over those Restatements and the broader issue is large, but consider only the titles of articles in a well-known symposium in the *Hofstra Law Review* which illustrate the depth of disagreement: Restatement drafting, like lawmaking more generally, is subject to Bismarck's aphorism about law and sausages.[41] The drafting process is either a "process of democracy and deliberation"[42] or subject to "lobbying"[43] and "conflicts of interest."[44] The ALI itself is either "alive and well"[45] or "dead in the water."[46]

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38. *Id.* at 86.

39. *Current Projects*, A.L.I., https://www.ali.org/projects/ (last visited Nov. 14, 2015).

40. GRANT GILMORE, THE DEATH OF CONTRACT 67–71 (Ronald K. L. Collins ed., 2d ed. 1995).

41. Charles W. Wolfram, *Bismarck's Sausages and the ALI's Restatements*, 26 HOFSTRA L. REV. 817 (1998).

42. Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability—The American Law Institute's Process of Democracy and Deliberation*, 26 HOFSTRA L. REV. 743 (1998).

43. William T. Barker, *Lobbying and the American Law Institute: The Example of Insurance Defense*, 26 HOFSTRA L. REV. 573 (1998).

44. Monroe H. Freedman, *Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements*, 26 HOFSTRA L. REV. 641 (1998).

45. Geoffrey C. Hazard, Jr., *The American Law Institute Is Alive and Well*, 26 HOFSTRA L. REV. 661 (1998).

The Rutgers Conference and resulting articles illustrate similar disagreements, although usually in more measured tones. For example, with reference to some or perhaps many provisions:

- The RLLI "does an admirable job" that "reflects and advances the trends of the common law."[47]

Or:

- The RLLI "revers[es] the majority common law approach . . . [and] is unsound because it is not a subtle change in the law, but a major one—and this change is not supported by reliable empirical analysis or . . . a clear trend in the direction of the law."[48]

- The RLLI is "unnecessarily prejudicial to insurers"[49] and "create[s] avenues for gamesmanship [that] would unfairly increase the burdens and costs on insurers"[50] because it is "driven by a narrative that large insurers advance their own interests at the expense of relatively powerless small policyholders."[51]

Or:

- The RLLI "invites a view of insurer conduct that may be too generous to insurers at the expense of insureds" and "severely undermines the insured's interest and exacerbates existing perverse incentives of the insurer."[52]

Some of these propositions are simply part of broader discussions of the merits and demerits of particular provisions. In that respect, they are part of the ordinary discourse about legal doctrine and the process by which Restatement provisions proceed through drafts to final form. Other articles in this Issue contribute to that discourse, too, by parsing the

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46. Frank J. Vandall, *The American Law Institute Is Dead in the Water*, 26 HOFSTRA L. REV. 801 (1998).
47. Law & Szymanski, *supra* note 8, at 32, 63.
48. Foggan, *supra* note 11, at 193; *accord* Marrkand, *supra* note 16, at 202.
49. Foggan & Toto, *supra* note 11, at 65.
50. Schwartz & Appel, *supra* note 31, at 476.
51. Marrkand, *supra* note 16, at 203.
52. Martinez, *supra* note 18, at 174, 191.

conceptual underpinnings of particular doctrines[53] and their expression in the cases.[54]

Read as a whole and distanced from the particular Restatement provisions they address, however, the articles reflect perceptions about the nature of a Restatement and the Restatement drafting process. Surely there is not consensus on those topics, but the more developed accounts in the articles suggest some common range of understanding, some areas of disagreement, and some deficiencies in those perceptions. Here are a series of propositions about Restatements and the Restatement drafting process that the articles suggest. Even though most of the propositions are obvious, they may be useful in framing what will doubtless be further debate about Restatements and the Restatement drafting process in the discussion of the RLLI and others. The propositions are:

A. Restatements address easy cases and hard cases.
B. Precedent matters for a Restatement.
C. A Restatement is about weighing, not counting.
D. A Restatement is a product of the ALI process.

I will focus on what the RLLI calls the "duty to make reasonable settlement decisions"[55]—more commonly but less accurately called the "duty to settle"—as a principal example, as it is discussed by several of the articles in this Issue, with occasional reference to other topics as well.

A. Restatements address easy cases and hard cases.

Restatements aim to be comprehensive, so they include provisions that are obvious and largely undisputed (easy cases) and others the content or application of which are likely to be in dispute (hard cases). The distinction between easy cases and hard cases is continuous rather than binary.

At the easy end, section 27 of the RLLI permits the insured to assign to a tort claimant the insured's cause of action against an insurer for breach of the duty to make reasonable settlement decisions.[56] The Comment and Reporters' Note to this section explain the highly persuasive rationale for this, the modern rule, and explain that

53. *E.g.*, Abraham, *supra* note 23; Geistfeld, *supra* note 26.
54. *E.g.*, Martinez, *supra* note 18; Thomas, *supra* note 19.
55. RESTATEMENT OF THE LAW OF LIAB. INS. § 24 (AM. LAW INST., Discussion Draft 2015).
56. *Id.* § 27(3).

Tennessee "appears to be the only state that does not allow the assignment of duty-to-settle claims."[57]

More toward the hard end are the quite common occurrences in which a core understanding is easy but the details, application, or scope of a provision are contested. Section 4(2) states the hoary principle of contra proferentem: "When an insurance policy term is ambiguous, the term is interpreted in favor of the party that did not supply the term . . . ."[58] That simple proposition conceals great controversy about, for example, whether extrinsic evidence can be used to establish an ambiguity (no)[59] or to render an interpretation unreasonable (yes)[60] and against whom standard policy terms may be interpreted.[61] A dozen pages of commentary fill out the concepts, noting issues such as the relation of the doctrine to the much-contested use of reasonable expectations,[62] "mechanical" use of contra proferentem,[63] or its use as a "last resort,"[64] and whether the doctrine is available to sophisticated policyholders.[65]

Harder still are those provisions in which there is at best general agreement on the inclusion of a provision or a concept but little agreement on form or content. The Restatement's duty to make reasonable settlement decisions is an example. Most liability insurance policies grant the insurer the power to control litigation brought against its insured, and it is uniformly understood that with that power comes a duty: the duty to take the insured's interests into account and not just its own when deciding whether to settle a case. The authors argue for different ways to conceive of the source of the duty. Martinez regards the source of the duty as "not self-evident,"[66] and Marrkand argues it is solely an instance of the general duty of good faith and fair dealing implied in every contract,[67] but the existence of the duty is an easy case.[68]

Once going beyond the existence of the duty, however, the case becomes very hard. The RLLI frames the duty as one "to make reasonable settlement decisions," which means "one that would be made

57. *Id.* § 27 reporters' note e.
58. *Id.* § 4(2).
59. *Id.* § 4(1).
60. *Id.* § 4(2).
61. *Id.* § 4(3).
62. *Id.* § 4 cmt. b.
63. *Id.* § 4 cmt. j.
64. *Id.* § 4 reporters' note j.
65. *Id.* § 4 cmt. k.
66. Martinez, *supra* note 18, at 161.
67. Marrkand, *surpa* note 16, at 206–10. For a broader view of the good faith obligation, see Jay M. Feinman, *Good Faith and Reasonable Expectations*, 67 ARK. L. REV. 525 (2014).
68. *See* Martinez, *supra* note 18, at 161.

by a reasonable person who bears the sole financial responsibility for the full amount of the potential judgment."[69] Marrkand and Martinez criticize section 24 from opposite directions. Among other reasons, Marrkand attacks the section because it focuses only on whether the insurer declined a reasonable settlement offer to the exclusion of other elements of its acting in good or bad faith.[70] Martinez, by contrast, criticizes the way in which the Reporters "sprinkle a number of factors to consider in determining the reasonableness of an insurer's decision," diminishing the effects of a focus on reasonableness as whether the insurer has given at least as much consideration to the insured's interests as to its own by disregarding the policy limits in assessing a potential settlement.[71] Jeffrey Thomas makes the case even harder by spelling out the differences between the two elements Martinez cites—equal consideration and disregard the limits.[72]

If every case was an easy case, the Restatement drafting process would be much simpler, if indeed Restatements would be useful at all. The ALI recognizes the presence of hard cases and prescribes a process for resolving them. It first identifies "four principal elements" in the drafting process: "the majority rule," "trends in the law," "what specific rule fits best with the broader body of law and therefore leads to more coherence in the law," and "ascertain[ing] the relative desirability of competing rules."[73] Identifying the four elements provides a helpful framework, but things become more complicated and even schizophrenic in considering what to do with the elements. The list has an air of determinacy about it. The majority rule is helpful "[i]f most courts faced with an issue have resolved it in a particular way."[74] But a different situation arises with a trend, as when "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."[75] Resolving hard cases entails "an appropriate mix of these four elements," but there is no formula to determine the mix, because "the relative weighing of these considerations [is] art and not science."[76] Nevertheless, the list of elements is helpful in providing a starting point, beginning with existing law.

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69. RESTATEMENT OF THE LAW OF LIAB. INS. § 24(1)–(2) (AM. LAW INST., Discussion Draft 2015).
70. Marrkand, *supra* note 16, at 208–10.
71. Martinez, *supra* note 18, at 171.
72. Thomas, *supra* note 19, at 235–57.
73. CAPTURING THE VOICE, *supra* note 5, at 5–6.
74. *Id.* at 5.
75. *Id.*
76. *Id.* at 6.

B. Precedent matters for a Restatement.

Restatements "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."[77] "The prime source material for Restatements has been the case law of American courts . . . ."[78] Therefore, precedent is crucial to a Restatement and judicial authority is essential for any Restatement provision.

But precedent is not enough, in two respects. The first respect is that precedent rarely speaks with a single voice. The ALI was founded to address the "uncertainty" and "complexity" of American law: "[T]he law's uncertainty stemmed in part from a lack of agreement on fundamental principles of the common law, while the law's complexity was attributed to the numerous variations within different jurisdictions of the United States."[79] As law has expanded its reach and cases have proliferated in the succeeding century, continuing complexity and some degree of uncertainty are inevitable.

Several of the articles in this Issue address the question of whether provisions of the RLLI accord with the majority rule and whether, in what circumstances, or with what justification or support they may depart from a majority rule—only the latest iteration of a longstanding debate.[80] Marrkand, for example, suggests that the duty to make reasonable settlement decisions section "divert[s] from accepted law"[81] and Laura Foggan and Karen Toto, citing the factors of a majority view or trend in the law, make the same complaint about section 19 on consequences of breach of the duty to defend.[82]

The Articles by Martinez and Thomas demonstrate the difficulty of assessing precedent relevant to even a single issue in the Restatement.[83]

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77. *Id.* at 4.

78. *Id.* at 7.

79. *Creation*, *supra* note 35.

80. *See, e.g.*, Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423 (2004); Herbert Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS U. L.J. 185 (1968).

81. Marrkand, *supra* note 16, at 202.

82. Foggan & Toto, *supra* note 11, at 66 ("[T]his section is a major departure from settled insurance law in the majority of states, and the approach taken is not supported by a modern view or emerging trend in the law.").

83. Martinez, *supra* note 18; Thomas, *supra* note 19; *see also* Geistfeld, *supra* note 26, at 372–73 ("But an accurate restatement of this case law will also have to recognize that courts do not necessarily have a shared understanding of the problem, explaining why different courts can apply the same black-letter rule in different ways. . . . Thus, to fully

Martinez addresses the source of the duty to settle, the standard applied to assess the insurer's conduct, and the remedies for breach.[84] In each he describes categories in which the cases fall and measures the Restatement provisions against the courts' approaches.[85] A summary of the law in Thomas's even more detailed Article—a summary following some fifty pages of analysis—indicates even more clearly the difficulty:

> Having looked at the way that the DTL ["disregard the limits"] and EC ["equal consideration"] tests are used in some thirty jurisdictions, it seems clear that, numerically speaking, EC is the majority rule. Thirteen states use EC without reference to DTL. In addition, another nine states continue to use EC along with DTL . . . .
>
> On the other hand, if the nine states that use the blended approach are added to the eight jurisdictions that use the pure DTL approach, one could conclude that DTL is the majority rule, because, the total jurisdictions using DTL is seventeen out of thirty . . . . While this combined group does not have quite as many large states as the combined EC group, it still includes a significant number of large states: California, Florida, Pennsylvania, and New Jersey. . . .
>
> However, stating a rule with approval is much different than applying that rule. Courts often make statements in dicta or for rhetorical purposes without those statements having much bearing on the outcome of the case. Sometimes those statements are picked up by later cases and become the law, but sometimes those statements are ignored and have no precedential impact.[86]

As this passage illustrates, in hard cases, determining the relevant precedent is not simply an exercise in counting. And even in easy cases in which determining a majority rule by counting may be plausible, the use of precedent is deficient in a second respect: counting is not enough.

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specify the rules of insurance contract interpretation, one must identify the underlying substantive rationale for the rules in question.").

84. Martinez, *supra* note 18.

85. *Id.*

86. Thomas, *supra* note 19, at 280–81 (footnotes omitted).

C. A Restatement is about weighing, not counting.[87]

The ALI style manual recognizes the limits of precedent and adds other elements to the process of Restatement drafting. Its third element is the desirability of "more coherence in the law," which is obtained by determining "what specific rule fits best with the broader body of law."[88] If the web of law is not seamless, the ALI at least aims to make it coherent.

Restatement provisions can cohere with the broader body of law at two levels. Particular Restatement provisions link to rules in other Restatements and elsewhere. Section 5 of the RLLI adopts the doctrine of waiver from the Restatement (Second) of Contracts[89] and the rule for apparent authority from the Restatement (Third) of Agency.[90] More interesting is the way in which particular provisions draw on broad approaches and principles from other bodies of law. The Reporters' Note to section 3 on interpretation refers to the conflict between textual and contextual approaches and notes the preference for the latter in the Restatement (Second) of Contracts and the Uniform Commercial Code.[91]

In criticizing sections 24 and 27, Marrkand begins with "the fundamental source of all insurance law: the policy itself."[92] The insurance policy is a contract from which all of the parties' obligations flow.[93] The duty to settle is an instance of the contractual duty to perform in good faith.[94] Even courts that use a tort-based standard for the duty to settle still view that standard largely through the lens of violation of the good-faith obligation.[95] Because the formulation of the duty to settle in sections 24 and 27 departs from its contractual origins, there is not a good fit between those sections and "the broader body of law" of which it is a part.[96]

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87. With apologies to Benjamin Graham ("In the short run, the stock market is a voting machine but in the long run, it is a weighing machine.").

88. CAPTURING THE VOICE, *supra* note 5, at 5–6.

89. RESTATEMENT OF THE LAW OF LIAB. INS. § 5 reporters' note a (AM. LAW INST., Discussion Draft 2015).

90. *Id.* § 5 reporters' note b.

91. *Id.* § 3 reporters' note a.

92. Marrkand, *supra* note 16, at 206.

93. *Id.*

94. *Id.* at 206–10.

95. *Id.* at 207–08.

96. *Id.* at 209.

Martinez, by contrast, regards the source of the duty to settle as "not self-evident."[97] He identifies three approaches in the cases, one based in contract, one in tort, and one that is a hybrid of the two.[98] He then teases out the conception of the source implicit in section 24, describes the more explicit choice made in section 27, and explains the significance of the choice and its remedial consequences.[99]

Both of these discussions reflect a common and important issue in insurance law and other bodies of law. Many cases can be treated doctrinally under one body of law or another, and many doctrinal issues potentially reflect the principles of different bodies of law. What choice does a court or a body such as the ALI make in one of those cases and on what basis does it choose?[100]

As the Marrkand and Martinez discussions reflect, in insurance cases, contract and tort law are the principal areas of law that are potentially relevant, especially on issues commonly referred to as involving "bad faith" by the insurer. But the issue is more complex than a choice between contract and tort. Rather, the issue is how best to think of insurance, insurance law, and particular issues that arise such as the scope of the duty to settle and the remedies for its breach.

A first approach, as Marrkand emphasizes and Martinez notes, is to associate insurance, insurance law, and the issues in play with a single body of law, such as contract law. That move does not solve all the problems however, because a single body of law seldom speaks with a single voice. The Reporters' discussion of the tension in contract law between plain meaning and contextual approaches to interpretation illustrates.[101] More broadly, the insurance "contract" can be conceived of as either a discrete contract embodied in the insurance policy or a relational contract that also includes significant elements of context and environment.[102]

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97. Martinez, *supra* note 18, at 161.

98. *Id.* at 161–64.

99. *Id.* at 164–65.

100. *See generally* JAY M. FEINMAN, PROFESSIONAL LIABILITY TO THIRD PARTIES (3d ed. 2013); Jay M. Feinman, *Doctrinal Classification and Economic Negligence*, 33 SAN DIEGO L. REV. 137 (1996); Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661 (1989).

101. RESTATEMENT OF THE LAW OF LIAB. INS. § 3 reporters' note a (AM. LAW INST., Discussion Draft 2015).

102. *See generally* Jay M. Feinman, *The Insurance Contract as Relational Contract and the "Fairly Debatable" Rule for First-Party Bad Faith*, 46 SAN DIEGO L. REV. 553 (2009).

A more general approach is the attempt to conceptualize the nature of insurance and insurance law within the broader scheme of the law, particularly in non-traditional ways. There is something of a cottage industry among insurance scholars in reconceptualizing in this way. Insurance can be thought of as a contract,[103] but also as a social instrument,[104] a "thing,"[105] a public utility or regulated industry,[106] a product,[107] or a form of governance.[108] To the extent that insurance is a product, insurance law should fit with products liability law; to the extent that it is a regulated industry, insurance law should reflect the law of administrative regulation. And so on. Therefore, coherence of Restatement provisions with the broader body of law is a lofty goal, but the range of potential descriptions of the broader body of law and of insurance law itself render it difficult to achieve.

The ALI style manual finally identifies the ultimate weighing process: "ascertain[ing] the relative desirability of competing rules."[109] As a next step in that process it suggests that "social-science evidence and empirical analysis can be helpful."[110] Social science evidence, particularly quantitative research, has seldom entered into ALI deliberations,[111] but its growing popularity among legal academics may portend an increased role in the future. Empirical analysis of a less rigorous sort has always been an important feature of the Restatement drafting process. In the various stages of the drafting process, the interplay among academics, practitioners, and judges is interesting and valuable. The difference among the groups can be exaggerated, but as a rough generalization each brings different emphasis to the process based on their different experiences of engaging in detailed analysis and seeking broad perspective, representing clients in relevant contexts, and attempting to realize rules in litigation. Empirical analysis based on experience in the contexts to which Restatement rules will be applied is an essential element of the process.

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103. Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653, 658–68 (2013).

104. Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489 (2010).

105. Jeffrey W. Stempel, *The Insurance Policy as a Thing*, 44 TORT TRIAL & INS. PRAC. L.J. 813 (2009).

106. Abraham, *supra* note 103, at 668–73.

107. Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389 (2007).

108. Abraham, *supra* note 103, at 683–97.

109. CAPTURING THE VOICE, *supra* note 5, at 6.

110. *Id.*

111. For an exception, see Silver & Barker, *supra* note 12.

Several articles in the Issue provide empirical analysis in support of analysis of the Restatement provisions. For example, in analyzing the provisions on the consequences of an insurer's breaching the duty to defend, Charles Silver and William T. Barker support doctrinal and policy analysis with observations about the ability of policyholders to bear defense costs when the insurer does not defend.[112]

As the articles illustrate, however, empirical analysis is shaped by perspective, and perspective in turn is shaped by interest and ideology as well as by experience. This characterization is descriptive and not pejorative. Philosophers and physicists may debate whether there is an objective reality in the world, but there is little debate that even if there is, people do not always perceive it objectively. How people see the world is shaped in part by what they believe about the world, and what they believe about the world is shaped in part by their interest in believing and seeing certain things.

Differences in perception of empirical reality matter greatly in the issues that the Restatement addresses. With little risk of over-generalization, it is fair to say that there are pro-insurer and pro-insured views.

In discussing misrepresentation, the duty to make reasonable settlement decisions, and the duty to cooperate, Victor Schwartz and Christopher Appel focus on the risk of rules that create "unsound avenues for policyholders to engage in gamesmanship and improper conduct that subverts the fair and efficient handling of liability insurance claims."[113] Their concern is echoed by Laura Foggan and Karen Toto, concerned with the potential for "gamesmanship" by policyholders using the remedies for breach of the duty to defend "to 'set up' an insurer in the hopes of producing some type of breach and thereby obtaining indemnity for an uninsured loss."[114] Their emphasis on the potential for gamesmanship by policyholders suggests a general pro-insured perception—an empirical analysis—that by and large insurers fully and fairly fulfill their responsibilities to their policyholders. Mistakes are made, and egregious exceptions occur, but insurers generally handle liability insurance claims appropriately. Policyholders, on the other hand, are likely to exploit rules of law to undermine the system.

I have elsewhere suggested a different perception of the reality of the insurance relationship in general—that insurers often behave

112. *Id.* at 96–101.
113. Schwartz & Appel, *supra* note 31, at 457.
114. Foggan & Toto, *supra* note 11, at 67.

opportunistically.[115] Some policyholders attempt to game the system some of the time, but by far the larger problem is insurers who systematically favor their own interests at the expense of their insureds and in violation of their obligations expressed and implied in the insurance relation.

Neither the pro-insurer nor the pro-insured perceptions are fanciful. Proponents of each offer evidence in support of their positions but the positions are irreconcilable by almost any resort to evidence. Empirical analysis on relatively narrow points can inform the drafting of a Restatement, but broad disagreement on the behavior of insurers and insureds in the world indicates that how "helpful" empirical analysis can be is limited.

So how to weigh "the relative desirability of competing rules"?[116] Emblazoned on the wall of the conference room in ALI headquarters in Philadelphia, the room in which Restatements are debated, is the admonition of former director Herbert Wechsler: "We should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs."[117]

Giving weight to a broad range of considerations does not describe how Restatement drafters are to give them weight, or how they are to determine the relative desirability of competing rules. In that process, Wechsler's admonition suggests that one needs a theory of judicial decision-making.[118] That task is beyond the scope of this Introduction and even beyond the abilities of the ALI, nor is it necessary, because Restatements are not the products of courts but of a unique "private legislature": the ALI.[119]

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115. JAY M. FEINMAN, DELAY, DENY, DEFEND: WHY INSURANCE COMPANIES DON'T PAY CLAIMS AND WHAT YOU CAN DO ABOUT IT (2010); Jay M. Feinman, *The Law of Insurance Claim Practices: Beyond Bad Faith*, 47 TORT TRIAL & INS. PRAC. L.J. 693, 715–17 (2012).

116. CAPTURING THE VOICE, *supra* note 5, at 6.

117. *Id.*

118. The literature is voluminous. *See, e.g.*, DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) (1997).

119. Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 596 (1995). Schwartz and Scott use a theoretical approach and case studies of Uniform Commercial Code drafting to examine how organizational form influences the outputs of the ALI and the National Conference of Commissioners on Uniform State Laws, another private legislature. Their model includes interest group participation and information symmetries and asymmetries, all of which are featured in the Restatement drafting process. *Id.* at 609–10. Further development of their model using different Restatements as case studies would be useful but is beyond the scope of this Introduction. For a less theoretical approach that also considers endogenous factors, see

D. A Restatement is a product of the ALI process.

The Restatement drafting process is a point of pride for the ALI. Extending over a period of years, the initial drafting by an expert Reporter is reviewed in turn by Advisers with "particular knowledge and experience" or "special perspective," ALI members who chose to participate in a Members Consultative Group, the ALI Council, and attendees at the annual meeting.[120] "The final product, the work of highly competent group scholarship, thus reflects the searching review and criticism of learned and experienced members of the bench and bar."[121]

Those who participate in the process as well as those who view its products should be impressed with how well the process works. Reporters of great expertise and ability expend massive effort to produce drafts that aim toward the amorphous goals of a Restatement and then willingly submit the drafts to editing on points large and small by successive groups of dozens and even hundreds of critics who take seriously their role.[122]

That the Restatement drafting process works well does not mean that it fulfills the ALI's lofty goal of giving weight to all relevant factors and determining the relative desirability of competing rules, if such a thing were even possible. Several important factors shaping the process are seldom noted in the ALI's adulatory self-descriptions, factors that are especially relevant in the RLLI. One factor concerns the Reporters; another concerns the other participants in the process.

The successive drafts of each Restatement are prepared by one or more Reporters. The Reporters are academics chosen for their expertise in the subject matter and, one suspects, for a variety of other abilities, including facility of writing in the disciplined Restatement form, the willingness to do the work over an extended period of time, and the combination of a thick skin and an open mind to withstand and absorb the comments of dozens or hundreds of critics.

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generally Gail Hillebrand, *What's Wrong with the Uniform Law Process?*, 52 HASTINGS L.J. 631 (2001).

120. CAPTURING THE VOICE, *supra* note 5, at 16–19.

121. *How the Institute Works*, A.L.I., https://www.ali.org/about-ali/how-institute-works/ (last visited Nov. 14, 2015).

122. As Professor George Cohen's Article reports, the Rutgers Conference included a remarkable example of the influence of commentators and the willingness of Reporters to accept criticism. The draft paper he presented to the Conference criticized the Restatement's provision on vicarious liability of liability insurers for defense counsel malpractice. In part because of the argument in his paper, the Reporters changed their view to a position he now supports. Cohen, *supra* note 13, at 119.

Although the ALI process is deliberative and involves many participants, the Reporters obviously have an outsize role. The business lawyer's aphorism that there is always an advantage to writing the first draft of a document is equally true of a Restatement. Advisers, members, and Council are always responding to the Reporters' draft, so the draft frames the debate.

The ALI's experience with products liability illustrates. William L. Prosser was the Reporter for the Restatement (Second) of Torts.[123] This was an obvious choice; Prosser was a dominant academic figure in torts in the 1950s and 1960s.[124] Several sections of the Restatement were based on his prior scholarly work and were natural candidates for statement in a certain way. But less obvious was the Restatement's eventual position on an expansive rule of products liability in section 402A, which was included at the Reporters' urging despite its lack of a majority rule in support of its breadth.[125] Nevertheless, section 402A for a time was the most successful of all Restatement provisions, influencing many courts to dramatically expand liability.[126] The Reporters for the Restatement (Third) of Torts: Products Liability were James A. Henderson, Jr. and Aaron D. Twerski.[127] Also distinguished torts scholars, they wrote in what was essentially a prospectus for the new Restatement that "American products liability law has reached a point from which further meaningful development is not only socially undesirable but also institutionally unworkable."[128] The Restatement (Third) of Torts: Products Liability was drafted in the era of tort reform, so broader factors were at work, but the Reporters' views surely had an effect on its limited scope, best exemplified in the controversy over the "reasonable alternative design" requirement of section 2(b).[129]

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123. Prosser was succeeded as the Reporter by Professor John W. Wade.

124. *See generally* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 139–79 (1985) (discussing Prosser and "consensus thought" in tort law).

125. Schwartz, *supra* note 42, at 746–48.

126. *See* Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 9–13 (1995) (discussing the drafting and influence of section 402A); Schwartz, *supra* note 42, at 745–48.

127. Bogus, *supra* note 126, at 12–13; Schwartz, *supra* note 42, at 752.

128. James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1266 (1991); *see also* Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 643–46 (1995) (discussing political context of the Restatement (Third) of Torts).

129. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (AM. LAW INST. 1998). Most famously, John Vargo's mammoth 462-page law review article with 2403 footnotes argued that the Restatement misstated the law. John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design*

A second factor is a tension between the ALI's desire for a diverse membership representing diverse points of view and its admonition that participants in the drafting process should express independent professional judgment. As stated by former director Lance Liebman:

> An ALI rule tells members to "leave their clients at the door," and it is a point of honor among members that they state what they personally believe to be right, not what their clients want them to say. But it is equally important that the ALI make certain that all significant points of view are represented and explained.[130]

The aim of broad representation is served by seeking a more diverse membership and by balancing representation on Restatement advisory committees. The ALI membership and leadership for a long time were overwhelmingly white, male, older, and elite.[131] More recently the ALI has diversified its membership;[132] for example, regional advisory groups have been formed, with one of their charges to review the demographics of their regions and identify candidates for membership from underrepresented groups defined by a host of factors, including race, gender, national origin, practice area, member type (academic, practitioner, or judge), and age.[133]

As important as demographic diversity is the diversity in perspective provided by lawyers and academics with different practice experiences and orientations. The composition of the Advisers for the RLLI illustrates. The Advisers include, as is typical, leading academic experts and judges. Also included are lawyers who specialize in policyholder representation, lawyers for insurance companies, and even Advisers who are not ALI members but who represent interests that were seen by the ALI leadership as appropriately heard in the debates, including a lawyer for a major national insurer and the head of a policyholder advocacy

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Defects—A Survey of the States Reveals a Different Weave, 26 U. MEM. L. REV. 493 (1996); *see also* Vandall, *supra* note 46, at 808–14 (criticizing Restatement test for defective product).

130. Lance Liebman, *Law Reform Agenda as ALI Approaches Its Centennial*, 79 BROOK. L. REV. 821, 828 (2014).

131. Hebert P. Wilkins, *Foreword*, 26 HOFSTRA L. REV. 567, 568 (1998).

132. As of September 3, 2015, 7% of the membership identified themselves at African American, 5% as Hispanic, 3% as Asian, and 61% as Caucasian, with 24% not reporting race or ethnicity. The most recent group of new members included 43% women and twenty ethnic minorities. E-mail from Beth McGettigan Goldstein, Membership Dir., Am. Law Inst., to author (Sept. 3, 2015, 13:26 EST) (on file with author).

133. *Id.*

organization, and a "Liaison" from the American Insurance Association, the trade group of property/casualty insurers.

Until the early 1980s, disputes about Restatement provisions sometimes became heated, but they were seldom based clearly on interest. At the 1991 annual meeting, ALI president Roswell Perkins noted that through that period "perhaps the most emotional debate was in 1978, when Professors Powell and Casner went at each other over the Rule Against Perpetuities."[134] The quaint quiescence of those days (heated debates over the Rule Against Perpetuities!) disappeared when, in Perkins's words, the ALI began "to bite on more economically divisive meat . . . [that] carries the disease of polarization."[135] A partial list of economically divisive topics—which were also politically and ideologically divisive—includes the Principles of Corporate Governance;[136] the Study of Enterprise Responsibility for Personal Injury, which led to the equally-controversial Restatement (Third) of Torts: Products Liability;[137] the Restatement of the Law Governing Lawyers;[138] proposed revisions to article 2 of the Uniform Commercial Code;[139] and the Principles of Software Contracts.[140]

This is not the place to revisit the controversies over those projects or to describe in detail the great extent to which the discussion of their provisions departed from the ALI's ideal of informed but disinterested discourse. They certainly put under stress the concept of leaving one's clients at the door and even resulted in the application to the ALI process of the techniques of ordinary politics, including publicity in support of positions, lobbying, and get-out-the-vote campaigns.[141]

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134. Roswell B. Perkins, *Opening Remarks by the Honorable J. Clifford Wallace, Chief Judge of the United States Court of Appeals for the Ninth Circuit*, 68 A.L.I. PROC. 8 (1991).

135. *Id.*

136. *See generally* Joel Seligman, *A Sheep in Wolf's Clothing: The American Law Institute Principles of Corporate Governance Project*, 55 GEO. WASH. L. REV. 325 (1987).

137. *See supra* text accompanying notes 123–29.

138. Barker, *supra* note 43, at 573; Wolfram, *supra* note 41, at 820–25.

139. *See* Richard E. Speidel, *Revising UCC Article 2: A View from the Trenches*, 52 HASTINGS L.J. 607 (2001). The UCC is a joint project of the ALI and the National Conference of Commissioners on Uniform State laws. *Id.* at 608.

140. *See* Juliet M. Moringiello & William L. Reynolds, *What's Software Got To Do with It? The ALI Principles of the Law of Software Contracts*, 84 TUL. L. REV. 1541, 1541–42 (2010); Maureen A. O'Rourke, *An Essay on the Challenges of Drafting a Uniform Law of Software Contracting*, 10 LEWIS & CLARK L. REV. 925, 930–34 (2006).

141. *See* Barker, *supra* note 43, at 573; Freedman, *supra* note 44, at 644; Charles Silver, *The Lost World: Of Politics and Getting the Law Right*, 26 HOFSTRA L. REV. 773, 773–74 (1998); Wolfram, *supra* note 41, at 817. The authors report that the insurance industry is a frequent player in such efforts, *see* sources cited *supra*, which is not surprising given the range of issues in which it is interested, its well-organized trade associations, and its financial power.

The "leave your clients at the door" ideal is based on the notion that a participant chooses to advance his or her own interests and those of his or her clients or chooses to temporarily set aside those interests. That notion ignores the power of the participant's belief structure. Consider a lawyer who continually represents a set of client interests, either insurance companies or policyholders, and makes arguments that serve those clients' interests, either in litigation, legislative lobbying, or Restatement drafting. Most often—perhaps nearly always—the lawyer does not perceive the arguments as purely instrumental, aimed at achieving particular ends without regard for the truth or falsity of the arguments or the moral value and social desirability of the ends. The lawyer's innate desire for integration and coherence in his or her work life and moral being drives the lawyer to consider particular arguments as true and just; the fact that the arguments serve client ends becomes almost incidental.

The pro-insurer position sketched in Part I demonstrates the point.[142] The criticisms of particular provisions of the Restatement are part of a broader framework of understanding in which insurers act reasonably but policyholders engage in gamesmanship, so Restatement rules need to be formulated that give freedom to insurers but check policyholders. These rules are not primarily for the benefit of insurers—insurers' profit motive is never mentioned—but for the benefit of the pool of policyholders themselves, as the nefarious tactics of some policyholders cause an increase in insurers' costs that must be passed on to all policyholders in the form of higher premiums.[143]

The analysis applies to other insurance issues[144] and is not confined to insurance. Virtuous business enterprises are under threat by advantage-seeking consumers (and their lawyers) in other settings so, for example, tort causes of action by injury victims against manufacturers should be limited as well.[145] More broadly, this analysis is part of a

142. The same could be said of the pro-insured position, but the pro-insurer position is better represented in the articles by practitioners in this Issue.

143. *See supra* text accompanying notes 49–51.

144. *See* Victor E. Schwartz & Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 AM. U. L. REV. 1477 (2009).

145. *See generally* Victor E. Schwartz & Leah Lorber, *A Letter to the Trial Judges of America: Help the True Victims of Silica Injuries and Avoid Another Litigation Crisis,* 28 AM. J. TRIAL ADVOC. 295 (2004) (criticizing expansion of asbestos litigation); Victor E. Schwartz & Phil Goldberg, *A Prescription for Drug Liability and Regulation*, 58 OKLA. L. REV. 135 (2005) (criticizing expansion of liability for prescription drugs); Victor E. Schwartz, Cary Silverman & Christopher E. Appel, *Respirators to the Rescue: Why Tort Law Should*

narrative about markets and law, about individualism and the role of the state, about freedom and constraint.[146]

This belief structure—this ideology—and the others with which participants approach the Restatement process is, in an important sense, genuine and not instrumental. Proponents make arguments in good faith more than in service of clients' interests, because each argument reflects a broader social vision. The individual arguments and the ideology of which they are a part cohere in that they hang together even if the arguments are not logically entailed by deduction from the principles of the social vision.

Thus whether a participant in the Restatement drafting process leaves the client at the door is largely irrelevant. President Perkins at the 1991 annual meeting railed against any ALI member "who does not have the stomach for voting in a way that an important client would not like."[147] Allegations of overt lobbying and solicitation of members' votes may have spurred the comment, but the picture of ideology described in this Introduction suggests that over time there will be relatively few cases to which the warning would apply; ALI members seldom will vote against the interests of long-term, important clients because the members have internalized those interests.

Arguments based in the ideologies of individual participants in Restatement drafting are mediated by the arguments of other participants with different views, of course. When the ALI process works best, there is a balance of views and the beliefs underlying those views are made transparent. That optimal state is hard to achieve; it is easier to argue at a level of detail than at a level of broad principle, especially within the structure of a Restatement debate, when the focus of the argument is a particular black letter text and time is limited.[148] But that is also true of litigation that results in judicial opinions, which is seldom conducted at more than an intermediate level of generalization about principle. In that respect, the ALI certainly follows director Wechsler's

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Encourage, Not Deter, the Manufacture of Products that Make Us Safer, 33 AM. J. TRIAL ADVOC. 13 (2009) (criticizing expansion of liability of respirator manufacturers).

146. *See* Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 839–44 (1983); *see generally* Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 55–59 (2004) (describing conservative vision of the economy, state, and law).

147. Perkins, *supra* note 134, at 10.

148. *See* Schwartz & Scott, *supra* note 119, at 603 ("The ALI prefer[s] to deal with technical issues that legal expertise can resolve, not matters whose resolution requires controversial value choices or would be aided by social science or philosophical skills.").

admonition to emulate the decision process of courts in a very basic way.[149]

149. *See supra* text accompanying note 117.