



News Release

For Immediate Release

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DRI Opposes American Law Institute's Restatement of the Law, Liability Insurance

Called Creating, Rather Than Clarifying, the Law

CHICAGO – (May 16, 2017)—Stating “. . . we are gravely concerned that many provisions contained in ALI's Restatement are at odds with the common law of insurance, and will impede the ability of our members to represent policyholders pursuant to the tripartite relationship . . .,” DRI – The Voice of the Defense Bar is asking American Law Institute members to oppose ALI's Restatement of the Law, Liability Insurance during ALI's annual meeting in Washington, DC, May 22-24.

In a letter to ALI Director Richard Revesz, DRI stated “In preparing drafts of a proposed Restatement of the Law, ALI Reporters are tasked to identify the majority rule and should only diverge from it if recent trends in the case law have shown the majority rule to be ‘outmoded or undesirable.’” Yet, in many instances, the Restatement would adopt rules that are entirely new, or have only been adopted in a handful of states. Reporters clearly diverge from the majority rule without demonstrating why or how the majority rule allegedly is “outmoded or undesirable.”

There are numerous individual sections that are seriously flawed in their statements of the common law and basic principles of insurance jurisprudence. For instance, the Restatement proposes a new set of rules governing the relationship between policyholders, their defense counsel and insurers. Specifically, in Section 12, the Restatement sets out new rules concerning the liability of the insurer for defense counsel's conduct in defending the policyholder. Section 12 would provide that “An insurer exercising the right to defend a legal action is subject to liability for the negligence or other breach of professional obligation of defense counsel and related service providers if the insurer negligently selects or supervises defense counsel. This Section *would create new direct liability* on the part of the insurer to the insured for the acts of defense counsel, and would do so in the absence of appropriate support in the case law for applying direct liability in this setting. In fact, the Restatement draft itself acknowledges that “[t]here is little case law on this topic.”

Promoting a new cause of action against insurers for the “selection” or inadequate or negligent “supervision” of defense counsel raises many issues of great concern to DRI.” It would encourage greater intrusion into the professional services of defense counsel by insurers, impede the relationship

between defense counsel and policyholders and tread on the ethical obligations of defense counsel to their clients.

There are many other sections of the draft that also depart from the common law to propose new rules, which further exemplifies that this project is far from a typical “Restatement” of the Law.

Said DRI Executive Director John R. Kouris, “The late-Justice Antonin Scalia criticized Restatements that did not report and explain the law, but instead stated what they wished it to be. This may be the very type of Restatement of which he spoke.”

In sum the Proposed Final Draft of this Restatement does not codify existing common law, but instead repeatedly stakes out new and controversial positions without adequate grounding in law or public policy. A *Restatement of the Law, Liability Insurance* that is an advocate for dramatic changes in the law without common law basis would be an abrupt departure from the reliable, clear statement of existing law that lawyers and courts have come to expect as the scholarly work product in ALI’s Restatements. ALI should not adopt this Restatement project as it stands.

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About DRI – The Voice of the Defense Bar

For more than fifty-five years, DRI has been the voice of the defense bar, advocating for 22,000 defense attorneys, commercial trial attorneys, and corporate counsel and defending the integrity of the civil judiciary. A thought leader, DRI provides world-class legal education, deep expertise for policy-makers, legal resources, and networking opportunities to facilitate career and law firm growth. For more information, log on to www.dri.org