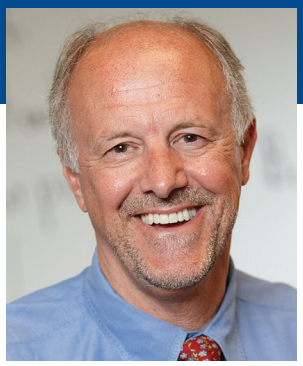
12-2015

Rodney Dangerfield No More: The American Law Institute's Coming Restatement of the Law of Liability Insurance

Jeffrey W. Stempel
University of Nevada, Las Vegas -- William S. Boyd School of Law

Dean's Column



BY GUEST COLUMNIST PROF. JEFFREY W. STEMPEL

RODNEY DANGERFIELD NO MORE: THE AMERICAN LAW INSTITUTE'S COMING RESTATEMENT OF THE LAW OF LIABILITY INSURANCE

In a casebook I co-author, "Principles of Insurance Law," with Peter Swisher and Erik Knutsen, we refer to insurance as "the Rodney Dangerfield of law." It just does not (to paraphrase the words of the late comedian), get enough respect. Lawyers are familiar with (and have been since perhaps the fourth week of law school), the American Law Institute's Restatements of the Law, particularly widely cited restatements, such as those governing torts and contracts (and, to a lesser extent, judgments, conflict of laws, restitution, suretyship and others). Despite the importance of insurance in the civil justice system, it has been slow in getting its own restatement – but that's changing, at least for liability insurance. The institute is crafting the first Restatement of the Law of Liability Insurance.

As with other restatements, reporters for the project were selected (Professors Tom Baker of the University of Pennsylvania Law School and Kyle Logue of the University of Michigan Law School), and a group of advisers and a Members Consultative Group (MCG) were formed to provide feedback to the reporters. I serve as a member of the advisors' group, and Professor Keith Rowley serves on the MCG. Since 2012, we have been making periodic trips to Philadelphia for group meetings (literally passing each other at an airport gate on one occasion, as I was leaving an advisers' session and he was heading to an MCG meeting), during which we discuss drafts of the restatement that are presented in chapters.

After the reporters have had a chance to respond to comments of the advisers and MCG, a revised draft is presented to the institute's council, where the draft is again vetted and revised before presentation to the full membership for tentative approval at the institute's annual meeting. The draft restatement section is tentatively approved in stages, until a complete restatement is presented to the full membership for approval. Then the document becomes an official publication of the Institute — hopefully proving useful to lawyers and judges addressing the restatement's topic.

Restating the law of liability insurance presents particular challenges because of the degree of state-to-state variation on controversial or emerging issues.[1] To some extent, this is a product of the McCarran-Ferguson Act (named for Nevada's famous U.S. Senator, who championed state regulation over a federal regime).

Although there never is perfect legal uniformity among jurisdictions, insurance can exhibit particularly pronounced divisions when compared to basic contract, tort or property law. The Supreme Court of one state may hold that particular standardized policy language

unambiguously means "X," with the Supreme Court of a neighboring state holding that the very same language unambiguously means "Y."

Obviously, the restatement cannot have it both ways, which has created some vigorous debate over draft provisions. As an example, one of the current draft sections deals with the issue of each insurer's liability for claims that extend across several policy periods involving several insurance policies. This arises with "long-tail" tort claims such as those involving drug product liability, asbestos and pollution. Even though asbestos and pollution claims have been excluded from the standard general liability coverage form since 1986, there are still claims working through the system. Collectively, billions of dollars of coverage responsibility are at stake.

Policyholders feel they are entitled to coverage up to the full limit of each policy, while insurers contend that their responsibility should be pro-rated by the respective "time on the risk" of all insurance policies issued during the years (or even decades) of plaintiffs' injurious exposure. Because some of the insurers are insolvent or defunct — or some policies have been exhausted by prior claims payments — pro-ration can prevent policyholders from obtaining full policy limits for claims payments, and has the effect of requiring policyholders to fill resulting gaps in coverage. Conversely, an all-sums approach may have one insurer arguably paying more than its fair share and then finding itself unable to obtain contribution from other insurers.

Roughly 15 states have supported the insurer position while nine have endorsed the policyholders' view. Restatements, of course, are intended to *restate* the law. But when there is no clearly dominant majority rule, there is a long ALI tradition of favoring the "better" rule in restatements; this in turn leads to continuing, vigorous debate among the advisers, MCG, council and membership as to which is the better rule. Alternatively, a restatement may, in apt cases, endorse a hybrid approach that seeks to improve upon the majority or minority rules.

Both insurer and policyholder attorneys are represented among the advisers and MCG, along, of course, with judges and law professors. In spite of divisions over some of the proposed sections of the draft restatement, many provisions of the draft set forth "black letter" legal principles on which there is wide agreement, including providing helpful definitions of insurance terms.

> Restating the law of liability insurance presents particular challenges because of the degree of state-to-state variation on controversial or emerging issues.[1]

In spite of the areas of conflict, the Liability Insurance Restatement continues to march toward completion. Chapters one and two of the insurance restatement have been approved (subject to reconsideration when the entire restatement is available to the membership), Chapter three is under consideration and Chapter four (the final chapter), will be addressed during 2016 and 2017. Like an amendment of procedural rules, the process takes a significant amount of time. If things go smoothly, the restatement should gain final approval at the 2017 Annual Meeting.

Although there are many useful treatises and casebooks on insurance, the restatement's user-friendly format (setting forth black letter law, followed by commentary, illustrative examples and the reporter's notes compiling key case law) should be very useful to lawyers and judges. Where a given provision is one of some interstate division, this is well-noted. Courts will be aided in choosing among competing arguments and lines of cases.

Drafts of the Liability Insurance Restatement are available at the institute's website (ali.org), as are drafts of other works in progress, such as the Restatement of the Law of Consumer Contracts (where Rowley is also on the MCG), the Project on Sexual and Gender-Based Misconduct on Campus and Principles of the Law of Data Privacy.

The faculty of UNLV Boyd School of Law is well-represented in Nevada's ALI membership. In addition to Rowley and me, other faculty ALI members include Chris Blakesley, Leslie Griffin, Francine Lipman, Thom Main, Nancy Rapoport and Dean Dan Hamilton. Other Nevada ALI members include: Federal Judge Procter Hug; Nevada Supreme Court Justices Mark Gibbons and Kristina Pickering; Second Judicial District Court Judge David Hardy; and attorneys Aaron Ford (who has served as an adjunct professor at UNLV Boyd School of Law), Laurance Hyde, Phyllis Ann James, Alan Lefebvre, Steve Morris, Charles William Nihan and Rosa Solis-Rainey, the first UNLV Boyd School of Law graduate (Class of 2001) to be elected to the Institute. NL

1. *See generally* Randy Maniloff & Jeffrey Stempel, General Liability Insurance Coverage: Key Issues in Every State (3d ed. 2015) (presenting 50-state surveys of frequently litigated questions and reflecting substantial variance among states regarding some issues).

JEFFREY W. STEMPEL is the Doris S. and Theodore B. Lee Professor of Law at the UNLV Boyd School of Law, where he teaches civil procedure/alternative dispute resolution, evidence, professional responsibility and — you guessed it — insurance law.