

ALI Restatement of the Law, Liability Insurance:

Does it Intrude on the Legislative Prerogative?

Examples of Statutory Law Overridden

Here are some illustrations of new law made by the Restatement in place of existing statutory law. Although existing statutory law may not address all subjects in the Restatement, there are many other instances where the Restatement announces new rules, as well.

- Section 8 (misrepresentation – materiality)
- Section 27 (punitive damages part of award for failure to settle)
- Section 36 (late notice/claims made and reported/extended reporting periods)
- Sections 48, 49 and 51 (fee-shifting)

Section 8

Misrepresentation/Rescission and the Materiality Requirement (cont.)

- Section 8 of the proposed Restatement provides:
 - A misrepresentation by or on behalf of an insured during the application for, or renewal of, an insurance policy is material only if, in the absence of the misrepresentation, a reasonable insurer in this insurer's position would not have issued the policy **or would have issued the policy only under *substantially* different terms.**

Section 8

Misrepresentation/Rescission and the Materiality Requirement

Example: Delaware Code Ann. Tit. 18 §2711

Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either:

- (1) Fraudulent; or
- (2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or
- (3) The insurer in good faith would either not have issued the policy or contract, or **would not have issued it at the *same* premium rate or would not have issued a policy or contract in as large an amount** or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

Section 8

Misrepresentation/Rescission and the Materiality Requirement

Example: FLORIDA STAT. ANN. Title 37, §627.409 (West 1996).

If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith would not have issued the policy or contract, **would not have issued it at the *same* premium rate, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.**

Section 8

Misrepresentation/Rescission and the Materiality Requirement

Example: GA. CODE ANN. §33-24-7 (Harrison 1994)

The insurer in good faith would either not have issued the policy or contract or would not have issued a policy or contract **in as large an amount or *at the premium rate as applied for*** or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been known to the insurer as required either by the application for the policy or contract or otherwise.

Section 8

Misrepresentation/Rescission and the Materiality Requirement

Example: S.D. CODIFIED LAWS § 58-11-44

Policy may be rescinded if misrepresentations or omissions were (1) fraudulent; or (2) material to the acceptance of the risk or the hazard assumed by the insurer; or (3) the insurer in good faith would not have issued the policy, or **would not have issued it *on same terms***, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise.

Section 8

Misrepresentation/Rescission and the Materiality Requirement

Example: WYO. STAT. ANN. § 26-15-109 (1977); WYO. STAT. ANN. § 26-35-202 (1977).

Coverage under the policy may be denied or the policy rescinded where the misrepresentation was:

- (1) fraudulent;
- (2) material to the risk or the hazard assumed by the insurer; or
- (3) **affects whether the insurer would have issued the policy *or the terms they would have issued the policy under.***

Section 27

Damages for Insurer Breach of Settlement Duties

- Section 27 provides:
 - An insurer that breaches the duty to make reasonable settlement decisions is subject to liability for any foreseeable harm caused by the breach, including the full amount of damages assessed against the insured in the underlying legal action, without regard to the policy limits.
- **Comment *d* specifically references *punitive* damages as among the type of damages that an insurer can be required to pay**, even when the policy language specifically excludes coverage for punitive damages.
- **Comment *d* further states that the Reporters intend this rule to apply even in jurisdictions that *forbid* providing insurance coverage for punitive damages.**

Section 27

Damages for Insurer Breach of Settlement Duties (cont.)

- Notably, state approaches to the insurability of punitive damages are sharply divided.
- Some states expressly prohibit insuring punitive damages by statute:
 - E.g., Ohio Rev. Code. § 3937.182 precludes coverage for punitive damages under UIM policies and policies of casualty or liability insurance.
- Others permit insurers to write coverage for punitive damages only in certain instances:
 - E.g., Kansas Stat. Ann. § 40-2115 states that it does not violate public policy to provide coverage for punitive damages that are assessed against an insured on the basis of vicarious liability without the actual prior knowledge of such insured.

Section 27

Damages for Insurer Breach of Settlement Duties (cont.)

- Still others regulate the circumstances under which coverage written for punitive damages will be recognized:
 - Montana Code Ann. § 33-15-317 provides that “[i]nsurance coverage does not extend to punitive or exemplary damages unless expressly included by the contract of insurance.”
 - Hawaii Rev. Stat. § 431:10-240 provides “Coverage under any policy of insurance issued in this state shall not be construed to provide coverage for punitive damages unless specifically included.”

Section 36

Late Notice Under Claims Made and Reported Policies

- Section 36(2) provides:
 - With respect to claims first reported after the conclusion of the claim-reporting period in a claims-made-and-reported policy, the failure of the insured to satisfy the claim-reporting condition in the policy excuses an insurer from performance under the policy without regard to prejudice, ***except when:***
 - (a) The policy does not contain an extended reporting period;***
 - (b) The claim at issue is made too close to the end of the policy period to allow the insured a reasonable time to satisfy the condition; and***
 - (c) The insured reports the claim to the insurer within a reasonable time.***

Section 36

Late Notice Under Claims Made and Reported Policies (cont.)

- Legislation addressing whether and to what extent extended reporting periods are required in claims made and reported policies has been adopted by the state legislatures of AK, CO, CT, HA, NY, NC, and VA.
- While some states require the inclusion of an extended reporting period in the policy, or require the insurer to allow for the purchase of such additional coverage, none relieve the insureds from the terms of its policy.
- Moreover, the majority of states have not adopted legislation by-passing the requirement that a claim be made and reported during the policy period under claims made and reported policies, as has been done in the Restatement.

Sections 48, 49, and 51

One-way attorneys' fee-shifting

- Restatement Section 48(3) provides that available remedies include court costs or attorneys' fees to a prevailing party "when provided by legislation."
- However, other Restatement Sections override the legislative determination and expand fee recovery to additional situations:
 - Section 48(4) calls for insurers to pay an insured's coverage litigation costs when an insured "substantially prevails in a declaratory-judgment action brought by an insurer."
 - Section 49(3) calls for insurers to assume the insured's attorneys fees if the insured successfully establishes that the insurer breached its duty to defend or pay defense costs with respect to an underlying claim.
 - Section 51(1) calls for the award of "attorneys' fees and other costs incurred by the insured in the legal action establishing an insurer's breach" as damages upon a finding of bad faith.
- Thus, instead of endorsing fee-shifting "when provided by legislation," the Restatement supplants the legislature by seeking to establish its own rules regarding fee-shifting.

Sections 48, 49, and 51

One-way attorneys' fee-shifting (cont.)

- As the Reporters acknowledged in Section 48 (3), the legislatures of a number of states have passed laws that provide for recovery of attorney fees in coverage litigation.
- Some statutes are drafted broadly:
 - N.H. Rev. Stat. Ann. § 491:22-b (2014), states: “In any action to determine coverage of an insurance policy pursuant to [Section] 491:22, if the insured prevails in such action, he shall receive court costs and reasonable attorneys’ fees from the insurer.
- But other statutes are drafted differently:
 - Va. Code Ann. § 38.2-209 (2014), permits recovery only in cases in which an insurance company, not acting in good faith, failed to make payment to the policyholder.
 - La. Rev. Stat. Ann. § 22:1220 (2014), entitles a policyholder to recover attorneys’ fees if the insurer has acted in bad faith by, for example, “[m]isrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.”

Sections 48, 49, and 51

One-way attorneys' fee-shifting (cont.)

- Furthermore, some states which typically do not permit shifting of attorneys' fees allow policyholders to recover but only under specific circumstances:
 - For example, Del. Code Ann. tit. 18, § 4102 (2014), provides for reasonable attorney fees for “property insurance” coverage actions. *See Galiotti v. Travelers Indem. Co.*, 333 A.2d 176, 178 (Del. Super. Ct. 1975) (awarding fees under Section 4102 because the policyholder was seeking coverage under the “property insurance” component of the policy, i.e., damage to the vehicle)
- The Restatement casts to the side the careful considerations of state legislatures regarding whether, and under what circumstances, fee-shifting is appropriate. Rather, it seeks to impose its own public policy judgments on the topic.

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