



# From Legal Scholarship to Legal Advocacy: The Evolving Role of the American Law Institute in State Court Jurisprudence

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**ATRA**

AMERICAN TORT  
REFORM ASSOCIATION

## Introduction

Several years ago, the American Tort Reform Association (ATRA) began to take note of a disturbing new trend; the once-esteemed American Law Institute (ALI) was evolving its role. No longer was it content to serve as an educational resource to state courts and the legal profession—rather it has begun to move into a new advocacy role outlining what the law *should become*.

This short paper outlines and highlights the adverse impact of this new ALI role on state court jurisprudence. The late Supreme Court Justice Antonin Scalia noted that the authors of the ALI's flagship publications – its restatements – have, “abandoned the mission of describing the law and have chosen instead to set forth their aspirations for what the law ought to be.”

Here we outline the ALI's agenda and highlight how the ALI's new advocacy agenda threatens ATRA's goal of a fair, equitable and predictable civil justice system.

## A Brief History of the American Law Institute and Its Restatements

The American Law Institute was founded in the early 1920s by an esteemed group of legal scholars seeking to address two concrete challenges to the application of law in state courts across the United States: the lack of agreement on the common law, and the complexity this created as the law was applied differently in different jurisdictions.<sup>1</sup>

This was a very real challenge in an era before widespread commercial air travel and electronic publishing, where one state's common law could evolve organically to eventually operate entirely differently from that in a neighboring state. The ALI helped to address this challenge by, “promot[ing] 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.”<sup>2</sup>

The principal tool the ALI used to accomplish this mission is what are known as restatements of the law— detailed book-length publications each of which address a wide range of specific legal issues in a subject such as torts, contract and property law. Each restatement seeks to “synthesize and restate existing case law and statutes from various jurisdictions.”<sup>3</sup> Restatements are then sold by the ALI on its website.<sup>4</sup>

This work of developing each restatement falls not to authors, but to what are known as reporters – most-often law professors – who steer the ALI and its members through the

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<sup>1</sup> <https://www.ali.org/about-ali/story-line/> accessed 4/4/2022.

<sup>2</sup> <https://www.ali.org/about-ali/story-line/>

<sup>3</sup> [https://www.law.cornell.edu/wex/restatement\\_of\\_the\\_law](https://www.law.cornell.edu/wex/restatement_of_the_law)

<sup>4</sup> <https://www.ali.org/publications/#publication-type-restatements>

lengthy years-long process<sup>5</sup> of developing and publishing a restatement (some are multi-volume) on a specific legal topic.

For generations, restatements sat on the bookshelves of lawyers and judges seeking guidance on what should be considered legal best practice. It's important to note that restatements are not precedents and they are not statutes; they are secondary sources of legal reference and authority. However, when a court cites or "adopts" the law as articulated in a restatement, the restatement becomes a mandatory authority on that state's law. As such, restatements have historically been extremely useful to and influential with state trial court and supreme court judges, and are cited extensively and authoritatively in both legal briefs and legal opinions. Over the course of the current pandemic alone, the ALI Restatements and Principles of the Law have been cited in published decisions by U.S. courts more than 3,000 times.<sup>6</sup>

This is a prescribed role for the ALI that is both limited by and hews closely to the 1928 guidance offered by ALI Director William Draper stating that the Institute should, "...concern itself with such matters as the form in which public law should be expressed, the details of private law, procedure, or the administration of law and judicial organization. *It should not promote or restrict political, social or economic changes.*" (Emphasis added)

## **ALI at the Centennial: From Neutrality to Advocacy**

Since the time of that guidance, the ALI's role appears to have changed. While the common law continues to evolve as a reflection of the changing needs and circumstances of society, the ALI is no longer merely restating the common law. Rather it is promulgating and advocating for legal dogmas that exist well outside of the legal mainstream, or where there is a lack of clear consensus in state courts. In a growing number of cases, the ALI is purporting to "restate" law that has never been clearly stated in the first place.

### **The Law of Trespass**

This troubling trend started more than a decade ago, with the law of trespass. In its 2010 restatement on the law of physical and emotional harm, the ALI departed from decades of accepted law and practice and declared that land possessors owed a novel duty of care to trespassers – those unlawfully on their property. Under this theory, a trespasser could successfully sue a landowner for failing to act reasonably in preventing the trespasser's injury. This approach upends the traditional common law rule that a landowner generally owes no duty to a trespasser except to refrain from willfully or wantonly injuring the trespasser. It also created an exception for "flagrant trespassers" – a term that is undefined in the law and therefore contributes to its complexity – in contradiction to the ALI's stated goal promoting simplicity.

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<sup>5</sup> <https://www.ali.org/about-ali/how-institute-works/>

<sup>6</sup> <https://www.ali.org/news/?categories%5b%5d=Annual%20Report>.

Tellingly, following the ALI's approval of this restatement, one of the co-reporters went so far as to write and publish an article in *Trial* magazine, the members-only publication of the plaintiffs' bar's trade and lobbying organization extolling the virtues of this restatement to trial lawyers and their clients.<sup>7</sup>

Thanks in part to ATRA's advocacy, 25 states have rejected the ALI's restatement on trespass, instead codifying the traditional common law standard into statute. This broad-based rejection of a key provision of a restatement was unprecedented.

## The Law of “Consumer” Contracts

One of the most conspicuous areas of ALI activism over objectivity can be seen in the restatement of the law of consumer contracts. Here, the ALI is proposing to create a separate and unprecedented area of governing law distinct from the established law of contracts – the tenets of which are well-known across the legal community, from virtually every first-year law student to the most senior and tenured federal judges.

- The ALI's restatement of the law of “consumer” contracts intertwines contract law with state consumer protection statutes. ATRA has exhaustively documented how some personal injury lawyers use these amorphous statutes to target large and small businesses alike with frivolous and unfounded claims.
- The restatement creates a new theory of “deceptive contracts,” allowing consumers to challenge – and courts to overturn – any allegedly deceptive contract or term. Imagine litigating every line of the terms of service of a software agreement, or a cell phone contract alleged by any consumer to be misleading, unfair or deceptive and you have some idea of the scale of what's at stake with the ALI's approach.
- Finally, the restatement ignores both the Federal Arbitration Act and the Supreme Court's ample precedents favoring arbitration and predispute arbitration agreements. If adopted, it would encourage any state court judge to nullify arbitration agreements or otherwise reach results inconsistent with existing law. If applied in some of the “judicial hellholes” that ATRA has identified, this is an invitation for specious class action litigation.

## Concluding Provisions of the Third Restatement of Torts

As its name suggests, this restatement is the final part of the Third Restatement of Torts, a multi-volume ALI document in development since 1992. The Concluding Provisions Restatement addresses a grab bag of “leftover” and emerging tort law issues not covered in previously published volumes of this restatement.<sup>8</sup> Two are of particular concern to ATRA:

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<sup>7</sup> [https://www.judicialhellholes.org/wp-content/uploads/2017/06/DC-178506-v1-AAJ\\_article\\_on\\_Restatement\\_s\\_top\\_10\\_tort\\_tools.pdf](https://www.judicialhellholes.org/wp-content/uploads/2017/06/DC-178506-v1-AAJ_article_on_Restatement_s_top_10_tort_tools.pdf)

<sup>8</sup> <https://www.thealiadviser.org/torts-concluding-provisions/project-spotlight-restatement-of-the-law-third-torts-concluding-provisions/>

## Medical Monitoring

One of the draft “concluding provisions” endorses a remedy for medical monitoring – a legal theory that allows an uninjured plaintiff to be compensated for the cost of detecting the possible onset of a latent illness even if such injury never occurs.

The draft provision is controversial because the existence of an injury has traditionally been a fundamental tort law requirement; the ALI has never before adopted a restatement rule endorsing a tort recovery for unimpaired claimants.

Importantly, state case law addressing medical monitoring for the unimpaired is divided, with no clear trend toward either adoption or rejection. Only a minority of states, roughly one-third, authorize (or appear to authorize) recovery. At least as many states reject recovery of medical monitoring for the unimpaired. The remaining states have either unclear or no relevant case law.

Despite this lack of consensus, a medical monitoring provision has been put before the ALI Council, the organization’s governing body, on several occasions, with the Council declining to approve the proposed medical monitoring rule. Prior to the ALI Council’s latest meetings in 2022, numerous Council members and ALI members submitted comments urging the ALI **not** to adopt the proposed medical monitoring rule.

To date, the ALI Council has taken no action on medical monitoring but has proposed to address it at a meeting in the near future.

## Negligent Misrepresentation Causing Physical Harm

Another “concluding provision” of concern proposes to restate the tort of “negligent misrepresentation causing physical harm” in a novel and unsound way. Versions of this proposed rule have directly endorsed “innovator liability” against branded drug manufacturers where persons who took a competitor’s generic drug product sustained injury.

This is a significant change that is outside the mainstream of settled law in most states. It would assign liability to a defendant that had no part in putting the product in question on the market. Nevertheless, the reporters have indicated they may still advance this provision *in spite* of the substantial case law that has been provided by ALI members showing that courts have overwhelmingly rejected innovator liability arguments applied in this fashion.

## **Conclusion & ATRA’s Role**

How did it come to this point where an esteemed legal organization is endorsing legal theories that would allow a trespasser – so long as she wasn’t “flagrantly trespassing,” whatever that means – to sue a landowner for an injury?

The lynchpin of the ALI's legitimacy and prestige is the reliance of lawyers and judges on its work product. Absent that reliance, the ALI's mission is imperiled.

The ALI is by nature deliberative, insular and slow-moving; its work is generally performed by member volunteers. That membership is exclusive and self-perpetuating. Successful candidates for membership must be nominated by a current member with support from two additional members before being elected by the ALI's leadership.<sup>9</sup>

One result of this highly exclusive structure is that the ALI's restatements can take decades to complete. The Third Restatement of the Law of Torts, begun in 1992, is entering its fourth decade and remains a work in progress.<sup>10</sup> A lawyer elected to membership in the ALI at age 35, when the project began, has reached retirement age. The long arc of these projects transcends the tenure of the reporters and ALI leaders (many of whom retire, and some of whom pass away) that champion this process. Each successor inherently imposes a slightly different viewpoint and his or her own imprimatur on the project, a practice which has seemingly pulled the ALI further and further away from its intended purpose to restate, not reshape, the common law.

Today, in fundamental areas of the law essential to the continued predictability and fairness to our civil justice system, ATRA has documented examples where reporters have recommended and the ALI has adopted novel legal policies that are outside of the legal mainstream and do not restate any legitimate common law consensus.

ATRA is not the only entity to note this disturbing trend. In 2019, the Texas state legislature was poised to enact legislation declaring that the ALI's restatements were not a controlling authority in any legal proceeding governed by the laws of Texas. It's hardly surprising then, that the ALI hired a lobbyist to intervene given that the rejection of the ALI's work product in a state as large as Texas represents an existential threat to its legitimacy. Despite the ALI's lobbying efforts, however, the bill was enacted into law.

State legislatures have pushed back on another problematic restatement in recent years. Since 2018, several states have enacted legislation in response to the ALI's Restatement of Law of Liability Insurance.

ATRA's focus on the ALI is intended to shed light on its practices and spark constructive debate on its role today in American jurisprudence. If the ALI intends to engage in the scholarly exercise of restating the law, then it should maintain fidelity to that limited but essential role. If the goal, however, is to serve as an advocacy organization, then it should queue up with other such entities – including ATRA – at the doors to the courthouse and the statehouse, prepared to plead its case.

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<sup>9</sup> <https://www.ali.org/members/about-our-members/>

<sup>10</sup> <https://www.thealiadviser.org/torts-concluding-provisions/project-spotlight-restatement-of-the-law-third-torts-concluding-provisions/>