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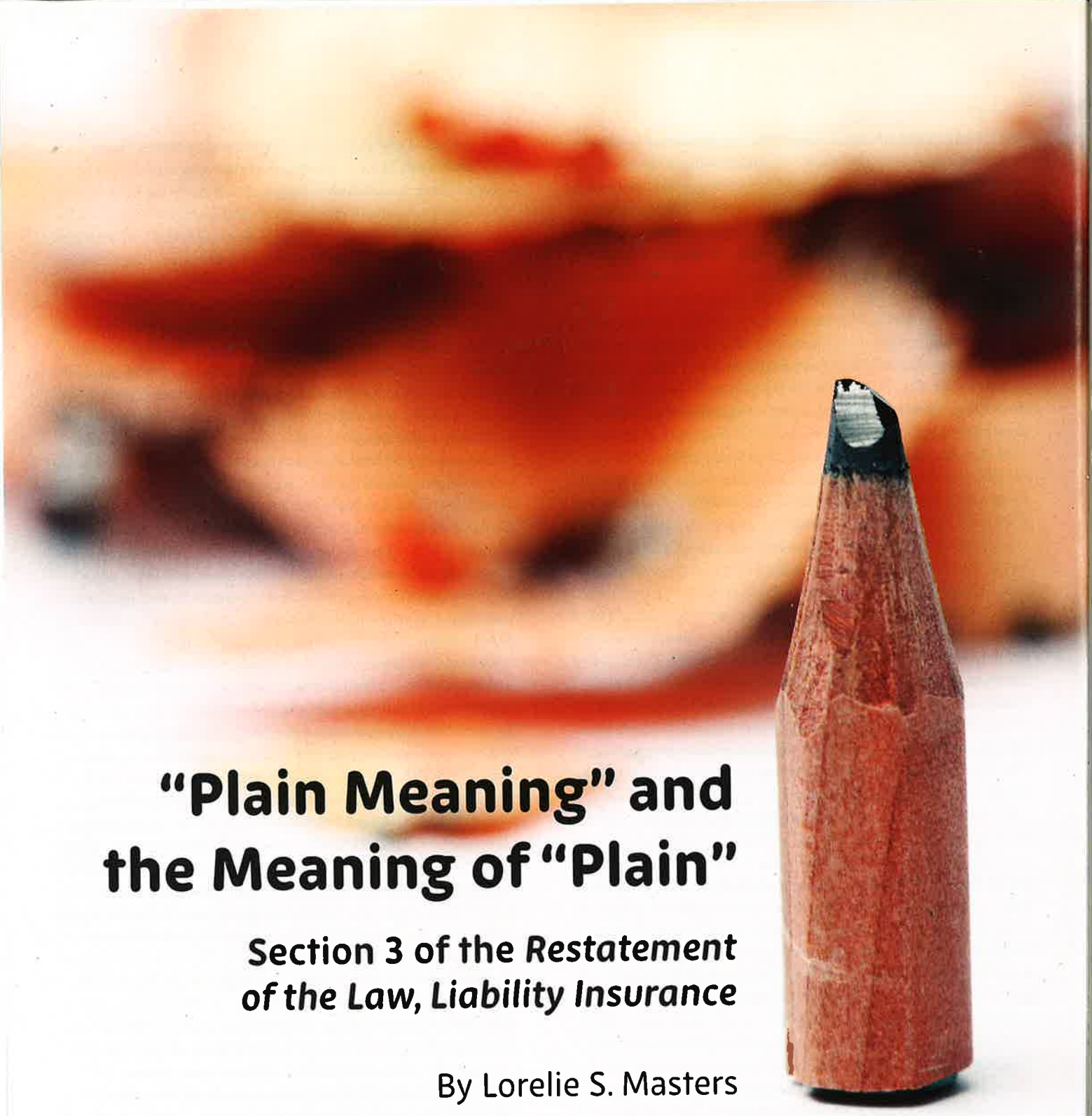

# "Plain Meaning" and the Meaning of "Plain"

## Section 3 of the *Restatement of the Law, Liability Insurance*

By Lorelie S. Masters

Insurance policies, of course, are contracts, and interpretation lies at the core of most disputes over insurance coverage. Certainly, we already see that in the high-profile disputes filed by both policyholders and insurers in courts across the country about business interruption, directors and officers (D&O), commercial general liability (CGL), and other types of insurance in light of the shutdowns and other events relating to COVID-19. That fact likely explains why sections 2 to 4 of the American Law Institute's (ALI's) *Restatement of the Law, Liability Insurance* (RLLI) generated such intense controversy throughout the eight years that the project was in development (including four years as a "principles" project before being changed to a restatement).[1] Indeed, section 3, entitled "The Plain-Meaning Rule," generated as much, and perhaps more, controversy than any of the other black-letter statements included in the RLLI.

After seven years of in-depth research and work from the RLLI's reporters and advisers, ALI members, ALI council, and others, the RLLI was slated for final approval at the ALI's May 2017 annual meeting. However, "in response to many comments [about the project], including [those from the National Council of Insurance Legislators (NCOIL)], ALI decided in May 2017 to take an extra year to review the entire project."[2] During that year of review, the insurance industry obtained many of the revisions it sought in the RLLI, including those involving the "plain meaning rule" in section 3. The ALI deputy director, in a letter to NCOIL, explained:

> In that final year the draft [RLLI] adopted some significant changes that your letters [had] urged: a simple plain-meaning rule; greatly limited insurer liability for negligent selection of counsel; an added catch-all exception to the complaint allegation rules; revised language to make it even clearer that an insurer may discontinue the defense without seeking a declaratory judgment; removal of language that would prevent insurers from asserting coverage defenses in cases of non-bad-faith breach; and removal of language that would require insurers to pay the attorneys' fees . . . when the insured prevails in a suit against the insurer for non-bad-faith breach.[3]

The letter confirms section 3's status as a focal point in ongoing controversies over the RLLI.

The RLLI in all but a handful of instances relies on majority rules and is not, contrary to the sky-is-falling depictions in the press, simply a pro-policyholder "wish list."[4] The project endeavored to state "the efficient and fair rules that should govern the insurer/insured relationship."[5] Policyholder representatives throughout sought acknowledgment of the "objectives" of insurance, which the RLLI rightly delivers, as follows:

- "effecting the dominant protective purpose of insurance";
- "facilitating the resolution of insurance-coverage disputes and the payment of covered claims";
- "encouraging the accurate description of insurance policies by insurers and their agents"; and
- "providing clear guidance on the meaning of insurance policy terms in order to promote, among other benefits, fair and efficient insurance pricing, underwriting, and claims management."[6]

This article explains the history of section 3, threshold considerations for application of the RLLI's policy interpretation rules, and the basics of the RLLI's policy interpretation framework. It closes with a discussion of the insurance industry's efforts to address the RLLI in legislation in statehouses across the country.

## History of Section 3: The Plain Meaning Rule

The continuing complaints about section 3 (for example, that it does not put enough emphasis on the text of the insurance policy) generally fail to account for the broader context of the role of extrinsic evidence in contract interpretation. A more textual approach reflected by the *Restatement (First) of Contracts*[7] was rejected and replaced by the flexible and modern contextual rule of contract interpretation adopted in the *Restatement (Second) of Contracts* in 1981.[8] After extensive lobbying by insurer representatives in the drafting process and in the larger ALI and the press, the RLLI specifically declined to follow the more contextual approach of the *Restatement (Second) of Contracts*, concluding that "a substantial majority of courts in insurance cases have adopted a plain-meaning rule."[9] The RLLI approach thus harkens back more to the more rigid approach of the *Restatement (First) of Contracts*.

The initial formulation of this section once the project changed from a principles project to a restatement proposed a "presumption of plain meaning" that could be rebutted with introduction of "extrinsic evidence,"[10] a term that, of course, is fraught with its own controversies. Earlier drafts of the RLLI sought to reach a middle ground[11] between a strict approach to interpretation[12] and a highly contextual approach.[13] RLLI Preliminary Draft No. 1 stated a rebuttable presumption that the plain meaning should apply unless "the court determines that a reasonable person would clearly give the term a different meaning in light of the extrinsic evidence."[14] The presumption could be displaced if a court concluded that extrinsic evidence revealed an alternative meaning that "reasonable persons in the policyholder's position would give to the term under the circumstances and that the plain meaning is, in this sense, a less reasonable meaning."[15] Thus, notwithstanding the criticism of this approach, it focused from the outset on insurance policy "plain meaning."[16]

In the end, the RLLI eliminated the "rebuttable presumption" and demoted the use of extrinsic evidence from the black-letter rules to a comment, making the use of such evidence more limited.[17] This is not the approach that policyholder advocates in the process favored. Although the cases do not refer to a "presumption of plain meaning," in this author's experience as an insurance coverage attorney, this approach

**TIP**: The RLLI recognizes that certain kinds of extrinsic information can be used to supplement the plain meaning and may be used when the terms are ambiguous.

is one that courts, as a matter of practicality if not explicit analysis, often employ.

Insurer advocates have argued that the RLLI rules, such as the presumption of plain meaning, would increase costs in the form of higher premiums.[18] No empirical evidence has been produced for such assertions. Alternatively, policyholder advocates can argue that ensuring that the insurance protection promised at the point of purchase is available at the point of claim could increase consumer confidence and therefore could increase sales. Even if these insurer assertions of higher premiums are true, to some extent insurers already may have factored uncertainty about interpretation rules—which have been around for decades—into premiums.

## Threshold Considerations: Mandatory vs. Default Rules and Standard-Form Terms

**Mandatory vs. default rules.** A starting point in considering the particulars of the RLLI plain meaning rule is the RLLI's framework for mandatory and default rules.

The RLLI designates many of its rules as mandatory rules, i.e., rules that cannot be changed by agreement of the parties.[19] Of course, many kinds of liability insurance, especially homeowners liability, automobile liability, and CGL insurance, are standard-form contracts that require approval by state insurance regulators before they can be marketed and sold. Because of the standardized nature of policy forms, and because many of them are mass-marketed, the RLLI treats the rules of policy interpretation as mandatory,[20] which "promotes the development of uniform, reasoned meanings of insurance policy terms."[21]

Default rules are those rules that apply in the absence of any agreement between the parties and therefore can be waived or altered by agreement.[22] Under the RLLI, default rules apply only to substantive insurance policy terms that have been negotiated jointly by the parties (insurer and policyholder) and are not in regular use in the insurance markets.

By drawing a distinction between mandatory and default rules, the RLLI helps ensure uniform rules on policy terms and reduce litigation, stated goals of the project throughout its eight-year duration. Because insurance is marketed on a mass scale, having mandatory rules of interpretation helps the insurance-buying public understand how coverage will apply with a consistent, "apples-to-apples" application of standard-form terms. In part for this reason, the RLLI rejected the insurance industry's arguments for a "sophisticated-policyholder exception,"[23] ultimately placing responsibility for ambiguity on the insurer/drafter and incentivizing insurers to draft terms that are clear.[24]

**Standard-form terms.** The RLLI's treatment of standard-form terms is another important part of the policy interpretation framework.

Section 1(13), which sets forth definitions, defines "standard-form term" as "a term that appears in, or is taken from, an insurance policy form (including an endorsement) that an insurer makes available for a non-predetermined number of transactions in the insurance market."[25] The comments provide further gloss: "[A]ny term that is not specifically negotiated by the parties for inclusion in the insurance policy at issue is a standard-term. A term contained in an insurance policy form approved for use by an insurance regulatory authority for any insurer is a standard-form term unless the circumstances clearly indicate the contrary."[26]

This definition is key to the policy interpretation framework of the RLLI, including section 3 (plain meaning) and section 4 (ambiguity). Because most insurance policy terms being interpreted are standard-form terms, the mandatory interpretation rules will apply. Section 4 applies when courts find that the terms at issue are subject to more than one reasonable interpretation; in that case, the terms will be construed against the insurance company drafter. It is noteworthy that the RLLI eschews "the mechanical application" of contra proferentem,[27] stating that insurers may use extrinsic evidence to demonstrate that the insured's coverage-promoting interpretation is "unreasonable in the circumstances."[28] At the same time, this definition of standard-form terms helps protect policyholders from the effects of ambiguous language into which they had no input.[29]

## The RLLI's Policy Interpretation Framework

With the threshold considerations in mind, we now turn to the framework for policy interpretation. This framework begins with the plain meaning rule but also includes the treatment of ambiguity and the role of extrinsic evidence and other matters outside the four corners of the policy that the court may consider.

**Section 3: "plain meaning."** The court has the responsibility to make the determination of plain meaning. As RLLI section 2 states, insurance policy interpretation is a "question

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of law" and "is the process of determining the meaning of the terms of an insurance policy."[30]

RLLI section 3 states the plain meaning rule, the initial standard for policy interpretation: "If an insurance policy term has a plain meaning when applied to the facts of the claim at issue, the term is interpreted according to that meaning." This principle—that, at the outset, a court should interpret an insurance policy according to its plain meaning—is recognized in many jurisdictions.[31] Section 3(2) defines "plain meaning" as the "single meaning to which the language of the term is reasonably susceptible when applied to the facts of the claim at issue in the context of the entire insurance policy."[32] Section 3 thus adopts principles widely accepted in both insurance policy and contract interpretation. It brings into play the reasonableness of terms used and makes clear that the decision about plain meaning should consider how terms are used in the insurance policy as a whole. The section further makes clear that provisions with no plain meaning as defined in section 3(2) are ambiguous and interpreted as provided in section 4.[33]

This approach to plain meaning was advocated by insurers,[34] and therefore it should not be surprising that it is less favorable to policyholders, who advocated for more use of extrinsic evidence in interpretation.[35] By putting greater emphasis on the text of the policy and less emphasis on extrinsic evidence, the plain meaning approach in the final, approved RLLI rejects the approach taken by the *Restatement (Second) of Contracts* that would allow interpretation "in light of all the circumstances surrounding the drafting, negotiation, and performance of the insurance policy."[36] It can be argued that the RLLI's principles of policy interpretation are less favorable to policyholders than those applied under the *Restatement (Second) of Contracts* contextual approach. Nevertheless, section 2 specifically states that, "[e]xcept as this Restatement or applicable law otherwise provides, the ordinary rules of contract interpretation apply to the interpretation of liability insurance policies."[37]

Given the substantial revisions to section 3 to conform it to the position advocated by insurer representatives, one might expect an end to the controversy over these rules. However, even though the plain meaning rule was adopted in the black-letter rules in the RLLI, insurers continue to complain that the RLLI still allows too much consideration of information outside of the four corners of the policy.[38]

**Use of evidence outside the insurance policy.** After years of controversy, the black-letter rules and some comments specifically endorsed the plain meaning rule and arguably reduced the use of extrinsic evidence. However, it is important to consider what "extrinsic evidence" means in the RLLI.[39]

Under the RLLI, custom, practice, and usage evidence is available to help determine the "objective," or "plain," meaning of insurance policy terms among "parties who can reasonably be expected to have transacted with knowledge of that custom, practice, or usage."[40] Although facts relating to the claim might be considered extrinsic evidence, "all courts that follow the plain-meaning rule permit consideration of claim facts and some of those courts also permit consideration of trade custom, practice, and usage when determining whether a term has a plain meaning."[41] While it might seem unnecessary to make this point, the comments also make clear that courts may consult the following "external sources of meaning" in determining plain meaning:

- dictionaries,
- court decisions,
- statutes and regulations, and
- secondary legal authority such as treatises and law-review articles.[42]

The RLLI specifically says that such external sources of meaning are "legal authorities" and not "extrinsic evidence,"[43] unless used for an evidentiary purpose.

*Section 3 makes clear that the decision about plain meaning should consider how terms are used in the insurance policy as a whole.*

In a more controversial point for policyholders, the comments state that "[c]onsideration of custom, practice, and usage at the plain-meaning stage does not . . . open the door to extrinsic evidence of the parties' specific or subjective intent or understanding regarding the insurance policy, such as drafting history, course of dealing, or precontractual negotiations."[44] As courts across the country have concluded, drafting history and course of dealing evidence can provide important evidence of the insurance industry's intent about the meaning of boilerplate used in standard-form insurance contracts.[45] For example, courts may conclude that custom and practice evidence can be used to determine plain meaning. A comment to section 3 provides:

> Some courts that follow a plain-meaning rule also consider custom, practice, and usage when determining the plain meaning of insurance policies entered into between parties who can reasonably be expected to have transacted with knowledge of the custom, practice, or usage. The plain-meaning rule adopted in this Section follows this approach, which recognizes that informed insurance-market participants conduct their business

of law" and "is the process of determining the meaning of the terms of an insurance policy."[30]

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in light of custom, practice, and usage in the insurance market and in the trade or business being insured.[46]

However, in a further nod to insurance company preferences, as widely expressed particularly in the final years of RLLI drafting, the comments state: "custom, practice, and usage refer only to aspects of the insurance market or the trade or business being insured that are so widely known as to form a shared backdrop against which an insurance policy is reasonably understood to have been written and executed."[47] Under the RLLI's formulation, these sources of evidence come into play only if insurance policy terms are considered ambiguous under the facts of the claim.[48] Other accepted sources of authority confirm the propriety of using such evidence to interpret contracts. For example, under the Uniform Commercial Code, parties in a particular industry or trade are bound by a usage about which they knew or should have known.[49]

*Legislation attacking the RLLI likely will increase uncertainty, rather than reduce it.*

These RLLI provisions do not conform to general rules of contract interpretation in the many jurisdictions that follow the contextual approach of the *Restatement (Second) of Contracts*.[50] The RLLI also could be read to preclude use of "factual matrix" or factual background evidence that could include drafting history or other evidence that does not contradict the terms of the contract. As Judge Abraham Sofaer found in the landmark case *American Home Products Corp. v. Liberty Mutual Insurance Co.*,[51] "[t]he background of the CGL, and the relationship that existed between these parties, are relevant in supplementing the policy's plain meaning." In adopting an "injury-in-fact" trigger of coverage, Judge Sofaer considered the documentary history of the CGL policy in detail, concluding that "[p]arol evidence can provide strong corroborative proof, however, of the parties' intent as suggested in their words."[52]

**Treatment of ambiguous policy terms.** The plain meaning does not apply if a term is found to be ambiguous. The RLLI adopted the generally accepted rule, applied to insurance policies and contracts alike, that a term is ambiguous "if there is more than one meaning to which the language of the term is reasonably susceptible when applied to the facts of the claim at issue in the context of the entire insurance policy."[53] In that situation, the term is construed against the party that supplied it.[54] Because the standard-form terms are supplied by insurers, the rule of ambiguity nearly always favors policyholders.

**Middle ground for interpretive rules.** The RLLI's movement from the presumption of plain meaning to the plain meaning rule was favored by insurers. However, the RLLI specifically identifies various kinds of information, such as dictionaries and legal authorities, that may be used without a finding of ambiguity. This is only sensible as courts can always cite to existing law and should be able to consult dictionaries, for example, in deciding how insurance policy terms should apply in the context of a specific claim. The allowance of insurance industry custom and practice generally is another example of a middle ground.

The RLLI rejected some commonly accepted doctrines of policy interpretation. For example, the RLLI does not adopt the reasonable expectations doctrine, a doctrine that is widely accepted[55] but reviled by insurers. The RLLI also specifically rejects[56] the latent ambiguity rule that is applied in some states[57]—another doctrine that insurance companies typically oppose.

Thus, even if the RLLI did not go "far enough" to protect insurers with the plain meaning rule (by allowing some information outside of the four corners of the policy), if the project were truly biased against insurers and in favor of policyholders, it could have adopted and endorsed an even more open-ended use of extrinsic evidence, as well as the pro-policyholder reasonable expectations doctrine and latent ambiguity rule.

## Legislative Efforts to Oppose the RLLI

Despite the rigorous work that went into the RLLI and the input included from a wide variety of constituencies, including insurer counsel and a liaison from the American Insurance Association (AIA),[58] the insurance industry has mounted a coordinated campaign to discredit not only the RLLI but also the ALI itself, through media[59] and legislation in statehouses around the country.[60] A working group of insurance industry organizations, insurers, and their counsel has coordinated to "fund opposition to the ALI's representation of minority positions as established law"[61] and to oppose the RLLI even when it states (as it does in the vast majority of instances) the majority rule or supports the insurers' litigation position.[62]

On the legislative front, in March 2019, NCOIL circulated its "Model Act Regarding Interpretation of an Insurance Policy," patterned after legislation passed in Tennessee in 2018 (a year before the final RLLI was published) to require application of the plain meaning rule to interpretation of insurance policies.[63] NCOIL's preface to the model language encouraged states to "avoid the 'Restatement of the Law, Liability Insurance' . . . being construed as the state's settled law on this issue."[64] A revised version, serving as a model for legislation, provides that a court cannot follow the RLLI if it

is "inconsistent or in conflict with" the U.S. or state constitution or the state's statutes or common law.[65] In fact, courts are unlikely to follow a secondary source, however well respected, if the laws of the state are to the contrary. As a Minnesota appellate court explained years before the RLLI began, "Restatements of the law are persuasive authority only and are not binding unless specifically adopted in Minnesota by statute or case law."[66]

Legislation, of course, plays an important role in insurance regulation and in setting standards (e.g., claims handling and settlement standards). However, the proposed legislation, while recognizing the primacy of state statutes and common law, typically makes no distinction between rules that favor insurers and those that favor policyholders. The legislation makes no effort to consider the RLLI's many black-letter rules or the elaboration contained in the comments on comparable state statutes or common law. Consequently, as pointed out to the Arizona state legislature by former chief justices of the Arizona Supreme Court, legislation attacking the RLLI likely will increase uncertainty, rather than reduce it as proponents tend to argue.[67] The statutes could distort the process of developing the common law—that body of law developed when courts resolve specific controversies and disputed facts, and with regard to which courts around the country typically have consulted restatements and other secondary sources.

But legislation is not designed to resolve disputes about how a specific insurance policy applies to a specific claim or set of facts. In addition, many of the principles used regularly in insurance coverage practice have developed (and will continue to develop) in the common law, and not from legislation.[68] The proposed legislation, by seeking to direct the courts to disregard the RLLI, could interfere with judicial independence and separation of powers. Over time, it is possible that negative consequences could result from this organized effort to undermine the RLLI. It could interfere with the development of the common law, which could create uncertainty and reduce the confidence of the insurance-buying public, companies and individuals alike.

## Conclusion

Although the black-letter law of RLLI section 3 was ultimately revised to meet the insurance industry's objections, efforts to undermine the RLLI have continued. The model legislation from NCOIL (and similar legislation introduced in many state legislatures around the country) is one example. Regardless of those efforts, the RLLI has embraced the plain meaning rule even though its approach is at odds with the broader use of extrinsic evidence in contract interpretation. However, the RLLI recognizes that "plain meaning" is not always "plain." It recognizes that certain kinds of extrinsic information can be used to supplement the understanding of the plain meaning and that extrinsic evidence may be used when the terms are ambiguous. While insurers may object that the plain meaning approach ultimately taken by the RLLI does not go far enough, in this author's view the RLLI takes the middle-ground approach by permitting the use of dictionaries, legal authorities, and custom and practice as part of the plain meaning inquiry. ◀

## Notes

1. During the first four years, the project was a principles project. In part as a result of concerns raised by the insurance industry, in 2014, the ALI changed the project from a principles project to a restatement. For a discussion of the distinctions between ALI principles and restatements, see https://www.ali.org/about-ali/how-institute-works.

2. Letter from ALI Deputy Dir. to NCOIL CEO & Gen. Counsel 1 (Apr. 3, 2019).

3. *Id.*

4. Press Release, NCOIL, NCOIL Adopts Model Act Concerning Interpretation of State Insurance Laws (July 25, 2019), http://ncoil.org/2019/07/25/ncoil-adopts-model-act-concerning-interpretation-of-state-insurance-laws. An obvious example of the RLLI rejecting a policyholder-oriented rule and instead using a rule favoring insurers is section 41, which uses a pro rata allocation for long-tail harm claims. *See* Restatement of the Law, Liability Insurance § 41 (Am. Law Inst. 2019). Policyholder advocates argued that section 41(1)(a)'s "time-on-the-risk allocation" is not the "majority rule." *See* Lorelie Masters, *Examining the Restatement of the Law, Liability Insurance*, Risk Mgmt. (July 10, 2017), http://www.rmmagazine.com/2017/07/10/examining-the-restatement-of-the-law-liability-insurance.

5. Principles of the Law of Liability Insurance, at xi (Am. Law Inst., Preliminary Draft No. 2, July 23, 2014); *see also* Lorelie S. Masters et al., *The American Law Institute Principles/Restatement of the Law of Liability Insurance: Part III—Selected Comments from a Policyholder Perspective*, *in* New Appleman on Insurance: Current Critical Issues in Insurance Law 2 n.3 (2015).

6. Restatement of the Law, Liability Insurance § 2 cmt. c (Am. Law Inst. 2019) ("Objectives of liability-insurance-policy interpretation").

7. Restatement (First) of Contracts § 230 (1932) (noting that when a contract is integrated, the "standard of interpretation . . . is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances").

8. Restatement (Second) of Contracts § 212 (1981) (noting that an integrated contract is to be interpreted according to the "meaning of the terms of the writing or writings in light of the circumstances").

9. Restatement of the Law, Liability Insurance § 3 cmt. a (Am. Law Inst. 2019).

10. Restatement of the Law, Liability Insurance § 3 (Am. Law Inst., Preliminary Draft No. 1, Mar. 2, 2015). In the earliest draft of the principles project, the proposed rule was simply to interpret "plain meaning . . . by reference to . . . [t]erms . . . interpreted in light of their purpose and in the context of the insurance policy as a whole." Principles of the Law of Liability Insurance § 1.10 (Am. Law Inst., Preliminary Draft No. 1, Feb. 17, 2011). The "purpose"

of the policy was to be determined by the "context of the insurance policy, the drafting history of the policy, and expert testimony." *Id.* § 1.10 cmt. b.

11. *See* RESTATEMENT OF THE LAW, LIABILITY INSURANCE § 3 reporters' note a (AM. LAW INST., Proposed Final Draft, Mar. 28, 2017) ("The plain-meaning presumption represents a middle point on that continuum [between reliance solely on the text and full consideration of extrinsic evidence].").

12. As evidenced by, for example, the RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 7.

13. As evidenced by, for example, the RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 8.

14. RESTATEMENT OF THE LAW, LIABILITY INSURANCE § 3(1) (AM. LAW INST., Preliminary Draft No. 1, Mar. 2, 2015).

15. *Id.* § 3 cmt. c.

16. *See, e.g.*, BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK OF INSURANCE COVERAGE DISPUTES § 1.01 (19th ed. 2019); JEFFREY W. STEMPEL, LAW OF INSURANCE COVERAGE DISPUTES § 4.04 (2d ed. 1999 & Supps. 2000–2005); *accord* LORELIE S. MASTERS ET AL., INSURANCE COVERAGE LITIGATION § 2.03 (2d ed. 2000 & Supp. 2020).

17. RESTATEMENT OF THE LAW, LIABILITY INSURANCE § 3 cmt. c (AM. LAW INST. 2019) (providing that "[c]ustom, practice, and usage therefore can inform the court's determination of the objective meaning"). "Consideration of custom, practice, and usage at the plain-meaning stage does not, however, open the door to extrinsic evidence of the parties' specific or subjective intent or understanding regarding the insurance policy, such as drafting history, course of dealing, or precontractual negotiations." *Id.*

18. *See, e.g.*, William T. Barker, *The American Law Institute* Principles of the Law of Liability Insurance*: Part II—Selected Comments from an Insurer Perspective, in* NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW 4 (2015).

19. RESTATEMENT OF THE LAW, LIABILITY INSURANCE § 1(8) (AM. LAW INST. 2019) (defining mandatory rules).

20. *Id.* § 1 cmt. f. *See generally* Tom Baker & Kyle D. Logue, *Mandatory Rules and Default Rules in Insurance Contracts, in* RESEARCH HANDBOOK ON THE ECONOMICS OF INSURANCE LAW (Daniel Schwarcz & Peter Siegelman eds., 2015).

21. RESTATEMENT OF THE LAW, LIABILITY INSURANCE § 1 cmt. f (AM. LAW INST. 2019); *see also* MASTERS ET AL., *supra* note 16, § 1.02[A] ("Standardization" (citing authorities)); George Katz, *Why the New Liability Policy?*, INS. ADVOC. 32 (Sept. 24, 1966).

22. RESTATEMENT OF THE LAW, LIABILITY INSURANCE § 1 cmt. f (AM. LAW INST. 2019).

23. *Id.* § 4 cmt. h.

24. *Id.* § 4 cmt. d ("Interpretation against the supplier of the term"). However, the RLLI recognizes that terms can be ambiguous when applied to the facts of a particular claim, and that it is not possible to eliminate all ambiguity without leading to policies whose length and complexity could introduce their own ambiguities. *See id.* § 4 cmt. a.

25. *Id.* § 1(13).

26. *Id.* § 1 cmt. i. The RLLI recognizes the use of the same or similar concepts and terms from one policy form, and one kind of insurance, to another.

27. *Id.* § 4 cmt. f.

28. *Id.*

29. *See* Mark A. Geistfeld, *Interpreting the Rules of Insurance Contract Interpretation*, 68 RUTGERS U. L. REV. 371, 381–82 (2015) (citing Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323, 329 (1986)); *see also* MASTERS ET AL., *supra* note 16, § 2.01 & ch. 2.

30. RESTATEMENT OF THE LAW, LIABILITY INSURANCE § 2(1), (2) (AM. LAW INST. 2019).

31. *See id.* § 3 cmt. a ("This Section does not follow the Restatement Second of Contracts contextual rule because a substantial majority of court insurance cases have adopted a plain-meaning rule."); *see also* 1 JEFFREY E. THOMAS, NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 5.02[2] (2020).

32. RESTATEMENT OF THE LAW, LIABILITY INSURANCE § 3(2) (AM. LAW INST. 2019).

33. *Id.* § 3(3).

34. *See, e.g.*, Laura A. Foggan & Rachael Padgett, *Rules of Policy Interpretation Reflect Lingering Policyholder Bias in the ALI's* Restatement of the Law, Liability Insurance, 50 BRIEF 26 (Fall 2020).

35. *See, e.g.*, Masters et al., *supra* note 5, § V[a][2].

36. RESTATEMENT OF THE LAW, LIABILITY INSURANCE § 3 cmt. a (AM. LAW INST. 2019).

37. *Id.* § 2(3).

38. *See, e.g.*, Foggan & Padgett, *supra* note 34, at 30 ("Most significantly, in tension with the law and now black-letter RLLI rule on plain meaning, the reporters continue to show their preference for dislodging the plain meaning rule and considering materials outside the contract to determine the meaning of a policy term."). A source of controversy in many insurance coverage disputes is use of insurance industry "custom and practice" evidence and other evidence that insurers consider to be extrinsic—and thus both inadmissible and beyond the scope of discovery. Decisions can be found on both sides of this issue, but courts often use such evidence. *See* MASTERS ET AL., *supra* note 16, ch. 2.

39. *See* RESTATEMENT OF THE LAW, LIABILITY INSURANCE § 3 cmts. b, c (AM. LAW INST. 2019). The RLLI does not consider dictionaries, legal authorities, secondary authorities, or custom and usage to be "extrinsic evidence." *Id.* The RLLI also draws a distinction between extrinsic evidence and the parol evidence rule. *Id.* cmt. i, reporters' note i.

40. *Id.* § 3 cmt. c.

41. *Id.*

42. *Id.* § 3 cmt. b.

43. *Id.*

44. *Id.* § 3 cmt. c.

45. *E.g.*, Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981) (trigger of coverage); Hoechst Celanese Corp. v. Certain Underwriters at Lloyd's London, 673 A.2d 164 (Del. 1996) (definition of "property damage"); Morton Int'l, Inc. v. Gen. Accident Ins. Co., 629 A.2d 831 (N.J. 1993) ("sudden and accidental" pollution

exclusion); Belt Painting Corp. v. TIG Ins. Co., 795 N.E.2d 15 (N.Y. 2003) ("absolute pollution exclusion").

46. Restatement of the Law, Liability Insurance § 3 cmt. c (Am. Law Inst. 2019).

47. *Id.*

48. *Id.* § 3 cmt. d.

49. U.C.C. § 1-205(3).

50. *See* Restatement of the Law, Liability Insurance § 3 cmt. a (Am. Law Inst. 2019) ("Under the contextual approach, which was adopted in the Restatement Second of Contracts, courts interpret insurance policy terms in light of all the circumstances surrounding the drafting, negotiation, and performance of the insurance policy. . . . This Section does not follow the Restatement Second of Contracts contextual rule . . . ."). For a reference to the contextual rule, see Restatement (Second) of Contracts § 112 cmt. b (1981) ("[The rule that an integrated agreement should be interpreted in light of the circumstances] is not limited to cases where it is determined that the language used is ambiguous. Any determination of meaning or ambiguity should only be made in light of the relevant evidence of the situation and relations of the parties, subject matter of the transaction, preliminary negotiations and statement made therein, usages of trade, and the course of dealing between the parties.").

51. 565 F. Supp. 1485, 1500 (S.D.N.Y. 1983), *aff'd and modified*, 748 F.2d 760 (2d Cir. 1984).

52. *Id.*

53. Restatement of the Law, Liability Insurance § 4(1) (Am. Law Inst. 2019).

54. *Id.* § 4(2).

55. *See, e.g.*, Masters et al., *supra* note 16, § 2.05.

56. Restatement of the Law, Liability Insurance § 4 cmt. b (Am. Law Inst. 2019) ("Using external sources of meaning to determine whether a term is ambiguous").

57. See discussion of ambiguity and latent ambiguity in Masters et al., *supra* note 16, ch. 2 (generally) & § 2.05 (specifically).

58. Except for a short time around 2013, when it quit the process, the insurance industry was represented in the RLLI process by a liaison from the AIA. The name of the liaison is listed in the various drafts of the RLLI immediately after the list of advisers. *See, e.g.*, Restatement of the Law, Liability Insurance, at vi (Am. Law Inst., Proposed Final Draft No. 2, Apr. 13, 2018).

59. *See, e.g.*, Patricia McHugh Lambert, *How Will States Respond to the Restatement of the Law, Liability Insurance?*, JD Supra (July 8, 2019), https://www.jdsupra.com/legalnews/how-will-states-respond-to-the-96410; Kim Marrkand, *ALI Shouldn't "Teach" Insurance Restatement in a Courthouse*, Law360 (Feb. 11, 2019), https://www.law360.com/articles/1127838/ali-shouldn-t-teach-insurance-restatement-in-a-courthouse; *Several More States Respond to the ALI's Restatement of Liability Insurance*, O'Meara Leer Wagner Kohl (Apr. 23, 2019), https://www.olwklaw.com/OLWK/19_04_23_Restatement_Legislation.pdf; Alan Smith, *As an Unelected Legal Organization Attempts to Rewrite Insurance Law, Indiana Legislators Are Pushing Back*, Ins. J. (Apr. 22, 2019), https://www.insurancejournal.com/blogs/right-street/2019/04/22/525145.htm.

60. Statutes addressing the RLLI include Ark. Code Ann. § 23-60-112 (enacted Apr. 5, 2019); Mich. Comp. Laws § 500.3032 (enacted Dec. 2018; effective Jan. 1, 2020); N.D. Century Code § 26.1-02-34 (enacted Mar. 21, 2019); Ohio Rev. Code Ann. § 3901.82 (effective Oct. 29, 2018); Tenn. Code Ann. § 56-7-102 (enacted Mar. 2018); and Tex. Civ. Prac. & Rem. Code Ann. § 5.001. Some have been attached as riders to otherwise irrelevant bills. Resolutions include Ind. H.R. Con. Res. 62 & H.R. Res. 86, 2019 Gen. Assemb. (both adopted Apr. 24, 2019); Ky. H.R. Res. 222, 2018 Gen. Assemb. (adopted Mar. 27, 2018); and La. S. Res. 149, 2019 Leg. (adopted May 30, 2019). Bills on the RLLI were introduced in at least nine states in early 2020, including Ariz. H.R. 2644, 54th Leg.; Fla. H.R. 359, 2020 Leg.; Iowa S. Study B. 3014 & Iowa H.R. 513, 88th Gen. Assemb.; Ky. H.R. 150, 2020 Gen. Assemb.; Mo. H.R. 2106 & S. 939, 100th Gen. Assemb.; Neb. Legis. B. 884, 106th Leg.; Okla. S. 1692, 57th Leg.; S.C. S. 1036, 123d Gen. Assemb.; W.Va. H.R. 4436 & S. 772, 84th Leg.

61. *Our Positions: American Law Institute (ALI)*, NAMIC, https://www.namic.org/Issues/american-law-institute (last visited Oct. 12, 2020) ("NAMIC and AIA have enlisted a working group of insurance companies to coordinate and fund the opposition to the ALI's improper representation of minority positions as established law.").

62. In ruling for insurers, a California state court noted that their antipathy toward the RLLI (and, it seems, the ALI generally) was at odds with their litigation position: "Although Defendant Insurers see fit to denigrate the integrity of the American Law Institute's modern *Restatements*, the final draft of the [RLLI] supports Defendant Insurers' position." City of Los Angeles v. Certain Underwriters at Lloyd's, London, No. BC588876 (Cal. Super. Ct. 2020) (Kuhl, J.) (citing section 20). Judge Kuhl is a member of the ALI's council.

63. *See* Prop. & Cas. Ins. Comm., NCOIL, Draft Minutes (Mar. 17, 2019), http://ncoil.org/wp-content/uploads/2019/04/Nashville-PC-Minutes.pdf.

64. NCOIL, Model Act Regarding Interpretation of an Insurance Policy (2019), http://ncoil.org/wp-content/uploads/2019/02/Plain-Meaning-Model.pdf.

65. Press Release, NCOIL, *supra* note 4 (reporting model act adopted by NCOIL's executive committee on July 13, 2019).

66. Williamson v. Guentzel, 584 N.W.2d 20, 24–35 (Minn. Ct. App. 1998) (citing Mahowald v. Minn. Gas Co., 344 N.W.2d 856, 860 (Minn. 1984)). Court decisions also on occasion have rejected points of law set forth in restatements. *E.g.*, Cramer v. Starr, 240 Ariz. 4, 10 ¶ 21 (2016) (refusing to adopt section of *Restatement (Second) of Torts* as contrary to Arizona statutes and case law).

67. Letter from Hon. Ruth V. McGregor (ret.), Hon. Rebecca White Berch (ret.), and Hon. Scott Bales (ret.), Former Chief Justices, Ariz. Supreme Court, Opposing H.B. 2644 (on file with author).

68. Many restatements, like the RLLI, in truth consider this same mix of statutory and common law. Examples include the *Restatement of Contracts* and the *Restatement of Torts*.