Restatements and the Federal Common Law

Because of Erie, the phrase “common law” probably conjures in most lawyers’ minds the idea of state common law. And, not surprisingly, the Restatements are generally identified with state common law rules. Indeed, our influence on state common law rules has been widely recognized since the publication of the First Restatement. Around the time of our 75th anniversary, Michael Traynor, then the ALI President, wrote about the Institute’s “significant contributions to unifying as well as simplifying and clarifying the law, primarily (although not exclusively) state law.” That story is now well known.

In this letter, I will focus on a different, less discussed front: federal common law. The ALI’s influence on this front is more recent. For example, an electronic search of “federal common law” in Supreme Court opinions that also referred to “Restatement” or “Restatements” revealed that the first case to satisfy these two conditions was decided in 1953—and it was the only case from the 1950s. There were then two such cases in the 1960s, two in the 1970s, 13 in the 1980s, 20 in the 1990s, 10 in the 2000s, and, so far, eight in the 2010s. Approximately half of these cases were decided after 1994. In contrast, only 32% of all references to “Restatement” or “Restatements” can be found in cases decided after that date.

An analysis of decisions of the U.S. Courts of Appeals reveals a similar pattern. There, approximately half the cases referring to “federal common law” and “Restatement” or “Restatements” were decided after 1996. By comparison, only 37% for all Restatement citations can be found in cases decided since then.

Though somewhat recent, the influence of Restatements on the federal common law is extremely significant. In fact, there are many instances in which the courts not only adopt a specific Restatement rule but also indicate that the Restatements are the way to determine the federal common law rules in a whole area. Three examples of this phenomenon follow.

RESTATEMENT OF CONFLICTS OF LAWS. The Second Circuit has said that “when conducting a federal common law choice-of-law analysis, absent guidance from Congress, we may consult the Restatement (Second) of Conflict of Laws,” and that “federal courts frequently consult the Restatement (Second) of Conflict of Laws in crafting [federal common law conflict of law] principles.” The Fifth, Sixth, and Eleventh Circuits have also indicated that they follow the Restatement in federal common law conflicts of law. In a number of cases, the Ninth Circuit has stated directly that “[f]ederal common law follows the approach of the Restatement (Second) of Conflicts of Laws.”

RESTATEMENT OF TORTS. This Restatement has been particularly influential under the Comprehensive Environmental Response, Liability, and Compensation Act (CERCLA). For example, the Fourth Circuit noted: “We think these principles, as reflected in the Restatement (Second) of Torts, represent the correct and uniform federal rules applicable to CERCLA cases.” The Third Circuit has explained that “[b]y adhering to the rules set forth in the Restatement, we also further the interest in achieving uniformity in the articulation of federal common law that governs CERCLA’s interstices.”

RESTATEMENT OF CONTRACTS. The D.C. Circuit has noted the tendency of federal courts to follow the Restatement and indicated that it “would be inclined to fashion a federal common law rule” from the principles of the Restatement because they “represent the ‘prevailing view’ among the states.” Similarly, the Federal Circuit has said that “[t]he Restatement of Contracts reflects many of the contract principles of federal common law,” and the Fourth, Sixth, and Eleventh Circuits have all explicitly looked to the Restatement as a source for the federal common law of contracts. Earlier this year, the Ninth Circuit stated that “federal common law . . . looks to ‘general principles for interpreting contracts.’ Often, those general principles are found in the Restatement (Second) of Contracts.”

The three preceding examples are not unique. For example, the Seventh Circuit has recognized that “in developing the federal law of agency, courts have relied on the Restatement of Agency as a valuable source for those general agency principles.” It has also indicated that “[f]ederal common law tracks the consensus of states, which have developed the law of restitution. We therefore turn to the Restatement of Restitution (1937), which summarizes the dominant themes of state common law.”

Similarly, the Supreme Court has noted that “[i]n determining whether a hired party is an employee under the general common law of agency, we have traditionally looked for guidance to the Restatement of Agency.” More generally, after observing that “the courts of appeals have acknowledged that ‘[f]ederal common law . . . looks to the Restatement as a source for the federal common law of contracts.’” the Court proceeded to apply the Restatement standard in a CERCLA case.

The use of Restatements in federal common law cases raises some distinct issues. First, Restatements should be understood as being addressed to federal judges as well as to state judges, which many regard as our target audience. Moreover, with respect to decisions involving federal common law, as opposed to state law, Restatements are relevant to the work of the Supreme Court. And, for federal common law cases, Restatements face a different institutional context because there is a mechanism—review by the Supreme Court—for resolving conflicts that is lacking for state law. One traditional argument for the value is Restatements is that they promote the harmonization the law in a context is in which no state court has the institutional authority to effect such harmonization. It is therefore noteworthy that Restatements have become so important to the development of federal common law, where the Supreme Court can play the harmonizing role.

Editor’s Note: A version of this Director’s Letter that includes a bibliography of related material with links to relevant documents is posted on the News page of the ALI website: www.ali.org/news.