The ALI Legacy Continues with Restatement Fourth of U.S. Foreign Relations Law

In the mid-1950s, lawyers, judges, and legal scholars gathered in New York City to discuss ALI’s possible work on a project in the field of foreign relations law. Future project Reporter Adrian S. Fisher noted that, at the time of its introduction, this Restatement presented two issues nonexistent in previous Restatements. First, foreign relations law was more the concern of the government attorney, and less the concern of the private attorney, than any of the other fields covered by a Restatement. Second, in order for this work to be of lasting value, it needed to be persuasive to lawyers in other countries.

It was precisely these two hurdles that made ALI the right organization to assemble a study of utility in understanding foreign relations law. The Institute held a level of objectivity and detachment that no government group could possess, and inviting lawyers from other countries to serve as participants in the drafting of the Restatement assured that the Institute’s reputation of having a diversity of experience from the best legal minds remained intact. The result of this effort was the Restatement Second of U.S. Foreign Relations Law, published in 1965.

ALI entered this area of law without compromising the integrity and authority for which Restatements had been known. The Restatements Second and Third (1987) have been enormously influential. But the world continues to change and with it so does the rule of law.

A reexamination of this Restatement began in October 2012. When the Council approved the project, it decided not to launch a full revision of the Restatement Third at that time. Instead, it limited the scope of the project to

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diversity jurisdiction. In turn, those federal courts are largely bereft of any state law moorings as they develop the common law of the electronic marketplace. *Erie Railroad v. Tompkins* notwithstanding, the common law is driven by federal court decisions, building incrementally on each other rather than state law.”

And, because the common law in this area is developing in federal court rather than in state court “there is no apex court that can define conclusively the law of any jurisdiction.” This litigation pattern poses a significant challenge to the traditional view of state supreme courts as the primary expositors of the common law: “Diversity jurisdiction allows federal courts to predict how they believe state common law would develop, but binds no state courts in the affected jurisdiction, and does not even bind federal courts in the same Circuit ...” How do dominant rules emerge under these conditions?: “[W]e identify a ‘tournament effect’ in which the law settles on one or a few influential decisions, regardless of the state law that the case may have arisen under.”

As Florencia and Sam recognize, these shifts affect the way in which the ALI produces Restatements: “[T]he traditional ALI approach has been to identify the majority rule from the most recent decisions of the highest state courts.” But in the electronic marketplace, the situation is quite different: “The normal process of hierarchical filtration does not occur. Looking at high state courts in this area would offer only a stale and incomplete reflection of current law.”

So, how does a legal rule become dominant under these circumstances? Florencia and Sam explain:

“[T]he weight of decisional law is how innovative, dispositive and persuasive it is. This translates into a constant tournament for authority, unlike the normal hierarchy of state law controlled by the state supreme court. Law likes clarity and in the absence of clarity through hierarchy, there is clarity through tournament. But, as with the U.S. Open, the first rounds are entertaining, but at some point we need to reach the finals. The law’s search for clarity in the absence of hierarchy might increase the likelihood of producing tournament winners.”

They suggest that for cases that are viable only as class actions and are therefore adjudicated primarily in federal court under diversity jurisdiction (a pattern they attribute to multidistrict litigation and the Class Action Fairness Act), the ALI must search for these tournament winners to determine its Restatement rules. And, they point out that empirical techniques are well suited for this task.

This new pattern of cases does not require a reconceptualization of the ALI’s work. The goal remains the same. In the words of our Style Manual, Restatement rules must be “clear formulations of common law,” which “reflect the law as it presently stands or might appropriately be stated by a court.” Regardless of how claims are adjudicated, our Restatements are designed to guide the exercise of judicial discretion. But somewhat different techniques are called for to determine what rules should form part of Restatements when the relevant litigation takes place primarily in the federal courts under diversity jurisdiction: simply counting how many state supreme courts adopted a particular rule will not do the trick.

Citations to Tentative Drafts after last year’s Annual Meeting can be found on pages 6-7. That these updated Sections of the Restatement Fourth have already been cited shows once more that the desire for clarification in the law remains.

**Restatement Fourth of U.S. Foreign Relations Law Official Text**

The Restatement Fourth of U.S. Foreign Relations Law, may be pre-ordered now. This publication addresses the U.S. approach to three areas of foreign relations law, with limitations:

- **Treaties** but not other forms of international agreements
- **U.S. views on Jurisdiction**, but not generally on separation of powers or federalism
- **Sovereign Immunity**, but not other immunities required or regulated by international law

Additional areas of the Restatement Third are likely to be addressed in future discrete projects within the Fourth Restatement.

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