Lobbying and the Restatement of Torts

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Elizabeth Laposata, Richard Barnes, & Stanton Glantz, Tobacco Industry Influence on the American Law Institute's Restatements of Torts and Implications for Its Conflict of Interest Policies, 98 **Iowa L. Rev.** 1 (2012).

With such a title, how could a tort scholar not want to read the new working paper by Laposata, Barnes, and Glantz? The Restatement plays a very prominent role in tort law; many courts cite its provisions. The thought that the tobacco industry may have influenced its development is unsettling.

The authors present a fair amount of worrisome evidence of efforts by tobacco lawyers to influence the Restatement, especially the Second Restatement, under the direction of Reporter William L. Prosser. The evidence is largely circumstantial. Drafts of various parts appear to change after tobacco lawyers intervene. The final draft of Restatement §402A, on products liability, includes an explicit exemption for "good tobacco."

The authors present a strong argument, but I am reluctant to accept all of it. They are right that the Restatement process is vulnerable to outside influence, much more so than are courts, and that this is a serious problem. On the other hand, their most worrisome example of outside influence, Prosser's work on Restatement Second §402A, is one that I do not find especially troubling.

First, Prosser's work, overall, shows the highest level of concern for doctrinal accuracy that one can find in perhaps all of torts scholarship. It would be a shame to sully his reputation in the absence of very strong evidence, which I don't think is provided here. The fact that tobacco lawyers attempted to lobby Prosser is not surprising – a lot of people try to lobby Restatement reporters, depending on the subject matter. I am inclined to believe that Prosser's final draft reflects conclusions that he had come to believe were correct – irrespective of what the tobacco lawyers were saying. In the Restatement process, as in the legislative process, lobbying is not the same thing as writing the final product.

Another factor that makes the inference that Prosser caved in to tobacco lobbyists unpersuasive is the structure of Restatement Second §402A. Products liability law has changed quite a bit since §402A was initially published in 1965. Today, defective design liability is dominated by the risk-utility test. However, Restatement Second §402A presents the "consumer expectations" test as the standard for strict products liability. Under the §402A test, a product was defective if it failed to meet the expectations of the ordinary consumer. By the time §402A was finalized, much information had been made available to the public on the dangers of cigarette smoking; the first cigarette label warnings appeared in 1966. It is not obvious to me that tobacco would require condemnation under the consumer expectations test; it was viewed in the mid-1960s as a product with obvious risks. Consumers who continued smoking after the mid-1960s mostly did so in the face of clear warnings. It strikes me as plausible that Prosser may have concluded that "good tobacco" was a product that generally met the expectations of the consumer. It may have taken him some time to reach that conclusion, and he may have been exposed to letters from tobacco lawyers along the way, but none of this would require us to conclude that he had been co-opted by the tobacco industry.

The authors' general point remains. The Restatement process is vulnerable to lobbying. But the

Restatement is not the law – it is an effort to codify common law in the form of rules. Courts rely on the Restatement at their own risk. If a Restatement reporter is unduly influenced by a lobbyist, or is unduly influenced by his own idealistic vision of the law, then it is up to judges to take the Restatement with a grain of salt.

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