Reevaluation Of The Restatement As A Source Of Law In Arizona

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The many citations in judicial decisions to the *Restatement of the Law*[1] indicate the wide acceptance which this work has come to enjoy. Without a more extensive analysis, however, such a compilation of citations fails to indicate the precedential weight given to the Restatement by these courts.[2] While many jurisdictions utilize the Restatement,[3] the Supreme Court of Arizona has expressly announced that it would follow the Restatement absent relevant prior decisions or legislative enactments.[4] If taken literally, such an announcement would indicate that in Arizona the Restatement has achieved the status of primary legal authority. Such an interpretation seems untenable since the Restatement principles do not represent law in the sense of final judicial decisions or legislative enactments.

This comment will briefly survey the development of the Restatement[5] and examine its status in the hierarchy of legal authority. The

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1. As of April 1, 1973 there had been 48,580 citations to paragraphs of the various Restatements by state and federal courts. THE AMERICAN LAW INSTITUTE, 1973 ANNUAL REPORT, 50TH ANNUAL MEETING 24 (1973) [hereinafter cited as A.L.I. ANNUAL REPORT]. As of April 1, 1973 Arizona courts cited to various Restatements 952 times. *Id.*

2. Milner, *Restatement: Failure of A Legal Experiment*, 20 U. PITT. L. REV. 795, 799 (1959).

3. All 50 states have cited to the Restatement. *See* A.L.I. ANNUAL REPORT, *supra* note 1, at 24.

4. *See* Smith v. Normart, 51 Ariz. 134, 143, 75 P.2d 38, 42 (1938). *See also* Irwin v. Murphey, 81 Ariz. 148, 302 P.2d 534 (1956); Rodriquez v. Terry, 79 Ariz. 348, 290 P.2d 248 (1955); Bristor v. Cheatham, 75 Ariz. 227, 225 P.2d 173 (1953); Ingalls v. Neidlinger, 70 Ariz. 40, 216 P.2d 387 (1950); Western Coal & Mining Co., v. Hilvert, 63 Ariz. 171, 160 P.2d 331 (1945); Waddell v. White, 56 Ariz. 525, 109 P.2d 843 (1941). Arizona appears to be the only jurisdiction which has given the Restatement this weight.

5. Throughout this comment, reference will be made to the "original" and "Second" Restatements. The original Restatement is that produced by the American Law Institute from 1923-44. This 21 year period of work resulted in 24 volumes consisting of over 17,000 pages. H. GOODRICH & P. WOLKIN, THE STORY OF THE AMERICAN LAW INSTITUTE 1923-1961, 10-11 (1961). Beginning in 1957, the Institute began revision and reexamination of the Restatement. To date, the RESTATEMENT (SECOND) OF AGENCY (1958), RESTATEMENT (SECOND) OF TRUSTS (1959), RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1951) and RESTATEMENT OF FOREIGN RELATIONS LAW (1965) have been completed. RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 19, 1973),

use of the Restatement by Arizona's courts will be traced and its proper role in judicial decision-making will be suggested.

ORIGIN AND DEVELOPMENT OF THE RESTATEMENT

The Arizona position on the Restatement can best be explained and evaluated by considering the purpose and objects of the original Restatement. Early in the 1920's, "The Committee on the Establishment of a Permanent Organization for the Improvement of the Law" presented its findings to the legal community concerning the state of American jurisprudence.[6] According to this Committee, which was comprised of prominent American judges, lawyers and law teachers, the two pervasive defects in the American legal system were its complexity and uncertainty.[7] In the hope of creating an entity capable of alleviating these defects, the Committee recommended the creation of the American Law Institute (ALI). The Committee also suggested that the initial project of the Institute should be the production of a restatement of the law.[8]

Originally, it was determined that the function of the Restatement would be to codify this country's common law in an effort to encourage uniformity among jurisdictions. Lawyers and judges then could look to a single trustworthy source in determining the state of the law.[9] Thus, the founders of the ALI intended merely to restate what had been the majority view up until that point in time, without offering an educated guess as to what the law ought to be.[10] It was

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RESTATEMENT (SECOND) OF JUDGMENTS (Tent. Draft No. 1, 1973), RESTATEMENT (SECOND) OF CONTRACTS (Tent. Draft No. 8, 1973) and RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant) (Tent. Draft No. 1, 1973) are near completion. *See* THE AMERICAN LAW INSTITUTE 50TH ANNIVERSARY 141-58 (1973).

6. *See generally* H. GOODRICH & P. WOLKIN, *supra* note 5.

7. *See id.* at 5. Several factors contributed to the uncertainty in the law: the lack of agreement among members of the legal profession as to the fundamental principles of the common law, conflicting statutory provisions, a lack of preciseness in the use of legal terms and the ignorance of judges and lawyers. *Id.* at 7.

8. *Id.*

9. *Id.* at 8. The initial project produced restatements in nine areas: contracts (1932); agency (1933); conflict of laws (1934); trusts (1935); restitution (1937); torts (1939); security (1941); judgments (1942); and property (1944). *See* Wechsler, *The Course of the Restatements*, 55 A.B.A.J. 147 (1969). In the eyes of the American Law Institute, the Restatement would dispel uncertainty if deferred to as "an authority greater than . . . any legal treatise, an authority more nearly on par with that accorded the decisions of the courts." H. GOODRICH & P. WOLKIN, *supra* note 5, at 8.

10. As early as 1937 an Advisor to the Institute declared:

> In the fresh flush of enthusiasm the accepted notion was that the Restatement would stand on its own authority. It would give no reasons; it would cite no authority; it would state no history; it would concede no doubt or divergence. There was to be no law but law, and the Institute was to be the prophet of the law. The blackletter was to be law because we said so, and that was that.

Leach, *The Restatements as They Were in the Beginning, Are Now and Perhaps Henceforth Shall Be*, 23 A.B.A.J. 517-18 (1937). *See also* W.D. LEWIS, *History of*

eventually realized, however, that if the Restatement remained static, without reflecting current changes and developments in the law, its effectiveness would be lessened.

Updating the original Restatement to reflect developments and changes in the law began in the early 1950's. Whereas the original Restatement was a code in the old form—a set of rules stated with little explanation—seeking solely to codify the common law,[11] the Second Restatement assumed a new direction. Although the Second Restatement, in many instances, also simply codifies the common law, where a new trend appears to be marked clearly, the authors often attempt to predict with reasonable certainty what the new rule will be.[12] Even where the course of a new trend is not yet clearly marked, the Second Restatement sometimes attempts to trace the development of an unsettled question and formulate what the Institute believes the proper rule should be.[13] Following such a formulation, the Institute adds the disclaimer that there exists little or no judicial authority in support of its conclusions.[14] The rationale for this shift from the original Restatement's inflexible codification policy was the belief that if the Restatement is to fulfill its function, it must reflect current legal changes and developments.[15]

PRECEDENTIAL AUTHORITY OF THE RESTATEMENT

The ALI appears to consider the number of judicial citations to the Restatement to be some measure of its success. But as was stated at the outset, such a compilation fails to disclose the precedential weight given to the Restatement by the citing courts. If used by a judicial body as the sole or main basis for its decision, the Restatement can be said to have been used as primary authority. Alternatively, if used only to bolster a court's decision which was reached by a process of reasoned analysis, then the Restatement has been used only as persuasive secondary authority. It is in keeping with the purposes of the American Law Institute that the Restatement be afforded this latter status; a source more authoritative than a treatise or an encyclopedia,[16] yet not having the force of primary authority. Indeed, a basic

The American Law Institute and the First Restatement of the Law in RESTATEMENT IN THE COURTS 1 (perm. ed. 1945).

11. Seavey, *The Restatement, Second, and Stare Decisis*, 48 A.B.A.J. 317, 318-19 (1962).

12. H. GOODRICH & P. WOLKIN, *supra* note 5, at 13.

13. *Id.* at 12-13.

14. *Id.* at 13.

15. *Id.* at 11.

16. *See id.* at 8. *See also* G. PATON, JURISPRUDENCE 231 (3d ed. 1964); E. PATTERSON, JURISPRUDENCE 222-23 (1953). One scholar has described the Restatement as a "valuable systematic summary of fundamental portions of private case law, not

difference exists between the function which the Institute was designed to serve and the function which a judicial body was designed to serve. This difference, which should preclude the pronouncements of the Institute from being considered as primary authority, was addressed by a past president of ALI

> Of course, the difference in the function of the Court and the function of the Institute calls for a very different method of procedure and of statement. The Courts must be alert constantly to make changes, to modify and to alter rules as conditions call for new decisions and new lines of approach. The Institute, on the other hand, confines itself to stating the law as it is. The purpose is that by means of a clear, concise, and accurate statement of the law, we can be of help to the courts directly and indirectly, through our usefulness to the bar in the presentation of their cases.[17]

The "law" of a state should be found in primary authority: its statutory and constitutional enactments and in the rulings of its courts.[18] Only judges, legislators and some administrative officials are directly or indirectly empowered to engage in the lawmaking process.[19] By limiting this power society is protected because these lawmakers, unlike the promulgators of the Restatement, can be held accountable to the people.[20] Moreover, when a court relies solely on secondary authority in support of its conclusions, an otherwise inferior authority takes on the characteristics of primary authority; and as such is subject to the interpretation that the secondary authority has become "law." The constitutionality of a court citing secondary authority as *law* has been questioned on the ground that this action represents an abdication of the judicial function to decide cases based only on judicial rulings, statutory enactments or the American common law.[21]

As noted above, the approach being taken in developing a Second Restatement evidences a radical shift in the policies of the Ameri-

enacted but having the unofficial authority of its able and learned reporters." E. PATTERSON, *supra*, at 425.

17. This statement comparing the function of the Institute with the function of the Supreme Court of the United States, was made by Harrison Tweed, past President of A.L.I. THE AMERICAN LAW INSTITUTE PROCEEDINGS 38 (1957).

18. Estate of Dauer v. Zabel, 9 Mich. App. 176, 180, 156 N.W.2d 34, 37 (1967).

19. *See* Merryman, *The Authority of Authority*, 6 STAN. L. REV. 613, 620 (1954).

20. *Id.*

21. Professor Albert Ehrenzweig has declared that for an Arizona court to accord primary authority status to the Restatements would constitute the unconstitutional abdication by that court of its judicial function. He reasoned:

> [w]here a case is not covered by statute or precedent, every court has the power and duty to adjudicate the case before it in the light of what it considers just in the particular case. It cannot divest itself of this power and duty by leaving the decision to another governmental body, let alone a private institution like the American Law Institute. [Footnote omitted].

Ehrenzweig, *The Restatement As A Source of Conflicts Law in Arizona*, 2 ARIZ. L. REV. 177, 178 (1960).

can Law Institute from the approach adopted in developing the original Restatement.[22] There has been no shift, however, as to the type of authority which the Restatement is intended to provide. This issue was addressed in the *History of the American Law Institute and the First Restatement of the Law*,[23] where it was stated:

> The Restatement is an agency tending to promote the clarification and the unification of the law in a form similar to a Code. But it is not a Code or statute. It is designed to help preserve not to change the common system of expressing law and adapting it to changing conditions in a changing world.[24]

Nevertheless, an argument could be made that since the original Restatement was no more than a mere codification of majority common law rules, no great harm was done to the judicial process by relying solely on these principles.[25] Given the Institute's shift in policy to setting forth principles which deviate from the majority rules, however, this argument would not apply to justify cases involving sole reliance by courts on the Second Restatement. Indeed, a Director of the American Law Institute has written recently that the Restatement, as originally written and as it has evolved, is "a modest but essential aid in the improved analysis, clarification, unification, growth and adaption of the common law."[26] Hence, the Restatement has been in-

22. *See* text & notes 9-15 *supra*.

23. RESTATEMENT IN THE COURTS, *supra* note 10, at 19.

24. *Id.*

25. Nevertheless, it should be emphasized that there are judicial pitfalls involved in continuing to cite the Restatement without instructing lower appellate courts that the policy of the A.L.I. is to allow the Second Restatement to contain statements of what the members feel the law ought to be, rather than what the established law is. Helms, *The Restatements: Existing Law or Prophecy*, 56 A.B.A.J. 152, 153 (1970).

Courts in Arizona have ignored this distinction. In Serrano v. Kenneth A. Ethridge Contracting Co., 2 Ariz. App. 473, 409 P.2d 757 (1966) the court noted that the Arizona courts follow the Restatement where the area is not covered by statute or former decision. It then cited as "law" sections of the *Restatement (Second) of Torts* which was only in tentative draft form. *Id.* at 474-76, 409 P.2d at 758-60.

26. Wechsler, *supra* note 9, at 150. The Restatements are not without their critics, however, most of whom can be described as legal realists. It is their vociferous contention that there never should have been a Restatement, let alone a Second or Re-Restatement. *See* W. RUMBLE, AMERICAN LEGAL REALISM 156-57 (1968); *see generally* Milner, *supra* note 2. For criticism of particular restatements see Clark, *The American Law Institute's Law of Real Covenants*, 52 YALE L.J. 699 (1943); Ehrenzweig, *supra* note 21 (Conflicts); Ehrenzweig, *Miscegenation in the Conflict of Laws*, 45 CORNELL L.Q. 659 (1960); James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968); Lorenzen & Heilman, *The Restatement of the Conflict of Laws*, 83 U. PA. L. REV. 555 (1935); Patterson, *The Restatement of the Law of Contracts*, 33 COLUM. L. REV. 397 (1933); Sims, *The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute*, 30 CORNELL L.Q. 1 (1944); Yntema, *The Restatement of the Law of Conflict of Laws*, 36 COLUM. L. REV. 183 (1936).

Like the founders of the Institute, the legal realists agree that American jurisprudence at one time was burdened with uncertainties. They reject, however, the idea that uncertainty can be sharply reduced through restatements of the common law. *See* RUMBLE, *supra*, at 156. Therefore, while agreeing with the Institute's diagnosis of the problem they believe a scientific approach to the administration of a judicial system would produce a better result. An advocate of this approach, Felix Cohen, declared:

tended primarily to serve as a jumping-off point for the main judicial inquiry.

An approach to the precedential authority of the Restatement which seems to reflect the intent of the Institute was announced by a California court which addressed the issue: "the rules announced in the Restatement of the Law do not have the force of statutory enactment nor do they supercede judicial decisions."[27] A few jurisdictions, however, appear to have given the Restatement a more authoritative position in the resolution of their judicial decisions.

Analyzing reported cases dealing with Pennsylvania tort law as an indication of the authority of the Restatement in that state,[28] one writer has concluded that the Restatement has taken on the status of de facto primary authority.[29] As he correctly noted, at least one decision has been based solely on the authority of two sections of the *Restatement of Torts*.[30] Such direct reliance on the Restatement in resolving judicial issues tends to promote the belief that the Restatement constitutes primary authority, and seems inconsistent with the approach taken by the Institute and most courts.[31]

> The age of the classifcal jurists is over . . . . The 'Restatement of the Law' by the American Law Institute is the last long-drawn-out gasp of a dying tradition. The more intelligent of our younger law teachers and students are not interested in "restating" the dogmas of legal theology. . . . Creative legal thought will more and more look behind the pretty array of 'correct' cases to the actual facts of judicial behavior, will make interesting use of statistical methods in the scientific description and prediction of judicial behavior, will more and more seek to map the hidden springs of judicial decision and to weight the social forces which are represented on the bench.

F. COHEN, THE LEGAL CONSCIENCE 59-60 (1960). At the opposite extreme are those who feel that the Restatement should return to the role intended for it by the founding fathers of the American Law Institute. *See* Helms, *supra* note 25. This approach asserts that the Restatement will lose its status as an authoritative source from which courts can at least begin the decision making process. *Id.* at 153.

27. Janofsky v. Garland, 42 Cal. App. 2d 655, 658-59, 109 P.2d 750, 752 (1941); *accord*, Kollburn v. P.J. Walker Co., 38 Cal. App. 2d 545, 550, 101 P.2d 747, 750 (1940); Grant v. McAuliffe, 41 Cal. 2d 859, 863, 264 P.2d 944, 946-47 (1953).

28. Up to April 1, 1973 Pennsylvania courts had cited Restatement paragraphs 3,266 times, second only to California. A.L.I. ANNUAL REPORT, *supra* note 1, at 24.

29. *See* Florey, *The Restatement of Torts in Pennsylvania 1939-1949*, 22 PA. B. ASS'N Q. 79, 81 (1950).

30. *See* Lambert v. Richards-Kelly Const. Co., 348 Pa. 407, 35 A.2d 76 (1944). For an Arizona case taking a similar approach see Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954).

31. A Reporter for the Restatements of agency, torts, restitution and judgments, Warren A. Seavey, spoke of the acceptance of the Restatement as follows:

> Further, I believe it is fair to say that it [the Restatement] was eagerly welcomed in many states. . . . Since the statements were usually in agreement with the rules in a very large percentage of the states, a survey showing something like ninety percent agreement with decided cases on contested points, the Restatement was normally cited to support previously existing rules. Also, in many cases it was of aid to the courts in changing a rule . . . . In still more cases, it changed the phrasing of the rules . . . . The Restatement, did not, however, become a sacred cow, nor were its words accepted as the complete truth. . . . But it did undoubtedly have a profound effect upon American common law and perhaps, although this is doubtful, saved some of the drudgery of finding cases.

See Seavey, *supra* note 11, at 318.

THE USE OF THE RESTATEMENT IN ARIZONA

The most radical approach to the precedential authority of the Restatement appears to have been the announcement by the Supreme Court of Arizona that it would follow the Restatement whenever it was not bound by either prior judicial decisions or legislative enactments. The first case to use words to this effect was *Smith v. Normart*.[32] In that case the court declared:

> We have heretofore announced that we would follow the Restatement of the Law where we are not bound by the previous decisions of this court or by legislative enactment, feeling that by doing so uniformity of decision would be more nearly effected.[33]

The uncited authority of this announcement seems to have been *Lightning Delivery Co. v. Matteson*,[34] which involved a matter of first impression in Arizona. While attempting to resolve the issue, the *Restatement of Agency* was examined and found to be in accord with various decisions from foreign jurisdictions. Stressing the high regard this country's bench and bar afforded the Restatement, the court concluded that, since the applicable rule and two factual illustrations following it were closely on point with the facts in *Lightning*, the court would adopt the Restatement principle for Arizona in that case.[35]

Although the Arizona decisions of *Lightning* and *Smith* could be cited for the proposition that the Restatement may be cited as primary authority for matters of first impression, the supreme court actually did not decide either of the above cases in that manner. Rather, the relevant Restatement principles were cited merely in conjunction with judicial decisions which supported the desired result. The cases decided since *Smith v. Normart*, however, have indicated that there exists some equivocalness among Arizona jurists as to the precedential authority of a Restatement provision. The supreme court, for example, complying with the language in *Smith*, has declared itself "impelled" to follow that announcement.[36] In another instance the

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32. 51 Ariz. 134, 75 P.2d 38 (1938).
33. *Id.* at 143, 75 P.2d at 42.
34. 45 Ariz. 92, 39 P.2d 938 (1935).
35. *Id.* at 99, 39 P.2d at 941. Although *Lightning* was silent on this point, a further explanation for the court's adoption of the Restatement principle could have been that the original Restatement, as a mere codification of common law rules, fulfilled the spirit and the letter of an Arizona statute to the effect that the common law shall be considered the law of this jurisdiction until changed by statute. ARIZ. REV. STAT. ANN. § 1-201 (1956). Ross v. Bumstead, 65 Ariz. 61, 173 P.2d 765 (1946). Arizona's adherence to common law rules, however, does not preclude one of its appellate courts from looking to foreign decisions in search of these rules. Shulansky v. Michaels, 14 Ariz. App. 402, 484 P.2d 14 (1971).
36. Condon v. Arizona Housing Corp., 63 Ariz. 125, 132-33, 160 P.2d 342, 346 (1945).

court accepted what it deemed its "committment" to the Restatement.[37]

There appeared to be considerable deviation from these strict applications of *Smith*, however, in *Reed v. Real Detective Publishing Co.*,[38] where the court considered whether Arizona recognized a cause of action for an invasion of privacy. Since it was a case of first impression, the court, under the literal language of *Smith*, automatically could have applied the pertinent Restatement principle. Instead, the court undertook a detailed analysis of the law in point before adopting the Restatement principle.[39] In this regard the court said:

> We think it would be unwise to follow this [Restatement] rule blindly, particularly when to do so would result in the recognition of a new cause of action [for the invasion of the right to privacy] in this jurisdiction. In view of our former pronouncements, great weight must be given to the recognition of this right in the Restatement of the Law, but notwithstanding this, we deem it our duty to consider the merits of this new right. If it is based on principles of justice, and has been generally acknowledged elsewhere, there would seem to be no reason why the cause of action should not be considered as existing here.[40]

Thus, in *Reed*, the court appears to have retreated considerably from its earlier position in *Smith*.[41] Seemingly, cases decided after *Reed* should have accorded the Restatement merely secondary or persuasive authority, and any possibility of the Restatement's continuing as primary authority in Arizona should have been erased.

In *Savage v. Boies*[42] which was decided 9 years after *Reed*, however, the court based its holding solely on a provision of the Restatement. No case was cited in support of the Restatement position, the court noting only that the Restatement's approach was the modern de-

37. Western Coal & Min. Co. v. Hilvert, 63 Ariz. 171, 178, 160 P.2d 331, 334 (1945).

Waddell v. White, 56 Ariz. 525, 109 P.2d 843 (1941), represented another application of the *Smith* announcement. In *Waddell* the court rejected a common law rule which had been adopted in the *Restatement of Torts*, reasoning that, since Arizona had long been committed to a different common law rule on the same issue, the Restatement principle should be ignored.

38. 63 Ariz. 294, 162 P.2d 133 (1945).

39. *Id.* at 303, 162 P.2d at 138.

40. *Id.*

41. For cases following the *Smith* approach *see, e.g.*, Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1953); Ingalls v. Neidlinger, 70 Ariz. 40, 216 P.2d 387 (1950); Cole v. Arizona Edison Co., 53 Ariz. 141, 86 P.2d 946 (1939); Burrell v. Southern Pac. Co., 13 Ariz. App. 107, 474 P.2d 466 (1970), Wright v. Palmer, 11 Ariz. App. 292, 464 P.2d 363 (1970); Serrano v. Kenneth A. Ethridge Contracting Co., 2 Ariz. App. 473, 409 P.2d 757 (1966).

42. 77 Ariz. 355, 272 P.2d 349 (1954).

veloping trend.[43] What made *Savage* unique was that it seemed to represent the only case literally to apply the approach announced in *Smith* and blindly follow the Restatement in a case of first impression without considering any other sources.

The *Savage* approach was not adopted, however, in two recent decisions by Division Two of the Court of Appeals of Arizona. Instead of considering itself compelled to follow the Restatement, in a matter of first impression, Division Two said:

> [W]e [have] held that when the law is not settled upon a particular subject, the law of the Restatement will be looked to with favor. We do not, however, believe that this court should look with favor on a doctrine which is senseless in modern times.[44]

Unfortunately, Division Two's approach of viewing the Restatement merely "with favor" in cases of first impression apparently was not adopted by Division One of that same court. In a recent decision by this latter division,[45] the court was faced with two choice of law issues, both of which were questions of first impression in this jurisdiction. In both instances the court based its choice of law decisions solely on relevant sections of the *Restatement of Conflicts.* While the court did undertake to reconcile the pertinent Restatement section with the facts of the case as to the first issue, no mention was made of the existence or nonexistence of any relevant foreign case law. As to the second issue the court merely stated the choice of law problem and applied a Restatement section. Such conflicting approaches to the precedential authority of the Restatement among two divisions of the same court clearly indicate that the present state of the law remains uncertain and that there exists a definite need for some clarification in the form of an unambiguous pronouncement by the Supreme Court of Arizona.

CONCLUSION

Clarity as to the authority of the Restatement can be achieved

43. One commentator, however, maintains that the 1948 amendments to the Restatement, which were the basis of the *Savage* decision, "were not the result of a thorough going re-analysis by a Reporter and his group of Advisors." *See* Seavey, *supra* note 11, at 318.

44. Day v. Wiswall, 11 Ariz. App. 306, 312, 464 P.2d 626, 632 (1970), *citing* Spetteque v. Mahoney, 8 Ariz. App. 281, 445 P.2d 557 (1968). Two considerations may tend to decrease the effect of this statement. Although the language seems to provide for a less restrictive approach to the precedential weight of the Restatement, it came from a lower appellate court, and hence does not carry the weight of a pronouncement of the state's supreme court. Additionally, the court in *Day* used the phrase "*law* of the Restatement," 11 Ariz. App. at 312, 464 P.2d at 632 (emphasis added). While this reference to the Restatement as "law" was probably no more than a mere careless misuse of words, it is subject to misleading interpretation by other courts.

45. Taylor v. Security Nat'l Bank, 20 Ariz. App. 504, 514 P.2d 257 (1973).

in Arizona. The inconsistent manner in which some of the courts of this state have applied the Restatement as de facto primary authority reflects the misconception that the Restatement has primary precedential authority. Analysis indicates, however, that it was the intention of the American Law Institute that the Restatement be regarded only as a persuasive secondary authority. The importance of applying the Restatement as the Institute intended has been accentuated since in the Second Restatement some majority common law rules have been displaced for developing trends which the Restatement's authors believe to be more appropriate.

Analysis of Arizona case law indicates that Arizona courts often have cited the Restatement as primary authority for the resolution of judicial questions in cases in which there has been an absence of Arizona common law or statutory enactment. Moreover, Arizona has the dubious distinction of being the only state expressly to have opened the door to affording primary precedential authority to the Restatement.[46] While there would appear to be support in *Smith v. Normart* for a court to do exactly this, an examination of Arizona case law reveals that courts have sometimes avoided a strict application of *Smith.* Nevertheless, in order to apprise the Bar of Arizona of the proper function of the Restatement as a secondary source of the law, a statement by the Supreme Court of Arizona denouncing a literal interpretation of *Smith v. Normat* and reiterating the approach taken in *Reed v. Real Detective Publishing Co.* should be forthcoming.

46. Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954).