

January 15, 2019

ALI Council
The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104

Dear Council Members:

The undersigned associations represent the interests of a variety of sectors of the American economy, including financial service providers, retailers, telecommunications companies, and insurers. We are writing to express our strong collective concern with respect to the Institute's pending Restatement of the Law, Consumer Contracts. We believe this project departs dramatically from the Institute's own rules governing Restatements by creating rather than "restating" common law, and does so in an unfair manner that consistently operates against businesses that contract with consumers.

Our understanding is that the Council approved the latest draft of this project at its October 2018 meeting, placing the project on a path for potential completion at the Institute's Annual Meeting in May 2019. We are writing to respectfully urge the Council to reconsider approval of this project as a Restatement at its meeting later this month and avoid potentially causing long-term harm to the Institute's reputation with respect to Restatements.

Conceptually, this Restatement is fundamentally flawed. As numerous Institute members and other commenters have expressed in previous submissions, it does not appear that *any court* has articulated a separate set of "consumer contract" rules that operate differently from the general law of contracts. The basic premise of this project, however, is that a different set of common law legal rules must apply to contracts between a business and a consumer. Each of the project's substantive provisions recommend courts adopt such a separate "consumer contract" rule. This is plainly a deviation from common law doctrine, and one with substantial public policy implications.

As the Council is aware, the Institute's Style Manual expressly cautions against using Restatements to "make major innovations in matters of public policy." Rather, Restatements are designed to present "clear formulations of common law . . . as it presently stands or might appropriately be stated by a court." The Restatement of the Law, Consumer Contracts fails to meet this basic standard. It is innovating in the area of common law and often doing so in the absence of any case law that directly tracks the project's "black letter" rule formulations.

In this regard, it is especially telling that this Restatement, unlike any other Restatement in the Institute's 95-year history, relies principally on statutory law, such as consumer protection statutes and regulations, to support "black letter" rule formulations. For example, the "black letter" rule of § 6 addressing "deception" in consumer contracts proposes to void any contract or term adopted "as a result of a deceptive act or practice"; language lifted directly from consumer protection statutes. The Comments and Reporters' Notes to this section also cross-reference and

cite to “federal and state anti-deception statutes” as the support for the proposed rule while including no discussion of case law actually reflecting the proffered rule formulation. This is a provision which, if adopted by courts, would impact the enforceability of countless contracts involving consumers.

The Restatement additionally proposes to create a path for courts to circumvent the application of federal laws such as the Federal Arbitration Act (FAA) and the U.S. Supreme Court’s interpretations of these laws. By restating rules “that determine the enforceability of clauses that limit the ability of consumers to pursue a complaint or seek legal redress” (i.e. pre-dispute arbitration provisions), and doing so “in the absence of constraints overlaid by federal law,” the project is not-so-subtly proposing new ways to challenge such provisions.

Substantively, Restatement rules are supposed to avoid proposing “wild swings” in the law, yet the Restatement of the Law, Consumer Contracts does just that. The proposed rules consistently operate to the detriment of a business contracting with a consumer. For example, from the undersigned’s perspective, these rules: enhance the required notice obligations for a business’ standard contract terms to be adopted (§ 2); restrict a business’ ability to modify contract terms when the business offers a reasonable opportunity for the consumer to exit the agreement without fee (§ 3); restrict a business’ use of discretionary terms (§ 4); expand the contract doctrine of unconscionability (§ 5); establish a novel “deceptive contract” theory (§ 6); create an amorphous standard regarding adoption of affirmations made by a business or third-party (§ 7); undermine application of the parol evidence rule (§ 8); and suggest that courts assert unprecedented authority to reform contracts involving consumers (§ 9).

The combined effect of courts’ adoption of these proposed rules as part of the common law would expose businesses to a new liability regime. It is disingenuous to suggest otherwise. Businesses would be required to adhere to a set of new rules governing only contracts with consumers that are not recognized under existing common law. These rules, collectively, would impair the ability of a business to enforce its contract terms.

Although the concerns expressed permeate the entire project, there is a path for this Council to mitigate the problems while preserving much of the Reporters’ work product. Principles of Law projects, as the Institute’s Style Manual makes clear, provide a vehicle for “address[ing] courts when an area is so new that there is little established law.” Principles projects also provide some latitude for aspirational recommendations that seek to “unify a legal field without regard to whether the formulations conform[] precisely to present law.”

As the Council can appreciate, the Institute’s definition of a Principles project describes exactly the content of the consumer contracts project. The project addresses courts in an area of law so new that there is little established common law – a fact clearly evidenced by the lack of case law support identified in the project’s Reporters’ Notes – and where the proposed rule formulations plainly do not conform to present law. The Council, therefore, should not approve the project as a Restatement of Law because it is not a Restatement as the Institute has defined that work product throughout its history.

The broad range of businesses represented by the undersigned associations rely on the Institute to adopt balanced, clarifying legal rules in Restatements with unassailable common law support.

The proposed Restatement of the Law, Consumer Contracts is far afield from this objective and, if adopted, could impair the Institute's long-term credibility within the legal community and cause many judges to "second guess" the value of Restatements. We appreciate the Council's time and attention to the concerns discussed, as well as our recommended solution, and implore the Council to reconsider approval of this project.

Respectfully submitted,

ACA International
American Bankers Association
American Financial Services Association
Consumer Bankers Association
Consumer Mortgage Coalition
CTIA
Electronic Transactions Association
Insights Association
Professional Association for Customer Engagement
Real Estate Services Providers Council
Restaurant Law Center
U.S. Chamber Institute for Legal Reform
USTelecom