

October 10, 2018

Council Members
American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104

Dear ALI Reporters:

Consumers Union, the advocacy division of Consumer Reports,¹ writes to voice our concerns about the direction of the American Law Institute's Restatement project on consumer contracts. We are concerned that attempting to "restate" what constitutes unfairness or unconscionability in the formation and enforcement of contracts at this point in time could interfere with ongoing efforts to ensure that the law is effectively protecting consumers from abuse.

We have witnessed the proliferation in recent years of standard-form contracts that businesses are routinely forcing consumers to sign as a condition of purchasing products and services or using facilities. These contracts are often lengthy, and difficult to understand, and filled with complex legal terminology. It is all too easy for a business to insert provisions that purport to limit its accountability in unreasonable ways that contradict established legal protections, and then to claim that the consumer has "agreed" to accept these unreasonable limitations. This is occurring even more frequently as commerce moves to online and mobile platforms, where businesses urge consumers to "agree" to a contract with a single click.

Although some courts have applied traditional principles of contract law to uphold these unfairly one-sided "agreements," we see this as an area of law that is very much in flux, as courts, legislatures, and the public are waking up to this imbalance and beginning to consider steps to correct it.

We are therefore concerned with both aspects of what we understand this Restatement project to be attempting – restating what is necessary to form a contract, and restating the grounds on which contract terms can be challenged as unfair or excessively one-sided.

On the contract formation side, the Restatement as currently drafted could foreclose the possibility of crafting effective protections that meet the new challenges. The draft Restatement seems to surrender to the current difficulties in coming to grips with how businesses can easily incorporate a "click the box" – or an even more passive "acceptance" – that overwhelms the capabilities of consumers to deal with in a confident and time-efficient manner.

¹ Consumer Reports is an independent, nonprofit member organization that works side by side with consumers for truth, transparency, and fairness in the marketplace. We use our rigorous research and testing, consumer insights, journalism, and policy expertise to inform purchase decisions, improve the products and services that businesses deliver, and drive regulatory and fair competitive practices.

We are further concerned that shifting all protections to the unenforceability side would shift the burden of proof onto consumers, who are likely to have far fewer resources and little ability to mount a legal challenge to an unfairly one-sided and overreaching standard form contract.

On the unenforceability side, even leaving aside the shift of the burden of proof onto the consumer, we are concerned that the draft Restatement's descriptions of the grounds on which contract terms can be challenged and invalidated hew too tightly to what some courts have already done and treat them as the established limits, thereby interfering with ongoing and coming efforts to invigorate these grounds to be more effective in protecting consumers.

To cite one example we have been following closely, there is a pending case in California dealing with whether contracts for installment loans above \$2500 that carry interest rates above 90% or even as high as 135% can be deemed unconscionable. *See De La Torre v. CashCall, Inc.*, 854 F.3d 1082 (9th Cir. 2017); *De La Torre v. CashCall, Inc.*, 5 Cal. 5th 966 (2018). In that case, the California Supreme Court affirmed the ability of courts to review certain contracts for unconscionability, opening the door for additional evolution of the case law in the coming years.

In light of these concerns, we urge you not to rush to finalize this Restatement as a definitive description of this sensitive and evolving area of law, but instead to leave latitude for it to continue evolving in a direction we hope will strengthen protections for consumers.

Respectfully,



Suzanne Martindale
Senior Attorney
Consumers Union

cc: Oren Bar-Gill
Omri Ben-Shahar
Florencia Marotta-Wurgler