The State of the Restatement of Consumer Contracts

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According to the United States Census Bureau, Americans spent almost $395 billion in online transactions in 2016.¹ Most of these transactions were governed by standard form contracts drafted solely by the online retailer and presented to consumers on a take-it-or-leave-it basis. In recognition of the ubiquity and unique nature of consumer contracts, in 2012, the American Law Institute (ALI) commissioned its first Restatement of the Law of Consumer Contracts,² an effort that culminated in a 2017 draft formally designated the Restatement of the Law of Consumer Contracts Preliminary Draft No. 3 (Draft Restatement).³ Although the ALI never made public its Draft Restatement, consumer groups, academics, and others – including a group of state attorneys general – submitted comments in opposition to the Draft Restatement.⁴ In January of this year, the ALI council declined to approve the Draft Restatement in its current form. The ALI Council asked the three Reporters – all of whom are prominent academics in the field of law and economics⁵ – to make revisions and plans to consider the Draft Restatement again in 2019.⁶ Because a Restatement of Consumer Contracts is likely to have a significant impact on consumers and fundamentally change basic principles of contract formation, this article provides some background on the Draft Restatement and highlights some issues of concern. It remains to be seen whether these concerns will be addressed by the ALI going forward.

The ALI stated that the Draft Restatement set out to resolve a tension in the law between two competing objectives: how to encourage efficient and streamlined contracting practices between consumers and businesses in the digital age, while also protecting consumers from

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² The ALI has issued – and revised – a Restatement of the Law of Contracts, but not consumer contracts.
⁴ On January 12, 2018, a group of thirteen state attorneys general – California, Delaware, the District of Columbia, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New York, Oregon, Pennsylvania, and Washington – sent a letter to the ALI setting forth their opposition to the Draft Restatement.
blatantly unfair contractual terms. The Draft Restatement attempts to resolve this tension by adjusting the balance between two contract-based legal doctrines that have historically been employed to protect consumers – mutual assent and unconscionability.⁷

The mutual assent doctrine is based on the foundational principle of contract law that a party is bound to only those contractual terms to which she assented – what then-Judge Sotomayor has called “the touchstone of contract.”⁸ As many of us who work in the area of consumer protection know, consumers often do not read standard form contracts and, even if they did, are unlikely to make informed decisions about the terms given that most form contracts are drafted in unintelligible legalese.⁹ The Draft Restatement argues that, given this reality, and applying a cost-benefit analysis, mutual assent should be presumed in standard consumer contracts. The Draft Restatement endorses the view that it is “more sensible to permit formation processes that do not rely on consumer readership”¹⁰ and proposes a presumption of assent that could be rebutted by a showing of deception or unconscionability.¹¹

This approach raises a number of concerns. The first is whether mutual assent – a doctrine enshrined in centuries of black-letter law – should be abandoned to accommodate changes in commerce and technology.¹² In fact, the mutual assent doctrine is commonly used by courts and state attorneys general to invalidate contracts under circumstances where consumers would never have assented to their terms.¹³

Second, the Draft Restatement unrealistically depends on after-the-fact judicial scrutiny to protect consumers from exploitation in the consumer financial marketplace. In so doing, the Draft Restatement fails to recognize that most consumers lack the time and resources to litigate disputes,

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⁷ See Draft Restatement § 2, comment 12, at 30. The Draft Restatement also provides that a contractual term agreed to as a result of a deceptive act or practice is voidable by the consumer. See id. § 6. The Draft Restatement’s approach to deception is consistent with current law and does not represent an expansion of the doctrine. See id. § 6, Reporters’ Notes, at 88.

⁸ See, e.g., Specht v. Netscape Comm’ns Corp., 306 F.3d 17, 28-29 (2d Cir. 2002) (Sotomayor, J.) (“Whether governed by the common law or by Article 2 of the Uniform Commercial Code [], a transaction, in order to be a contract, requires a manifestation of agreement between the parties. Mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract.”) (internal citations and quotation marks omitted).

⁹ See Draft Restatement, § 2, Reporters’ Notes, at 31 (“Informed assent to the standard contract terms is, by and large, absent in the typical consumer contract.”).

¹⁰ See id. Reporters’ Introduction, at 3,

¹¹ See id. at 7.

¹² As the Second Circuit has observed, “[w]hile new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.” Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004).

¹³ See, e.g., Noble v. Samsung Elecs. Am., Inc., 682 F. App’x 113, 118 (3d Cir. 2017) (“Because the contractual provision here appears on the ninety-seventh page of a ‘Health and Safety and Warranty Guide’ that gives no notice of something claiming to be a binding bilateral agreement and waiver of legal rights, we will not presume that consumers read or had notice of that purportedly binding agreement. . . . The Clause, in short, is not a valid contractual term.”) (internal footnote omitted). Savetsky v. Pre-Paid Legal Servs., Inc.No. 14-Civ.-03514-SC, 2015 WL 604767, at *5 (N.D. Cal. Feb. 12, 2015) (“Because the outward manifestations of consent present in this case would not lead a reasonable person to believe [plaintiff] has consented to the agreement, the Court finds there was no valid and enforceable agreement to arbitrate.”) (internal citations and quotation marks omitted). Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 367 (E.D.N.Y. 2015) (“It is concluded that the average internet user would not have been informed, in the circumstances present in this case, that he was binding himself to a sign-in-wrap.”).
particularly where they have only been defrauded out of small amounts of money, meaning they would never have the opportunity for any post hoc evaluation of the contract’s terms. The rare consumer who does attempt to vindicate her rights in litigation faces nearly insurmountable economic and procedural obstacles, including the resources to hire counsel and binding arbitration clauses combined with class-action waivers which force consumers to seek redress individually from private arbitrators incentivized to rule against them.15

Third, the proposed Restatement drastically redefines the concept of unconscionability in a manner that fails to adequately protect consumers. While the contours of the doctrine may differ from state to state, in general, unconscionability requires a showing of both procedural and substantive unconscionability. Procedural unconscionability looks at the contract formation process, and substantive unconscionability looks at the substantive terms of the contract.16 The burden of demonstrating unconscionability is generally high, and courts rarely find consumer contracts to be unconscionable.17 The Draft Restatement narrows the doctrine of procedural unconscionability by introducing an untested concept of “salience” – namely, whether a “substantial number of consumers” would factor a specific term into their purchasing decisions – that has never been applied by any court.18 For example, because price is typically the most salient term for consumers, under the Draft Restatement’s approach, a finding of procedural unconscionability with respect to price would never be possible, regardless of the presence of factors courts typically look at in considering procedural unconscionability, such as unequal bargaining power, lack of consumer sophistication, high-pressure tactics, or indicia of duress. And despite the central role substantive unconscionability plays in its proposal, the Draft Restatement declined to expand what is currently a very narrow legal doctrine.19 Both procedural and substantive unconscionability, moreover, are litigation defenses, and the reality of consumer litigation is that few consumers have the incentive, time, or resources to bring suit.20

While the ALI should be applauded for attempting to provide much-needed clarity to an area of the law that impacts millions of Americans on a daily basis, state attorneys general and

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14 As former Seventh Circuit Judge Posner has observed, “only a lunatic or a fanatic sues for $30.” Carnegie v. Household Int’l, Inc., 376 F.3d 656, 661 (7th Cir. 2004).

15 See Myriam Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 Mich. L. Rev. 373, 407 (2005) (noting that the “collective action waiver – and particularly its implicit ban on spreading across multiple plaintiffs the costs of experts, depositions, neutrals’ fees, and other disbursements – forces the individual claimant to assume financial burdens so prohibitive as to deter the bringing of claims. In the absence of the waiver, the claimant may spread these costs across thousands of coventurers (or have them advanced by lawyers, as happens in practice). In the presence of the waiver, these costs fall on her alone. And these costs, in a complex commercial case, will exceed the value of the recovery she is seeking.”) (internal footnotes omitted).

16 See Berksen, 97 F. Supp. 3d at 391-92.

17 See, e.g., Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d 302, 305 (4th Cir. 2001) (reversing a district court holding that an arbitration provision that was silent on fees and costs was unconscionable, and noting that “[u]nconscionability is a narrow doctrine whereby the challenged contract must be one which no reasonable person would enter into, and the inequality must be so gross as to shock the conscience.”) (internal citations and quotation marks omitted).

18 See Draft Restatement, § 5, comment 6, at 68.

19 Indeed, one of the Reporters for the Draft Restatement, Oren Bar-Gill, has acknowledged the narrow nature of the unconscionability doctrine. See Oren Bar-Gill & Elizabeth Warren, Making Credit Safer, 157 U. Pa. L. Rev. 1, 71 (2008) (noting that though “[u]nconscionability review is most commonly applied to contracts between consumers and sophisticated corporations . . . courts have been very circumspect in applying unconscionability review to credit contracts”).

those charged with protecting consumers will need to closely monitor developments in this area to ensure that the final Restatement of Consumer Contracts does not represent an abandonment of important principles of consumer protection in exchange for illusory benefits.

*Each month, the Center for Consumer Protection will provide an article written by an assistant attorney general. If you would like to provide an article, please email Blake Bee at bbee@naag.org.*