

January 19, 2022

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

Dear ALI Council Members:

We, the undersigned general counsel of major corporations and representatives of leading trade associations, write to urge the Council not to approve the proposed Restatement of the Law, Consumer Contracts.

ALI leadership has heard strong concern about this proposed Restatement from the business community across a variety of sectors of the American economy, including financial service providers, retailers, telecommunications companies, and insurers, on several occasions over the past few years. Our companies highly value our customers and constantly strive to improve our customer experience and clarity in consumer relationships. But our collective prior submissions, as well as numerous submissions by ALI members and others, explain why this proposed Restatement is conceptually flawed and may cause lasting reputational harm to the ALI if adopted. Unfortunately, these concerns remain unaddressed. The project continues to purport to “restate” an area of contract law in which it does not appear *any court* has articulated a separate set of “consumer contract” rules that operate differently from the general law of contracts. The project’s basic premise, though, is that a different set of legal rules should govern contracts between a business and a consumer.

Instead of restating an established area of law, these proposed rules advance a particular policy agenda: to subject agreements between businesses and consumers to heightened judicial scrutiny with respect to terms supplied by the business. To effectuate this policy preference, the proposed Restatement cobbles together disparate legal principles and sources of law to construct novel common law rules for courts to adopt. This approach appears directly at odds with the ALI’s Style Manual instruction, and the longstanding expectation of users of restatements such as the undersigned, that a restatement provide “clear formulations of common law . . . and reflect the law as it presently stands or might appropriately be stated by a court.”

The approach also appears inconsistent with the ALI’s cautionary principle that any recommended changes to prevailing common law be “accretional” and that “[w]ild swings” in the law be avoided in a restatement because the ALI “has limited competence and no special authority to make major innovations in matters of public policy.” This proposed Restatement’s core objective, however, is to usher in major public policy changes by enshrining into the common law a set of innovative legal rules regarding “ex post scrutiny of contract terms.” These proposed rules, if adopted by courts, would impair businesses’ ability to enforce the terms of contracts with consumers.

Examples of novel departures from the common law with potentially profound implications can be seen in most of the project's proposed rules. They have been the subject of critiques in law review articles and other scholarship, as well as public commentary.<sup>1</sup> The latest project draft, Council Draft No. 6, also does not appear to address any of the concerns that have been raised for years about the project's departures in law. Rather, revisions to the project appear only in the direction of endorsing more ways to challenge contracts between a business and a consumer.

The following are specific examples of proposals to rewrite common law:

- Section 5 proposes to broaden the centuries-old contract doctrine of unconscionability in the context of agreements between a business and a consumer. The proposed rule formulation incorporates highly ambiguous and subjective language, such as whether a term is “unreasonably one-sided” or “results in unfair surprise,” which could provide a basis to invalidate countless agreements. The proposed rule also deems any term substantively unconscionable if its effect is to “unreasonably exclude or limit the business’s liability or the consumer’s remedies” or “unreasonably expand” the business’s remedies or enforcement powers; again, highly ambiguous standards designed to implement a particular policy.
- Section 6, governing “deception,” represents an unprecedented attempt to appropriate the language of state consumer protection statutes and other select “federal and state anti-deception law” into an entirely new common law rule. In doing so, the proposed Restatement incorporates statutory law enacted with a separate purpose of addressing unfair and deceptive marketing practices to provide a basis for changing the general law of contracts between a business and a consumer. The proposed rule also states an intent not to incorporate any judicial interpretations of such federal and state anti-deception law, so that courts have a blank canvas to apply this novel, untested rule. Every aspect of this proposed rule, which no jurisdiction follows, appears antithetical to the purpose of a restatement.
- Sections 7 and 8 work together to redefine what affirmations become part of a contract between a business and a consumer. Section 7 sets forth a novel and amorphous standard by which consumers could allege an affirmation becomes a part of their contract with a business, or potentially binds a third party that did not transact with the consumer. Section 8 then proposes to abrogate the parol evidence rule only for contracts between a business and a consumer, so that any alleged affirmation may be admitted in a lawsuit. The proposed Restatement endorses this departure in law in spite of an express recognition that “[c]onsumer contracts, like all contracts, are subject to the parol evidence rule.” Similar to other provisions, the proposed Restatement identifies no case law authority for such a blanket rejection of the parol evidence rule.
- Section 9 proposes that courts recognize each of these novel rules as “mandatory rules” that cannot be derogated by agreement of the parties, and that they rely on these rules to assert

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<sup>1</sup> See, e.g., Christopher E. Appel, *The American Law Institute’s Unsound Bid to Reinvent Contract Law in the Proposed Restatement of the Law, Consumer Contracts*, 32 Loy. Consumer L. Rev. 339 (2020); John Fund, *When Lawyers No Longer Interpret the Law But Create It, Trouble Always Follows*, Nat’l Rev., Dec. 19, 2021.

unprecedented authority to reform contracts involving consumers. As with other sections, the proposed Restatement grasps onto other sources of law, such as the Uniform Commercial Code, as well as law review articles to bolster this particular policy view of what the common law ought to be.

As this Council knows, ALI restatements derive their utility by promoting clarity and uniformity in the law. This proposed Restatement stands in stark contrast to that goal. The project is far more likely to provide courts and other users with a significantly distorted portrait of common law doctrine. Inevitably, courts and other users may come to recognize the novelty of this project. It may prompt them to reevaluate the role and utility not only of this project, but also of other modern restatements.

In that regard, we believe this proposed Restatement marks a critical inflection point in the ALI's nearly 100-year history. The Council has an opportunity here to provide a needed course correction that protects the ALI's reputation for authoritatively restating common law rules. We appreciate the Council's time and attention to the concerns we have discussed and urge it not to approve this Restatement.

Respectfully submitted,

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**Trade Associations:**

American Bankers Association

American Financial Services Association

American Property Casualty Insurance Association

American Tort Reform Association

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Consumer Bankers Association

Illinois Chamber of Commerce

Louisiana Coalition for Common Sense

National Association of Federally-Insured Credit Unions

New Jersey Civil Justice Institute

NFIB Small Business Legal Center

Ohio Chamber of Commerce

Pennsylvania Chamber of Business and Industry

Pennsylvania Coalition for Civil Justice Reform

Pharmaceutical Research and Manufacturers of America (PhRMA)

Reinsurance Association of America

The State Chamber of Oklahoma

U.S. Chamber Institute for Legal Reform

Wisconsin Manufacturers & Commerce