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# THE AMERICAN LAW INSTITUTE'S UNSOUND BID TO REINVENT CONTRACT LAW IN THE PROPOSED RESTATEMENT OF THE LAW, CONSUMER CONTRACTS

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## I. INTRODUCTION

The American Law Institute (ALI) is currently engaged in a first-of-its-kind project to “restate” the law of so-called “consumer contracts” entered between a business and a consumer. The proposed Restatement of the Law, Consumer Contracts recommends governing legal rules for courts to adopt to address what the project describes as “a fundamental challenge to the law of contracts” where businesses contract with consumers.<sup>1</sup> The rationale underlying this Restatement is that differences between “well-informed” businesses and consumers who “typically lack the information, sophistication, and incentive to monitor terms appended to their transactions” warrant the development of a separate set of “consumer contract” rules to protect consumers.<sup>2</sup> Although the goal of enhancing consumer protections may be laudable, the basic problem with this proposed Restatement approach is that courts have not articulated a separate set of “consumer contract” rules

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<sup>1</sup> RESTATEMENT OF CONSUMER CONTRACTS rep. intro. (AM. LAW INST., Tentative Draft, 2019).

<sup>2</sup> *Id.*

that operate differently from the general law of contracts.<sup>3</sup> Consequently, a fundamental question that has arisen regarding the Restatement of the Law, Consumer Contracts is whether the project proposes to “restate” law or create it.<sup>4</sup>

The answer to this question has far-reaching implications for future Restatements and the ALI’s influence within the legal community. Restatements have been the ALI’s “flagship” work product for nearly a century.<sup>5</sup> They are designed to be an educational resource to assist judges in the development of state common law.<sup>6</sup> With no force of law themselves, Restatements derive their utility from the ALI’s reputation for producing carefully considered work products that authoritatively “restate” the most sound existing legal rules on a topic. That tradition, reputation, and utility change completely if Restatements no longer command the respect of the judiciary and broader legal community as reliable and authoritative work products, and instead become viewed as mere thought pieces that suggest aspirational or innovative rules for courts to adopt (or, worse, mislead courts as to existing common law doctrine).<sup>7</sup>

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<sup>3</sup> See Motion from Victor E. Schwartz, Harold Kim, Carla van Dongen, and Christopher E. Appel at ALI Annual Meeting 1 (2019) (on file with ALI) (stating that the “basic premise” of the Restatement of the Law, Consumer Contracts “is that a different set of legal rules must apply to contracts between a business and a consumer”) [hereinafter “Motion to Make Proposed Restatement of the Law, Consumer Contracts Principles of Law”].

<sup>4</sup> See, e.g., Letter from 27 General Counsel to ALI President David F. Levi (Dec. 1, 2017) (on file with ALI) (expressing fundamental concerns with the Restatement of the Law, Consumer Contracts); Letter from Harold Kim to ALI Council (Oct. 17, 2018) (on file with ALI) (sharing “major concerns about the [Restatement] blurring the line between recommending what the law ‘should be’ and ‘restating’ existing law”); Letter of 13 Trade Associations and Business Organizations to ALI Council (Jan. 15, 2019) (on file with ALI) (“Conceptually, this Restatement is fundamentally flawed.”).

<sup>5</sup> Letter from 27 General Counsel to ALI President David F. Levi (Dec. 1, 2017).

<sup>6</sup> See *infra* Part I.

<sup>7</sup> See Lisa Rickard, *Is The American Law Institute About To ‘Jump The Shark’?*, INV. BUS. DAILY (Jan. 15, 2019), <https://www.investors.com/politics/commentary/ali-american-law-institute-summaries/> (“This new Restatement . . . would push ALI firmly into the territory of policymaking, since no court in America has articulated a separate set of consumer contract rules that operate differently from the general law of contracts.”).

This article examines how the proposed Restatement of the Law, Consumer Contracts squares with the traditional purpose and design of ALI Restatements. Part I discusses the ALI's mission with respect to Restatements, which is set forth explicitly in the organization's Style Manual, as well as criticisms that modern Restatements have increasingly departed from that mission to recommend novel legal rules. Part II analyzes the approach taken in each section of the proposed Restatement of the Law, Consumer Contracts to assess whether the project aligns with the ALI's own guidelines for developing a Restatement.<sup>8</sup> The article concludes that this proposed Restatement fails to meet the ALI's standards because the project is replete with novel provisions that plainly do not "restate" the common law of any jurisdiction. Rather, the project recommends aspirational rules, which, if adopted by courts, would dramatically change contract law and effectively establish a new common law regime governing contracts between businesses and consumers.

These aspirational provisions would provide consumers with greater legal protections (again, a potentially laudable public policy goal), but would do so at the cost of sacrificing the basic function of an ALI Restatement. As a result, the project proposes to cause lasting and potentially irreparable harm to the ALI's reputation within the judiciary if approved in its current form as a Restatement. To avoid this outcome, Part III proposes changing the consumer contracts project from a Restatement to another ALI work product called "Principles of Law" that is designed specifically to address "courts when an area is so new that there is little established law" and to entertain innovative legal rules.<sup>9</sup>

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<sup>8</sup> See *infra* Part II. The draft of the proposed Restatement discussed in this article is the Tentative Draft submitted for final approval at the ALI's 2019 Annual Meeting. The draft was debated in a four-hour project meeting, but only the project's first section was tentatively approved by the ALI membership. See Letter of Victor Schwartz, Harold Kim, Carla van Dongen and Christopher Appel to Reporters of proposed Restatement of the Law, Consumer Contracts (Aug. 28, 2019) (on file with ALI) (discussing debate of proposed Restatement during 2019 ALI Annual Meeting).

<sup>9</sup> AM. LAW INST., *Capturing the Voice of The American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work* 13 (revised 2015) [hereinafter "ALI Style Manual"]; see also *infra* Part III.

## II. THE PURPOSE, DESIGN AND INFLUENCE OF ALI RESTATEMENTS

The ALI is the most influential private organization in the development of American law due in large part to the role Restatements have played for nearly a century.<sup>10</sup> The ALI was founded in 1923 to promote clarity and uniformity in the law, and has sought to accomplish this mission primarily through the development of educational resources for judges and policymakers.<sup>11</sup> The organization leverages the collective expertise of a membership comprised of many of the nation's most distinguished judges, law professors, and practitioners to develop a variety of work products with different objectives and audiences.<sup>12</sup> The ALI is perhaps best known for developing Restatements; work products that collectively are cited thousands of times each year by courts. Courts in every state have also relied, at some point, on an ALI Restatement when developing state common law.<sup>13</sup>

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<sup>10</sup> See *About ALI*, AM. LAW INST., <https://www.ali.org/about-ali/> (last visited Aug. 30, 2020) (“The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law.”).

<sup>11</sup> See *id.* (stating that the organization's projects are “enormously influential in the courts and legislatures, as well as in legal scholarship and education”); see also Victor E. Schwartz & Christopher E. Appel, *The American Law Institute at the Cross Road: With Power Comes Responsibility*, 2 NAT'L FOUND. FOR JUD. EXCELLENCE (May 22, 2017) (discussing ALI's influence).

<sup>12</sup> The ALI publishes three basic work products: (1) Restatements; (2) Model Laws; and (3) Principles. Each work product has a specific purpose and audience for the development of the law. See *About ALI*, AM. LAW INST., <https://www.ali.org/about-ali/> (last visited Aug. 30, 2020); see also Charles W. Wolfram, *Bismarck's Sausages and the ALI's Restatements*, 26 HOFSTRA L. REV. 817, 834 (1998) (“[T]he composite wisdom of many fine minds who have cared deeply about the quality of [ALI] products has created an organization that may, for its time and in this place, work about as well as is realistically imaginable.”).

<sup>13</sup> See, e.g., Dominick Vetri, *The Integration of Tort Law Reforms and Liability Insurance Ratemaking in the New Age*, 66 OR. L. REV. 277, 284 n.34 (1987) (“After the American Law Institute adopted section 402A in the RESTATEMENT (SECOND) OF TORTS, virtually every state has adopted some version of strict products liability.”). The proliferation of the doctrine of strict products liability provides just one example, albeit a major one, of the influence of ALI Restatements. Other examples include the ALI's Restatement multi-edition projects on contracts, property, agency, and trusts.

Although it may sound axiomatic, the fundamental purpose of an ALI Restatement is to “restate” existing law. Specifically, Restatements are supposed to set forth “clear formulations of common law . . . as it presently stands or might appropriately be stated by a court.”<sup>14</sup> The ALI, through its Style Manual, instructs appointed law professors who author Restatements (called “Reporters”) to “assume the perspective of a common-law court” to accomplish what a “busy common-law judge, however distinguished, cannot,” namely “to engage the best minds in the profession” and “scan an entire legal field and render it intelligible by a precise use of legal terms.”<sup>15</sup> Accordingly, Restatements are “primarily addressed to courts” to communicate a “black-letter statement of legal rules . . . ‘made with the care and precision of a well-drawn statute.’”<sup>16</sup>

The ALI’s guidelines for developing Restatements expressly state that rules put forth by Reporters “are constrained by the need to find support in sources of law.”<sup>17</sup> The organization’s Style Manual also cautions that the ALI, as an unelected body, “has limited competence and no special authority to make major innovations in matters of public policy.”<sup>18</sup> Restatement Reporters are further instructed that recommended “[w]ild swings [in law] are inconsistent with the work of . . . a Restatement.”<sup>19</sup>

The ALI’s Style Manual directs Reporters to adhere to four “principal elements” in developing a Restatement.<sup>20</sup> These elements include instructions to: 1) “ascertain the nature of the majority rule” on a topic; 2) “ascertain trends in the law”; 3) choose the “specific rule [that] fits best with the broader body of law and therefore leads to more coherence in the law”; and 4) “ascertain the relative desirability of competing rules.”<sup>21</sup> “When decisions among state courts conflict, a Reporter should report the conflict but is not bound to adhere to the majority rule.”<sup>22</sup> Rather, Reporters can

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<sup>14</sup> ALI Style Manual, *supra* note 9, at 3.

<sup>15</sup> *Id.* at 5–6.

<sup>16</sup> *Id.* at 4, 5.

<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 5.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 7.

endorse a minority rule in a Restatement provided they explain the rationale for that “better rule.”<sup>23</sup>

For most of the ALI’s history, Reporters have followed these unambiguous instructions to develop balanced, authoritative work products that educate judges on prevailing common law rules.<sup>24</sup> Modern Restatements, however, have increasingly come under criticism for departing from the ALI’s mission to promote clarity and uniformity in the law to instead advocate for legal system reform through aspirational rules.<sup>25</sup> The late U.S. Supreme Court Justice Antonin Scalia recognized this trend in 2015, stating:

[M]odern Restatements . . . are of questionable value, and must be used with caution. The object of the original Restatements was ‘to present an orderly statement of the general common law.’ Over time, the Restatements’ authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be.<sup>26</sup>

Justice Scalia added that where Restatement provisions endeavor to revise rather than restate existing law, they “should be given . . . no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar.”<sup>27</sup>

A recent example of a Restatement that incorporates novel provisions, generating significant controversy, is the Restatement

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<sup>23</sup> *Id.*

<sup>24</sup> See Norman L. Greene, *The American Law Institute: A Selective Perspective on the Restatement Process*, 62 HOWARD L. REV. 511, 520 (2019) (noting ALI’s “impressive vetting process” but recommending changes to improve voting process for Restatements).

<sup>25</sup> See Victor E. Schwartz & Christopher E. Appel, *Restating or Reshaping the Law?: A Critical Analysis of the Restatement of the Law, Liability Insurance*, 22 U. PA. J. BUS. L. 718 (2020) (examining the ALI’s 2019 publication of the Restatement of the Law, Liability Insurance and concluding that the project includes multiple aspirational provisions, which, if adopted by courts, would dramatically change liability insurance law); David A. Logan, *When the Restatement Is not a Restatement: The Curious Case of the “Flagrant Trespasser,”* 37 WM. MITCHELL L. REV. 1448, 1481-82 (2011) (examining a novel land possessor duty of care recommended in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm); see also Keith N. Hylton, *The Economics of the Restatement and of the Common Law*, 79 BROOK. L. REV. 595, 596 (2014) (“[I]t is an open question whether the Restatements will . . . unify and improve the common law.”).

<sup>26</sup> *Kansas v. Nebraska*, 574 U.S. 445, 475 (2015) (Scalia, J., concurring and dissenting in part) (citations omitted).

<sup>27</sup> *Id.* at 476.

of the Law, Liability Insurance (RLLI).<sup>28</sup> The RLLI is the ALI's first foray into "restating" insurance law. This Restatement was published in 2019 and met with swift and unprecedented backlash due to its inclusion of novel recommended liability insurance rules.<sup>29</sup> At least five states, namely Arkansas, Michigan, North Dakota, Ohio and Utah, enacted legislation to prevent courts from relying on the RLLI.<sup>30</sup> Notably, four of these states did so even before the RLLI's final publication.<sup>31</sup> A number of other states, including Indiana, Kentucky and Louisiana, have adopted resolutions intended to discourage courts from treating the RLLI as a faithful and authoritative restatement of liability insurance law and following its provisions.<sup>32</sup>

The proposed Restatement of the Law, Consumer Contracts implicates the same core concern about the adoption of novel provisions that recommend aspirational views of what the law "ought to be" rather than "restating" existing law. These concerns permeate virtually every aspect of this proposed Restatement.

## II. ANALYSIS OF THE PROPOSED RESTATEMENT OF THE LAW, CONSUMER CONTRACTS

### A. *The Basic Objectives and Design of the Consumer Contracts Project*

The ALI entered uncharted territory with its proposed consumer contracts Restatement. No other Restatement in the organization's nearly century history has truncated a general area of law to develop a set of rules aimed specifically at "consumers," especially an area of law as fundamental as contract law. For instance, there is no ALI Restatement of "consumer torts" or "consumer

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<sup>28</sup> See RESTATEMENT OF LIAB. INS. (AM. LAW INST. 2019).

<sup>29</sup> See Schwartz & Appel, *supra* note 25, at 719 (detailing the "eight year saga" of the RLLI's development).

<sup>30</sup> See Arkansas S.B. 565 (2019) (codified ARK. CODE ANN. § 23-60-112 (2019)); Michigan H.B. 6520 (2018) (codified MICH. COMP. LAWS § 500.3032 (2020)); North Dakota H.B. 1142 (2019) (codified N.D. CENT. CODE § 26.1-02-34 (2019)); Ohio S.B. 239 (2018) (codified OHIO REV. CODE ANN. § 3901.82 (2018)); Utah H.B. 37 (2020) (codified UTAH CODE ANN. § 31A-22-205 (2020)).

<sup>31</sup> These states include Arkansas, Michigan, North Dakota and Ohio. See *id.*

<sup>32</sup> See H.R. Con. Res. 62, 121st Gen. Assemb., Reg. Sess. (Ind. 2019); H.R. Res. 222, Gen. Assemb., Reg. Sess. (Ky. 2018); S. Res. 149, Reg. Sess. (La. 2019).

property”; recommended legal rules in Restatements have always endeavored to apply the law evenly to all entities. By tailoring a Restatement to consumers, though, the basic premise of the project is that a different set of legal rules must apply to contracts between a business and a consumer. This approach is unprecedented both for proposing to treat one constituency differently than all others and for proposing to do so where courts have not expressly set forth separate common law “consumer contract” rules.

Compounding these concerns with the proposed Restatement’s design is its clear philosophical bent. The project includes an introductory section that frames *all* situations in which a business seeks to contract with a consumer as a “David versus Goliath” scenario. The proposed Restatement states that “[o]n one side stands a well-informed and counseled business party” and “[o]n the other side stand consumers who are informed only about some core aspects of the transaction, but rarely about the list of standard terms.”<sup>33</sup> This homogenous treatment, however, fails to consider that many small businesses do not fit this paradigm at all.

The vast majority of businesses in the United States—some 99.9%—are small businesses.<sup>34</sup> In 2019, for example, the U.S. Small Business Administration reported that there are more than 30 million small businesses employing around half of the nation’s private workforce.<sup>35</sup> Most of these small businesses have either no paid employees (e.g. employer owned) or fewer than 20 employees (e.g. “mom and pop” business).<sup>36</sup> Hence, they are hardly the highly sophisticated, imposing corporate forces for which the proposed Restatement of the Law, Consumer Contracts develops specialized rules to combat.

Nevertheless, the proposed Restatement proceeds with the premise that it is “both irrational and infeasible for most consumers to keep up with the increasingly complex terms provided by businesses in the multitude of transactions, large and small,

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<sup>33</sup> RESTATEMENT OF CONSUMER CONTRACTS rep. intro. (AM. LAW INST., Tentative Draft, 2019).

<sup>34</sup> See U.S. SMALL BUS. ADMIN., 2019 SMALL BUSINESS PROFILE <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/04/23142719/2019-Small-Business-Profiles-US.pdf>.

<sup>35</sup> See *id.* (reporting that in 2019 small businesses employed 59.9 million employees constituting 47.3% of the private workforce).

<sup>36</sup> See *id.*

entered into daily.”<sup>37</sup> It reasons that “[b]ecause consumers typically lack the information, sophistication, and incentive to monitor” contracts they enter voluntarily with businesses, “there is concern that businesses will include terms that are unreasonably one-sided, unfair, and inefficient.”<sup>38</sup> The proposed Restatement further theorizes that “[s]uch overreaching might persist even in competitive environments.”<sup>39</sup>

To address this “fundamental challenge of potential abuse,” the proposed Restatement endorses “several policing techniques” on both the front and back end of contracts between businesses and consumers.<sup>40</sup> On the front end, the proposed Restatement sets forth a “set of techniques [that] fit within the doctrine of mutual assent” and determine whether a contract is formed, which terms are adopted, and what processes a business must follow to ensure terms are enforceable.<sup>41</sup> Here, the project expresses dissatisfaction with existing front-end safeguards, stating that the “proliferation of lengthy standard-term contracts . . . makes it practically impossible for consumers to scrutinize terms and evaluate them prior to manifesting assent.”<sup>42</sup> Nevertheless, it acknowledges that “the law has . . . viewed standard-form contracting favorably, enforcing such contracts without mounting special impediments.”<sup>43</sup>

The proposed Restatement then recommends the adoption of new special impediments on the back end of contracts between businesses and consumers. It argues that “strengthening the disclosure requirements emanating from contract law’s general rules of mutual assent would not prompt consumers to read the terms, to carefully weigh them, and to ultimately make more prudent decisions,” so greater “*mandatory* restrictions over the substance” of adopted contract terms are needed to better protect consumers.<sup>44</sup>

To develop such enhanced protections, the proposed Restatement “relies on two main sources” of law, namely common law principles and “principles of fairness and anti-deception guiding

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<sup>37</sup> RESTATEMENT OF CONSUMER CONTRACTS rep. intro. (AM. LAW INST., Tentative Draft, 2019).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (emphasis added).

consumer-protection statutes and regulations.”<sup>45</sup> This decision to incorporate statutory law as an essential basis for recommended “black letter” common law rules is another unprecedented departure in the design of an ALI Restatement. The proposed Restatement defends this approach on the basis that these two bodies of law “appear together in many litigated cases” and that this work product “promotes a greater conceptual unity across these two bodies of law.”<sup>46</sup>

Such an introductory statement underscores the novelty and aspirational nature of the entire proposed Restatement of the Law, Consumer Contracts. The project states directly that it is combining two distinct “bodies” or “sources” of law to develop and support recommended “black letter” legal rules as part of the common law. No court has merged common law and statutory law in this manner; if courts had, the consumer contracts project could simply “restate” those existing common law rules. The stated objective of promoting greater conceptual unity across two areas of law is also not an objective of an ALI Restatement. To the contrary, such an objective proposes to recommend “major innovations in matters of public policy” and “[w]ild swings [in law]” that are inapposite to the express purpose and design of an ALI Restatement.<sup>47</sup>

*B. Analysis of the Consumer Contract Project’s  
Recommended Common Law Rules*

Proposed common law innovations can be seen throughout the consumer contracts project. This proposed Restatement consists only of nine total sections of “consumer contract” rules, most of which include novel elements. As the project’s introduction indicated, the proposed Restatement can be divided into two distinct parts: front-end requirements regarding mutual assent to contract terms, and back-end “ex post scrutiny of permissible contracting.”<sup>48</sup>

Before delving into these rules, section 1, titled “Definitions and Scope,” clarifies the project’s intended application. The section defines terms such as “business,” “consumer,” and “consumer contract” broadly to cover any agreement, other than an

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> ALI Style Manual, *supra* note 9, at 6.

<sup>48</sup> RESTATEMENT OF CONSUMER CONTRACTS rep. intro. (AM. LAW INST., Tentative Draft, 2019).

employment contract, between a consumer and any individual or entity that conducts business.<sup>49</sup> The proposed Restatement also expressly states an intent to govern all contracts between a business and a consumer, except to the extent a matter is governed by statute or regulation (e.g. Uniform Commercial Code).<sup>50</sup> Where statutes or regulations govern, the proposed Restatement “provides common-law rules that supplement and implement the provisions of these enactments.”<sup>51</sup> The project additionally states an intent to supplement more “sector-specific common-law rules” that may apply to contracts between a business and a consumer, and lists insurance agreements and the Restatement of the Law, Liability Insurance as an example.<sup>52</sup>

Section 2, titled “Adoption of Standard Contract Terms,” sets forth the minimum requirements for “standard contract terms,” which are defined as terms drafted in advance of the transaction for use in multiple transactions between a business and consumers (i.e. boilerplate terms), to be considered part of the agreement.<sup>53</sup> These requirements represent the essential front-end protections referenced in the project’s introduction. Pursuant to section 2, standard contract terms are deemed part of an agreement between a business and a consumer when the consumer manifests assent to the transaction after receiving both “reasonable notice” of the intended terms and a “reasonable opportunity” to review them.<sup>54</sup> The “black letter” rule also states that standard contract terms will be adopted when made available *after* a consumer manifests assent to a transaction provided the consumer receives: 1) reasonable notice of the existence of the terms before manifesting assent; 2) a reasonable opportunity to review the terms after manifesting assent; and 3) a reasonable opportunity to terminate the transaction without “unreasonable cost, loss of value, or personal burden.”<sup>55</sup>

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<sup>49</sup> *Id.* § 1.

<sup>50</sup> *See id.* § 1(b) (stating the proposed scope of the Restatement of the Law, Consumer Contracts).

<sup>51</sup> *Id.* § 1 cmt. 10.

<sup>52</sup> *Id.*; *see also supra* notes 28–32 and accompanying text (discussing Restatement of the Law, Liability Insurance).

<sup>53</sup> *See* RESTATEMENT OF CONSUMER CONTRACTS § 2 (AM. LAW INST., Tentative Draft, 2019); *see also id.* § 1(5) (defining “standard contract terms”).

<sup>54</sup> *Id.* § 2(a).

<sup>55</sup> *Id.* § 2(b).

The proposed Restatement recognizes that this generally permissive approach to the adoption of standard contract terms is firmly rooted in common law.<sup>56</sup> As a Reporters' Note supporting the rule acknowledges, "courts routinely enforce standard terms, even in the absence of informed consent to those terms, if several basic requirements are met" that are reflected in section 2.<sup>57</sup> The proposed Restatement also supports this section based on a "comprehensive empirical analysis" of cases evaluating contracts between businesses and consumers.<sup>58</sup> Earlier versions of the proposed Restatement touted this empirical support as an "analysis of *all published decisions in state and federal courts*, as well as unpublished decisions reported on Westlaw and Lexis."<sup>59</sup> Hence, section 2's "black letter" rule regarding the adoption of standard contract terms is one section of the proposed Restatement—and, as discussed below, one of the only sections—with clear case law support.<sup>60</sup>

Section 3, titled "Modification of Standard Contract Terms," sets forth requirements for the adoption of modified standard contract terms in contracts between businesses and consumers with elements comparable to section 2.<sup>61</sup> Section 3's "black letter" rule provides that modified standard contract terms are adopted where the consumer receives reasonable notice and opportunity to review the proposed modified term and reject it while continuing the contractual relationship under the existing term, and the consumer either manifests assent to the modified term or does not object to it and continues the contractual relationship after the proposed period for rejecting the term expires.<sup>62</sup> The rule also adopts

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<sup>56</sup> See *supra* note 4 and accompanying text. *But see* Letter from 13 State Atty's Gen. to ALI Dir. Richard Revesz and Deputy Dir. Stephanie Middleton 1 (Oct. 15, 2018) (on file with ALI) (arguing proposed Restatement "fails to strike the appropriate balance between commercial efficiency and consumer protection" with respect to mutual assent provisions).

<sup>57</sup> RESTATEMENT OF CONSUMER CONTRACTS § 2 rep. notes (AM. LAW INST., Tentative Draft, 2019).

<sup>58</sup> *Id.*

<sup>59</sup> RESTATEMENT OF CONSUMER CONTRACTS rep. intro. (AM. LAW INST., Discussion Draft, 2017) (emphasis in original).

<sup>60</sup> See RESTATEMENT OF CONSUMER CONTRACTS § 2 rep. notes (AM. LAW INST., Tentative Draft, 2019) (citing case law support for each of Section 2's provisions).

<sup>61</sup> See *id.* § 3.

<sup>62</sup> See *id.*

a requirement that any proposed modification is enforceable only if proposed in “good faith” and does not serve to undermine the original bargain between a business and a consumer.<sup>63</sup>

Like section 2, section 3 is supported by case law. As the Reporters’ Notes supporting section 3 state, “Courts have developed a fairly consistent approach to determining the enforceability of modifications.”<sup>64</sup> The proposed Restatement’s empirical analysis of contract cases reports near uniformity in the case law with respect to issues of notice and opportunity to reject or terminate.<sup>65</sup> It further recognizes that a good faith requirement for modifications “figures prominently in the case law.”<sup>66</sup>

It is after these two sections of front-end requirements for the adoption and modification standard contract terms that the project—on the back end—starts to innovate. Section 4, titled “Discretionary Obligations,” is perhaps the least objectionable of the proposed Restatement’s “ex post scrutiny of permissible contracting.”<sup>67</sup> This section adopts a “black letter” rule stating that any contract or term that grants the business discretion to determine its rights and obligations must be interpreted to provide that the discretion be exercised in “good faith.”<sup>68</sup> The section then adds a corollary rule that any term purporting to grant the business “absolute or unlimited discretion” to determine its contractual rights and obligations in the absence of good faith is unenforceable.<sup>69</sup>

Although there can be no legitimate dispute that a covenant of good faith and fair dealing is generally implied in contracts (consumer or otherwise), the proposed Restatement’s blanket prohibition against discretionary contract terms that give a business complete discretion over certain rights or obligations does not appear to be a distinct common law rule. Rather, the interpretation and enforceability of discretionary terms appears to be decided by courts based on other contract doctrines and principles, such as unconscionability doctrine or illusory promises.<sup>70</sup> The rule’s

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<sup>63</sup> *Id.* § 3(c).

<sup>64</sup> *Id.* § 3 rep. notes (citing cases).

<sup>65</sup> *See id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* § 4; *id.* at rep. intro.

<sup>68</sup> *See id.* § 4(a).

<sup>69</sup> *Id.* § 4(b).

<sup>70</sup> *See id.* § 4 rep. notes (citing cases and comparing Section 4 rule to Restatement of the Law Second, Contracts Section 77 (Am. Law Inst. 1981) governing illusory promises).

inclusion of language referring to a business's "absolute or unlimited discretion" likewise does not appear to be a common law rule formulation articulated by courts, and, indeed, the proposed Restatement's comments and Reporters' Notes identify no such specific case law underpinning.<sup>71</sup>

Therefore, while some courts have applied a good faith requirement to the review of discretionary contract terms, as they have to the review of other contract terms, the precise rule formulation recommending that courts invalidate *any* term that cedes total discretion to a business appears novel. The inclusion of such a "black letter" common law rule, separate from other doctrines such as unconscionability doctrine, could also have significant implications if adopted by courts. The proposed Restatement contemplates that a court could rely on the rule stated in section 4 to invalidate an arbitration provision granting a business discretion.<sup>72</sup> Because courts may be limited in their ability to invalidate provisions such as an arbitration provision as unconscionable pursuant to statutes such as the Federal Arbitration Act (FAA),<sup>73</sup> as interpreted by the U.S. Supreme Court,<sup>74</sup> the proposed Restatement's rule could provide a new common law basis for consumers to challenge arbitration provisions.

Section 5, titled "Unconscionability," also addresses the enforceability of arbitration provisions and the application of federal laws such as the FAA. The project's introduction even lays groundwork to avoid the effect of such law with respect to unconscionability doctrine, stating "the interpretation of the FAA and of other federal rules that regulate the procedures for consumers' access to justice is outside the scope of the common law of consumer contracts."<sup>75</sup> The proposed Restatement then identifies a goal to articulate "principles that, in the absence of constraints of federal law, guide the application of the doctrine of unconscionability

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<sup>71</sup> *Id.*

<sup>72</sup> *See id.* § 4 illus. 6.

<sup>73</sup> *See* Pub. L. 68-401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1-16; 9 U.S.C. §§ 201-208; 9 U.S.C. §§ 301-307).

<sup>74</sup> *See, e.g.,* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (holding that FAA preempted California law invalidating business's pre-dispute arbitration agreement as unconscionable); *see also* Am. Express Co. v. It. Colors Rest., 570 U.S. 228, 238-39 (2013) (upholding contract provision prohibiting arbitration of business dispute on a class action basis).

<sup>75</sup> RESTATEMENT OF CONSUMER CONTRACTS rep. intro. (AM. LAW INST., Tentative Draft, 2019).

under state law,” in effect bypassing this controlling law.<sup>76</sup> The proposed Restatement explicitly states that it “takes no position on the proper application of the Federal Arbitration Act or other statutes governing enforceability of or limits on arbitration provisions, and the way such statutes affect the application of the unconscionability standard.”<sup>77</sup>

Although it is not inherently improper for a Restatement to proceed as if controlling federal law does not exist, section 5 appears crafted specifically to undercut that law. Section 5 sets forth a “black letter” unconscionably rule that would make it far easier for a consumer to challenge and nullify contract terms compared to existing common law.<sup>78</sup> This rule provides that a contract or term is substantively unconscionable if it is “fundamentally unfair” or “unreasonably one-sided”;<sup>79</sup> highly amorphous and undefined standards that a consumer could allege with respect to countless contract terms. The rule additionally provides that a contract or term is procedurally unconscionable if it “results in unfair surprise” or “results from the absence of meaningful choice on the part of the consumer”;<sup>80</sup> standards that are similarly vague and open to potentially expansive interpretations.

The proposed rule also includes a separate provision that identifies specific types of contract terms as substantively unconscionable and invalid. This list includes any contract term whose effect is to “exclude or limit the business’s liability or the consumer’s remedies” for personal injury or negligence.<sup>81</sup> It also deems substantively unconscionable any terms that “unreasonably expand the consumer’s liability, the business’s remedies, or the business’s enforcement powers” or “unreasonably limit the consumer’s ability to pursue or express a complaint or seek reasonable redress for a violation of a legal right.”<sup>82</sup>

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See Letter from Harold Kim to ALI Council, *supra* note 4, at 2 (“Ignoring such federal law in a Restatement is not, by itself, objectionable except that the project goes on in Section 5 to provide illustrations (e.g. ill. 8) that recommend legal results inconsistent with Supreme Court jurisprudence.”).

<sup>79</sup> RESTATEMENT OF CONSUMER CONTRACTS § 5(b)(1) (AM. LAW INST., Tentative Draft, 2019).

<sup>80</sup> *Id.* § 5(b)(2).

<sup>81</sup> *Id.* § 5(c)(1).

<sup>82</sup> *Id.* § 5(c)(2), (3).

The potential breadth of these recommended rules is unprecedented. If adopted by courts, these unconscionability provisions would provide new bases for consumers to challenge and invalidate myriad contracts between businesses and consumers.<sup>83</sup> The comments and Reporters' Notes supporting section 5 also appear to welcome that result.<sup>84</sup> For instance, with respect to the treatment of arbitration provisions and class action waivers, illustrations of the proposed unconscionability rules recommend legal results that appear inconsistent with U.S. Supreme Court jurisprudence that is directly on point.<sup>85</sup> In addition, neither the comments nor Reporters' Notes identify any jurisdiction that adopts the broad rule formulation set forth in section 5. To the contrary, the comments and Reporters' Notes cite numerous federal and state statutes addressing unfair and deceptive trade practices, as well as Uniform Commercial Code provisions, as the primary support for portions of the proposed Restatement's unconscionability rule, and even those statutes do not express unconscionability standards in such broad terms.<sup>86</sup> The result is a truly novel take on the centuries-old doctrine of unconscionability that appears designed at every phrase to expand the scope and application of this common law contract doctrine.

Section 6, titled "Deception," takes the proposed Restatement's unprecedented merger of common law and statutory law to an even greater level. The "black letter" rule sets forth a recommended common law rule that appropriates the language of state consumer protection statutes in declaring unenforceable any

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<sup>83</sup> See Letter of Andy Pincus on behalf of U.S. Chamber Institute for Legal Reform to ALI Director Richard Revesz and Deputy Director Stephanie Middleton (Jan. 16, 2017) (on file with ALI) (discussing ambiguous and non-descriptive language in proposed Restatement's black letter unconscionability rule).

<sup>84</sup> See RESTATEMENT OF CONSUMER CONTRACTS § 5 rep. notes (AM. LAW INST., Tentative Draft, 2019) ("The approach taken in this Section encourages the continued development of the substantive-unconscionability doctrine in the common-law method . . .").

<sup>85</sup> See, e.g., § 5 illus. 8 (suggesting a court may determine that a class action waiver is substantively unconscionable based on the application of the Restatement's proposed unconscionability rules); see also Pincus, *supra* note 83, at 3–5 (stating that proposed Restatement would "blatantly contradict U.S. Supreme Court precedent" upholding pre-dispute arbitration agreements entered into by consumers).

<sup>86</sup> See *id.* § 5, cmts. 4, 5, 7, 13, rep. notes.

“contract or a term adopted as a result of a deceptive act or practice.”<sup>87</sup> The rule, similar to the Restatement’s unconscionability provision, additionally identifies (without limiting the scope of the general rule) specific deceptive acts or practices. An act or practice is deemed deceptive, and therefore unenforceable, if it has the effect of “contradicting or unreasonably limiting” a promise made by the business or “obscuring a charge” or the overall cost of something to a consumer.<sup>88</sup>

The sheer breadth of this proposed rule is even more remarkable than the proposed Restatement’s unconscionability rule. If adopted by courts, this “deceptive contract” rule alone could provide a new basis for consumers to challenge countless contract terms.<sup>89</sup> The rule proposes a totally novel and untested standard that does not exist under any state’s common law. The comments and Reporters’ Notes supporting the rule are also less than forthcoming about the rule’s novelty. For instance, the proposed Restatement states that the rule “expands the rule in the Restatement of the Law Second, Contracts” and is “related to several other legal doctrines, both within and beyond traditional contract law,”<sup>90</sup> but nowhere states directly that no court has ever adopted such a rule or that it is purely an invention of the project’s Reporters.

The proposed Restatement further defends the rule as “consistent with federal and state anti-deception law,”<sup>91</sup> again implicating statutory law that is not supposed to be implicated in “restated” common law rules.<sup>92</sup> The Reporters’ Notes attempt to tie together the common law and “statutory consumer-protection law” based on the “similarity between these bodies of law – their shared policy

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<sup>87</sup> *Id.* § 6(a).

<sup>88</sup> *Id.* § 6(b).

<sup>89</sup> See Letter of 13 Trade Associations and Business Organizations to ALI Council (Jan. 15, 2019) (on file with ALI) (stating that the proposed Restatement’s deception rule would impact the enforceability of countless contracts involving consumers); see also RESTATEMENT OF CONSUMER CONTRACTS § 6 cmt. 1 (AM. LAW INST., Tentative Draft, 2019) (“Section [6] provides the consumer *with the power* to avoid any contract or term that is a result of a deceptive act or practice . . .”) (emphasis added).

<sup>90</sup> RESTATEMENT OF CONSUMER CONTRACTS § 6 cmt. 1, 8 (AM. LAW INST., Tentative Draft, 2019).

<sup>91</sup> *Id.* § 6 cmt. 8.

<sup>92</sup> See *supra* notes 45–47 and accompanying text.

to combat deception and their application in similar situations.”<sup>93</sup> The project then points to statutes such as the Federal Trade Commission Act and state unfair and deceptive acts and practices (UDAP) statutes as *the* support for the rule.<sup>94</sup> The proposed Restatement omits any discussion of the separate purpose and history behind these statutes that is entirely unrelated to contract law doctrine.<sup>95</sup> For example, state UDAP statutes were enacted to address unfair trade practices in the marketing and sales of products and services; they were not intended as a basis for the law of contracts.<sup>96</sup> Yet, the proposed Restatement attempts to cobble together this separate statutory law and other regulatory law, such as Federal Trade Commission policy statements, to construct a common law “black letter” deceptive contract rule absent any cited case law that actually reflects this approach.<sup>97</sup>

In doing so, the proposed Restatement also creates more questions than answers regarding the rule’s application, which is similarly antithetical to the purpose of an ALI Restatement to clarify law. The proposed Restatement rule does not define or place clear limits on what it means for a business to “unreasonably” limit a term, or contradict or “obscur[e] a charge,” or a consumer’s overall cost, any one of which purports to invalidate any term in a contract between a business and a consumer.<sup>98</sup> The proposed Restatement is also silent on whether the body of case law interpreting UDAP and other statutes is intended to govern what constitutes a “deceptive act or practice” under the consumer contracts project’s new common law rule, or whether courts are intended to apply the rule anew with a blank canvas.

The project additionally lacks any discussion of the rule’s intended application where a federal or state regulatory body specifically approves materials, and determines for the purpose of

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<sup>93</sup> RESTATEMENT OF CONSUMER CONTRACTS § 6 rep. notes (AM. LAW INST., Tentative Draft, 2019).

<sup>94</sup> *See id.*

<sup>95</sup> *See* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 5-15 (2006) (discussing tort law underpinnings of state consumer protection statutes, and origins of Federal Trade Commission Act to address competition between businesses and other issues unrelated to contract law).

<sup>96</sup> *See id.*

<sup>97</sup> *See* RESTATEMENT OF CONSUMER CONTRACTS § 6 rep. notes (AM. LAW INST., Tentative Draft, 2019).

<sup>98</sup> *Id.* § 6.

applying federal or state consumer protection statutes that no charge is obscured, unreasonably limited, or otherwise deceptive. Could a consumer could still bring a common law “deceptive contract” claim to reach the opposite result? If so, the proposed Restatement rule could effectively render many regulatory judgments meaningless, undermining predictability and consistency in business contracts with consumers.

The answers to such questions underscore the radical and potentially boundless nature of this single proposed Restatement rule. If adopted by courts, the rule could usher in a new common law regime for contracts between a business and a consumer.

Section 7, titled “Affirmations of Fact and Promises That Are Part of the Consumer Contract,” also proposes to expand existing common law doctrine.<sup>99</sup> The proposed Restatement’s “black letter” rule provides that “any affirmation of fact or promise made by the business that creates a reasonable expectation” on the part of a consumer will become part of the agreement, regardless of whether the agreement includes contrary language.<sup>100</sup> The rule additionally provides that any affirmation of fact or promise made by a third party that creates a reasonable consumer expectation will become part of the agreement between the business and the consumer if the business “knew or reasonably should have known about the term,” the consumer “reasonably believed the business intended to stand behind the affirmation or promise,” and the third party’s affirmation or promise created a contractual obligation to the consumer.<sup>101</sup> The proposed “black letter” rule further provides that any standard contract terms purporting to negate or limit affirmations of fact or promises are unenforceable.<sup>102</sup>

The basic goal of this proposed rule is to enshrine in the common law a “reasonable expectations” standard for consumers to rely upon to invalidate contract terms stating that the contract represents the entire agreement between a business and a consumer. Many contracts refer to such provisions as a “merger clause,” meaning that the contract merges or completely integrates all of the parties’ intended terms and constitutes the final expression of their agreement.<sup>103</sup> Consequently, these clauses generally do

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<sup>99</sup> See *id.* § 7.

<sup>100</sup> *Id.* § 7(a).

<sup>101</sup> *Id.* § 7(b).

<sup>102</sup> See *id.* § 7(c).

<sup>103</sup> See, e.g., *id.* § 8 cmt. 3 (discussing merger clauses).

not permit the introduction of evidence extrinsic to the agreement of prior communications, affirmations, or promises. The proposed Restatement rule recommends that courts broadly reject enforcement of such provisions, or any other contract term that purports to limit affirmations or promises in a contract between a business and a consumer.

A number of courts have invalidated merger or integration clauses, and, in doing so, examined the parties' expectations and communications prior to entering the contract.<sup>104</sup> Therefore, there is common law support for courts' scrutiny of such terms. The proposed Restatement rule, however, takes a novel leap in adopting a blanket rule invalidating any limiting contract term said to infringe upon a consumer's reasonable expectations vis a vis the business or any third party that at least appeared to make affirmations or promises that would bind the business.<sup>105</sup> The comment and Reporters' Notes supporting this approach establish no clear common law foundation for the broadly "restated" rule. A supporting comment, on the other hand, states that the project's recommended reasonable expectations approach "is consistent with," although "formally broader than UCC § 2-313" governing express warranties made by sellers; an explanation that suggests the primary legal basis for the Restatement rule is statutory law, not common law.<sup>106</sup> The comment also states that the proposed approach regarding affirmations or promises made by third parties "goes beyond existing obligations created under the UCC and reflects the Magnuson-Moss Warranty Act," further evidencing that the primary legal basis for the proposed Restatement rule is statutory law.<sup>107</sup>

Section 8, titled "Standard Contract Terms and the Parol Evidence Rule," builds upon the rule set forth in section 7 by stating that any "standard contract term that contradicts, unreasonably limits, or fails to give the reasonably intended effect to a prior affirmation of fact or promise by the business does not constitute a

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<sup>104</sup> See *id.* § 7 rep. notes.

<sup>105</sup> See Letter from Harold Kim to ALI Council, *supra* note 4 ("Section 7 [of proposed Restatement] . . . operates against businesses by proposing an amorphous consumer expectations rule with respect to whether something said or promised by a business or third-party is incorporated into a consumer contract . . .").

<sup>106</sup> RESTATEMENT OF CONSUMER CONTRACTS § 7 cmt. 9 (AM. LAW INST., Tentative Draft, 2019).

<sup>107</sup> *Id.*

final expression of the agreement.”<sup>108</sup> Section 8’s “black letter” rule then expressly states that the parol evidence rule governing all contracts, which generally precludes the introduction of extrinsic evidence with respect to integrated agreements, has no effect where a standard contract term contradicts, unreasonably limits, or fails to give the reasonably intended effect to a prior affirmation of fact or promise.<sup>109</sup>

The proposed Restatement rule, therefore, recommends that courts abrogate the parol evidence rule in the specific context of contracts between a business and a consumer. The project does so in spite of its acknowledgement that, under the common law, “[c]onsumer contracts, like all contracts, are subject to the parol evidence rule.”<sup>110</sup> The proposed Restatement also recognizes that “standard contract terms will often be considered a partially or fully integrated agreement under § 213 of the Restatement of the Law Second, Contracts,” and that “the finality provided by the parol evidence rule protects an important interest of the business in certainty and security.”<sup>111</sup> Nevertheless, the proposed Restatement takes the position that “when standard contract terms are inconsistent with prior affirmations of fact or promises”—which presumably would be the allegation in virtually any case seeking to overcome the effect of the parol evidence rule—the Restatement rule “denies those terms the preclusive effect of the parol evidence rule.”<sup>112</sup>

This approach, which is presented as a “logical corollary of §§ 6 and 7,” would have courts completely disregard the parol evidence rule wherever a consumer merely alleges that a contract term is inconsistent with an affirmation or promise made by the business.<sup>113</sup> It would effectively render any merger or integration clause in a contract between a business and a consumer unenforceable where courts have not articulated such a far-reaching common law rule. The proposed Restatement identifies some cases that have allowed the introduction of extrinsic evidence in spite of a merger clause, but fails to cite any case that reflects the broad proposition advanced in section 8.

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<sup>108</sup> *Id.* § 8.

<sup>109</sup> *See id.*

<sup>110</sup> *Id.* § 8 cmt 1.

<sup>111</sup> *Id.* § 8 cmt 1, rep. notes.

<sup>112</sup> *Id.* § 8 cmt 1.

<sup>113</sup> *Id.*

Section 9, titled “Effects of Derogation from Mandatory Rules,” is the final section of the proposed Restatement. It addresses the common law authority of courts to remedy violations of the rules provided in the Restatement of the Law, Consumer Contracts, and, similar to other provisions discussed, adopts an extraordinarily broad and unsupported approach. The “black letter” rule states that if a court finds that any contract or term “excludes, limits, or violates any mandatory rule” governing contracts between a business and a consumer set forth in the proposed Restatement, courts “should” exercise one of three options: 1) refuse to enforce the contract; 2) enforce the remainder of the contract without the derogating term; or 3) limit the application of the derogating term.<sup>114</sup> If a court selects the second option of enforcing the remainder of the contract without the derogating term, the proposed Restatement suggests the court exercise inherent authority to replace that term with a term that is “reasonable in the circumstances” or a term that “effects the minimal correction necessary to bring the contract into compliance with the mandatory rule.”<sup>115</sup>

If a court finds that the derogating term was supplied by a business in “bad faith,” the proposed Restatement rule recommends that the court replace the term with one “calculated to give the business an incentive to avoid placing such terms in consumer contracts.”<sup>116</sup> A comment supporting this provision clarifies that the intent here is for courts to replace the invalidated term with “a term that operates against the business.”<sup>117</sup>

This recommended common law approach is predicated on the notion that the proposed “Restatement contains several mandatory rules—rules that cannot be derogated from by agreement of the parties.”<sup>118</sup> The project lists as examples all or part of the rules set forth in sections 3 through 7, which, as discussed, comprise the bulk of the proposed Restatement’s “ex post scrutiny of permissible contracting.”<sup>119</sup> The proposed Restatement cites no legal authority supporting the idea of such a broad set of “mandatory rules” specific to contracts between a business and a consumer.

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<sup>114</sup> *Id.* § 9.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* § 9 cmt. 3.

<sup>118</sup> *Id.* § 9 cmt. 1.

<sup>119</sup> *Id.* at rep. intro.

Nevertheless, the project proceeds to adopt virtually all of its novel “back end” rule formulations as “mandatory rules.”

By endorsing the idea of a broad set of mandatory “consumer contract” rules, the proposed Restatement is attempting to lay a new foundation of contract law for which no business could contract around. The clear intent of the proposed Restatement rule is also for judges to assert greater authority to refuse to enforce, or to unilaterally reform, contracts involving consumers. The comments supporting the rule envision extensive “gap-filling” efforts by courts, the severability of any offending terms, and the reformation of contracts with whatever terms a particular court deems “reasonable in the circumstances.”<sup>120</sup> The rule also endorses a broad punitive application in recommending that courts reform contract terms to punish a business whenever the business can be said to have included a term in “bad faith.” Taken together, the proposed Restatement’s approach effectively urges a court to assert a common law basis to “do whatever it wants” with respect to the enforcement of a contract between a business and a consumer.

The proposed Restatement states that its approach is “consistent with the approaches taken by courts when a term is deemed unconscionable under the provisions of the Uniform Commercial Code and the Restatement of the Law Second, Contracts.”<sup>121</sup> Ignoring for the moment that the U.C.C. is statutory law that traditionally has no bearing on a Restatement of common law, the scope of the proposed rule extends far beyond unconscionability doctrine. As explained, the rule would make “mandatory” the other “ex post scrutiny” provisions of the proposed Restatement, for example section 6 governing “Deception” which is completely made up by the Reporters. A comment supporting the proposed Restatement approach in section 9 concedes that it “goes further” than the U.C.C. and Second Restatement in “restating the criteria courts deploy in adjusting the gap-filler to the circumstances that led to the inclusion of the offending term,” but, as with other sections, it fails to state directly that no court in the United States has adopted the “restated” approach or anything remotely close to it.<sup>122</sup>

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<sup>120</sup> *Id.* § 9, cmt. 2.

<sup>121</sup> *Id.* § 9, cmt. 6.

<sup>122</sup> *Id.*

### III. THE CONSUMER CONTRACTS PROJECT IS IDEALLY SUITED AS A PRINCIPLES OF LAW PROJECT

The foregoing section-by-section discussion of the proposed Restatement of the Law, Consumer Contracts reveals the remarkable extent to which this project fails to satisfy the ALI's most basic standards for a developing a Restatement. Most of the proposed Restatement's "black letter" rules do not "restate" the law of any jurisdiction and do not even attempt to rely on existing common law as the primary legal basis for a recommended common law rule.<sup>123</sup> Instead, the proposed Restatement recommends aspirational "mandatory" rules that would fundamentally change the common law of contracts if adopted by courts. These novel recommended rules are designed to govern only a specific subset of contracts, namely contracts between businesses and consumers, and do so with the specific, one-sided purpose of increasing a consumer's ability to challenge and invalidate those agreements.<sup>124</sup>

If the proposed Restatement were adopted wholesale by courts, the results would be chaotic. Courts would apply an entirely new set of governing common law rules for contracts between businesses and consumers with expansive, undefined terms and untested standards lacking any grounding in the common law

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<sup>123</sup> See Motion to Make Proposed Restatement of the Law, Consumer Contracts Principles of Law, at 1 (stating that adopting a Restatement in light of the lack of case law support for many of its provisions would be unprecedented in the ALI's history).

<sup>124</sup> More than a dozen trade associations and other organizations whose member businesses contract with consumers have expressed concern to the ALI's governing Council that the proposed Restatement's rules would: [E]nhance 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). Letter of 13 Trade Associations and Business Organizations to ALI Council (Jan. 15, 2019) (urging ALI Council to reconsider its approval of the proposed Restatement of the Law, Consumer Contracts).

doctrine that has developed over centuries. The “certainty and security” of the enforceability of contracts, which the proposed Restatement concedes are important interests for businesses,<sup>125</sup> would be eviscerated where almost any contract term could be challenged as “deceptive” or “unconscionable” under the project’s recommended approaches (§§ 5, 6), the introduction of extrinsic evidence would be effectively limitless (§§ 7, 8), and courts would be empowered to reform agreements however they choose (§ 9).

In addition, by predicating the development of these proposed mandatory rules on the notion that it is “irrational and infeasible for most consumers to keep up,”<sup>126</sup> the project downplays the importance of personal responsibility.<sup>127</sup> Instead of developing rules that encourage consumers to read and understand contracts they enter voluntarily with businesses, the proposed Restatement could potentially imbue greater legal protections to consumers who endeavor to be the least informed. For example, a consumer who makes no effort to read and understand the terms of an agreement might be better positioned to later claim “unfair surprise” or “deception” than a consumer who took the time and effort to carefully review the agreement.<sup>128</sup> The proposed Restatement, therefore, could potentially worsen concerns regarding “asymmetric contracting.”<sup>129</sup>

In any event, both the design and implementation of this proposed Restatement contravene the ALI’s express statement in its Style Manual that the organization, as an unelected body, “has limited competence and no special authority to make major innovations in matters of public policy.”<sup>130</sup> The consumer contracts project, however, encourages precisely the “wild swings [in law that]

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<sup>125</sup> RESTATEMENT OF CONSUMER CONTRACTS, § 8 cmt. 1 (AM. LAW INST., Tentative Draft, 2019).

<sup>126</sup> *Id.* at rep. intro.

<sup>127</sup> See Rickard, *supra* note 7 (stating that “[u]nderscoring this entire Restatement is the radical, unsupported idea that consumers should not be required to read and understand the agreements they enter voluntarily” and that the “fact that many consumers choose not to read their contracts serves as the foundation for new rules that effectively encourage consumers never to read them”).

<sup>128</sup> RESTATEMENT OF CONSUMER CONTRACTS §§ 5(b)(2), 6 (AM. LAW INST., Tentative Draft, 2019).

<sup>129</sup> *Id.* at rep. intro.

<sup>130</sup> ALI Style Manual, *supra* note 9, at 6.

are inconsistent with the work of . . . a Restatement.”<sup>131</sup> The proposed Restatement also ignores the four “principal elements” guiding the development of a Restatement outside of the project’s front-end protections regarding the adoption and modification of standard contract terms set forth in sections 2 and 3. Except for these two sections, which again are grounded in common law, the proposed Restatement appears to make no effort to “ascertain the nature of the majority rule” for any of the “ex post scrutiny” topics restated or “ascertain trends in the law”;<sup>132</sup> rather, the project simply advances policy preferences for what the common law “should be” and fashions new mandatory legal rules for courts to adopt to implement those policy preferences.<sup>133</sup>

These failures in the design and content of the proposed Restatement are fundamental in nature. Consequently, there is no “easy fix” to massage especially rough edges of the project as there might be with other Restatements to ensure each recommended rule conforms to *at least some* existing common law. The situation, though, is not as dire as it might seem. Fortunately, there is no need to jettison the substantial work that has been done on the consumer contracts project since its inception in 2012.<sup>134</sup> This is because the ALI produces another type of work product called “Principles of Law” that is a far better fit for the consumer contracts project.

ALI Principles projects “do not purport to restate [law] but rather pull together the fundamentals underlying statutory, judicial, and administrative law in a particular legal field and point the way to a coherent . . . future.”<sup>135</sup> These ALI work products may “be addressed to courts when an area is so new that there is little established law.”<sup>136</sup> Principles projects “may suggest best practices” to “promote greater predictability and fairness by setting out broad principles of sufficient generality to command widespread assent.”<sup>137</sup> Critically, a Principles project, unlike a Restatement, is not

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 13.

<sup>133</sup> See Rickard, *supra* note 7 (stating the “[s]uch blatant public policy advocacy may be fine for a professor’s law review article, but not an ALI Restatement of the Law”).

<sup>134</sup> RESTATEMENT OF CONSUMER CONTRACTS (AM. LAW INST., Tentative Draft, 2019) at xiii (stating that the project was initiated in 2012).

<sup>135</sup> ALI Style Manual, *supra* note 9, at ix.

<sup>136</sup> *Id.* at 4, 13.

<sup>137</sup> *Id.* at 13.

“constrained by the need to find support in sources of law.”<sup>138</sup> Principles projects provide some latitude for aspirational recommendations that seek to “unify a legal field without regard to whether the formulations conform[] precisely to present law.”<sup>139</sup>

The ALI’s definition of a Principles project describes *exactly* the content of the consumer contracts project. The project expressly states its goal to promote “a greater conceptual unity across . . . two bodies of law,” namely the common law of contracts and consumer-protection statutes and regulations.<sup>140</sup> It “pulls together” such statutory, judicial, and administrative law with the purpose of creating aspirational rules that “point the way” to what the project argues would be a better, more coherent future.<sup>141</sup> In doing so, the project addresses courts in an area of law in which there is little established law; a fact made clear by the absence of courts articulating distinct “consumer contract” rules that operate differently from the general law of contracts and the project’s repeated reliance on consumer-protection statutes and regulations as the primary support for proposed mandatory common law rules. Thus, the project aims to promote greater conceptual unity in a legal field (i.e. the law governing contracts between businesses and consumers) without regard to whether the recommended rule formulations conform precisely to present law.

Because the proposed Restatement of the Law, Consumer Contracts does not satisfy the standards for a Restatement, but does satisfy the standards for Principles (to a remarkable degree), the project should be changed to Principles. Clear precedent also exists for the ALI to change a pending project into another type of ALI work product. The ALI’s Principles of the Law, Data Privacy, which was completed in 2019, began as a Restatement in 2013.<sup>142</sup> The project Reporters and ALI leadership recognized that common law in the area of data privacy was too inchoate for a Restatement and changed the project to Principles to help guide the development of the law with respect to the collection, use, and sharing

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<sup>138</sup> *Id.* at 6.

<sup>139</sup> *Id.* at 13.

<sup>140</sup> RESTATEMENT OF CONSUMER CONTRACTS rep. intro. (AM. LAW INST., Tentative Draft, 2019).

<sup>141</sup> ALI Style Manual, *supra* note 9, at ix.

<sup>142</sup> See PRINCIPLES OF THE LAW, DATA PRIVACY” (AM. LAW INST. Tentative Draft, 2019) at xiii (providing history of project and noting project’s conversion from a Restatement to Principles in 2015).

of personal data.<sup>143</sup> Similarly, the ALI changed a pending Principles project into a Restatement with respect to the Restatement of the Law, Liability Insurance, also completed in 2019.<sup>144</sup>

If the proposed Restatement of the Law, Consumer Contracts is not changed to Principles, it could have enormous adverse implications for the ALI. A decision to approve and complete this project as a Restatement would likely mark a turning point in the organization's mission in Restatements to set forth "clear formulations of common law . . . as it presently stands or might appropriately be stated by a court."<sup>145</sup> It would become unclear, essentially overnight, to judges and practitioners in the legal community what, if anything, an ALI Restatement stands for anymore. The basic objective of Restatements to educate judges and policymakers in a dispassionate and authoritative manner would be supplanted by advocacy for unsupported and unprecedented legal system reform. Restatements would no longer "restate" common law; they would endeavor to create it.<sup>146</sup> While some ALI members may support that separate mission, such a change threatens to cause irreparable harm to the ALI's long-term reputation and influence in the legal community.

As mentioned in the introduction of this article, the ALI's influence in the legal community is intertwined with the development of Restatements that clarify legal rules based on unassailable common law support. That influence evaporates if judges and practitioners can no longer rely on Restatements as an educational resource and need to verify the validity and support of any given "black letter" rule. Restatements are designed to assist a "busy common-law judge," not make more work for him or her.<sup>147</sup> Additionally, if all a modern Restatement proposes to do is to "restate" innovative legal rules that advance a particular agenda, for example enhancing the ability of consumers to invalidate agreements with businesses, the value of a Restatement would become more speculative. It would feed directly into Justice Scalia's criticism

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<sup>143</sup> *See id.*

<sup>144</sup> *See* Schwartz & Appel, *supra* note 25, at 721-28 (discussing history and evolution of Restatement of the Law, Liability Insurance).

<sup>145</sup> ALI Style Manual, *supra* note 9, at 3.

<sup>146</sup> *See* Motion to Make Proposed Restatement of the Law, Consumer Contracts Principles of Law, *supra* note 3, at 4 ("Restatements should 'restate' common law, period. They should not promulgate innovative rules, no matter how well intended, that are designed to dramatically reshape the law.").

<sup>147</sup> ALI Style Manual, *supra* note 9, at 6.

that such Restatements “are of questionable value” and “should be given . . . no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar.”<sup>148</sup> Many judges, even those who disagree vehemently with Justice Scalia on other legal matters, may ultimately adopt that viewpoint.

Another concern is that Restatements endeavoring to revise rather restate law may ignite a backlash among state legislatures, similar to what occurred with the ALI’s adoption of the Restatement of the Law, Liability Insurance.<sup>149</sup> While legislation or resolutions rejecting one controversial Restatement in its entirety might be written-off as an anomaly or a cautionary tale for the ALI,<sup>150</sup> the situation would be very different if state legislatures stepped in on multiple occasions to prevent courts from adopting any part of modern Restatements. The ALI could face a credibility crisis in which all of the major stakeholders—judges, legislators, and practitioners—are compelled to reexamine the value of an ALI Restatement.

Changing the proposed Restatement of the Law, Consumer Contracts to the Principles of the Law, Consumer Contracts, or some similar title, would safeguard the ALI from the potentially disastrous consequences the consumer contracts project could have on the organization. Although changing the “label” on an ALI work product might not seem like a “big deal,” it is when talking about the history and tradition of Restatements and the continued viability and importance of these “flagship” ALI work products. As the adage goes, a “few bad apples can spoil the barrel,” and Restatements that do not “restate” existing common law threaten to do precisely that. The Restatement of the Law, Consumer Contracts also raises greater concern than other recent Restatements containing novel provisions, such as the Restatement of the Law, Liability Insurance, because the consumer contracts Restatement goes further in adopting aspirational rules than any other Restatement in the ALI’s history.

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<sup>148</sup> *Kansas v. Nebraska*, 574 U.S. 445, 475 (2015) (Scalia, J., concurring and dissenting in part).

<sup>149</sup> See *supra* notes 28-32 and accompanying text.

<sup>150</sup> See Schwartz & Appel, *supra* note 25, at 770 (discussing ramifications after adoption of Restatement of the Law, Liability Insurance on future ALI Restatements).

## IV. CONCLUSION

The ALI is on the precipice of adopting a Restatement that recommends fundamental changes to the common law of contracts that have no common law support. The proposed Restatement of the Law, Consumer Contracts endorses a novel set of mandatory “consumer contract” rules designed to introduce greater consumer protections into the common law that would allow consumers to invalidate all or part of an agreement entered voluntarily with a business. The project resorts to extraordinary and unprecedented means to accomplish this desired policy outcome and to usher in such a new common law regime. It cobbles together different aspects of “cherry picked” federal and state consumer protection statutes and regulations to support innovative and expansive mandatory common law rules, while avoiding the effect of limiting statutory law (e.g. Federal Arbitration Act). The result is a proposed Restatement replete with provisions that do not “restate” any law, and, consequently, a Restatement that carries a high potential to cause lasting and potentially irreparable reputational harm to the ALI. The ALI, however, has an attractive alternative. The organization can avoid the potential litany of adverse consequences by the changing this proposed Restatement to a Principles project, which is a different ALI work product that may incorporate recommended aspirational rules. If a change to Principles is not made, then the basic purpose, design, and utility of modern Restatements will require a sobering reexamination.