

January 16, 2017

VIA ELECTRONIC MAIL

Richard Revesz, Director  
Stephanie Middleton, Deputy Director  
The American Law Institute  
4025 Chestnut Street  
Philadelphia, PA 19104  
director@ali.org  
smiddleton@ali.org

Re: **Fundamental Concerns with Proposed  
Restatement of “Consumer Contracts”**

Dear Director Revesz and Deputy Director Middleton:

I write on behalf of the U.S. Chamber Institute for Legal Reform (ILR). The U.S. Chamber of Commerce is the world’s largest business federation, representing the interests of more than three million companies of every size, sector, and region. ILR is an affiliate of the Chamber dedicated to making our nation’s overall civil legal system simpler, faster, and fairer for all participants.

As you are aware, the American Law Institute (ALI) embarked in 2012 on a first-of-its-kind project to “restate” the so-called law of “consumer contracts.” Since that time, the project has generated increasing concern within the business community generally, and among ILR’s membership specifically, regarding both the project’s basic design and content. It does not appear that any other Restatement project in the ALI’s 93-year history has truncated a general area of law to develop a set of rules aimed specifically at a particular group, including “consumers.”

The ILR has, until now, refrained from commenting on this pending ALI work product, believing that the ALI leadership and project Reporters would ultimately recognize that the project’s basic approach constitutes an unprecedented, and rather astounding, departure from prior ALI Restatements – and take corrective action. Unfortunately, with the publication of Council Draft No. 3 (dated December 20, 2016), that has not occurred. To the contrary, the latest draft suggests that the project has matured to the point of being ripe for consideration by the ALI Council, and potentially the ALI membership. For that reason, I am writing on behalf of the ILR to express its fundamental concerns with this proposed Restatement.

The concerns expressed here relate not only to the interests of ILR members that contract with consumers, but also to the negative impact on the ALI’s reputation for promoting clarity in

Richard Revesz, Director  
Stephanie Middleton, Deputy Director  
January 16, 2017  
Page 2

the law through Restatements. This Restatement project has the potential to significantly distort prevailing contract law contrary to the ALI's existing Restatements of the Law of Contracts, and to do so in a manner that adversely and unfairly impacts a large number of businesses. The project, perhaps more so than any other pending ALI project, also has the potential to significantly impair the credibility of ALI Restatements among both federal and state judges.

### **The Project Should Be Reframed As What It Really Is: A Principles Project**

According to the ALI Style Manual (Revised 2015), Restatements are supposed to present "clear formulations of common law . . . as it presently stands or might appropriately be stated by a court." This project's Reporters state that the proposed Restatement's purpose "is to identify a class of contracts that have presented separate challenges and concerns and have received special treatment." In spite of this proclamation, it is *the Reporters* who are creating this topic of law. In this regard, it is, once again, telling that the ALI has never before separated out a general area of law (*e.g.*, contracts, torts, property) to develop a set of rules aimed specifically at "consumers."

The ALI Style Manual also sets forth the process for developing a Restatement, which is "constrained by the need to find support in sources of law." Here, the Style Manual is referring to the common law, which the project Reporters are directed to assess to "ascertain the nature of the majority rule" and "ascertain trends in the law." The Style Manual expressly states that any "wild swings" in the development of common law "are inconsistent with the work of both a common-law judge and a Restatement." The Style Manual further explains that an "unelected body like The American Law Institute has limited competence and no special authority to make major innovations in matters of public policy."

But, this is precisely what the Restatement of the Law of Consumer Contracts is: an innovation. The Reporters rely on an amalgam of cherry-picked judicial decisions applying general contract law principles in the consumer context (but not creating a separate "Law of Consumer Contracts") and selected state statutory provisions, such as consumer protection statutes and regulations, as their primary support for Restatement rules. These statutory provisions (whose broad interpretations have been criticized in their own right) were created to give state regulatory agencies authority to address unfair business practices in the marketing and sales of products and services; they were not created as a basis for the law of contracts. By attempting to adapt select elements of this statutory law to create a common law foundation for entirely novel "consumer contract" rules, the project is "making major innovations in matters of public policy."

By way of contrast, the ALI Style Manual already provides a vehicle for addressing "an area [that] is so new that there is little established law." That vehicle is a Principles of Law project. As you are aware, Principles projects provide latitude to Reporters to set forth rules that may be aspirational in nature and recommend what the law "should be" on a particular topic. In this regard, it is telling that the Reporters of the proposed Restatement of the Law of Consumer

Richard Revesz, Director  
Stephanie Middleton, Deputy Director  
January 16, 2017  
Page 3

Contracts expressly state in their introductory note that “consumer contract” law is an area of “emerging new law” and that their intended approach is to draw upon statutes and regulations to promote “a greater conceptual unity across . . . two bodies of law.”

This type of aspirational work product falls clearly within the definition of an ALI Principles projects. But by calling this novel work product a Restatement, and lending the ALI’s reputation for reserving that influential label only for truly deserving projects, the ALI is trying to fit a square peg into a round hole. Consequently, the project is likely to cause significant damage to the ALI’s long-term credibility. If the ALI is willing to call an amalgamation of “cherry-picked” statutes, regulations, and general contract law principles a Restatement of Law, then there is frankly no set of hoped-for legal principles that could not be shoehorned under the Restatement label.

The effect of calling this project a Restatement would – again, perhaps more than with any other pending ALI work product – support criticisms of modern Restatements. As you may recall, the late U.S. Supreme Court Justice Antonin Scalia stated the view that “modern Restatements . . . are of questionable value, and must be used with caution.” *Kansas v. Nebraska*, 135 S.Ct. 1042, 1064 (2015) (Scalia, J., concurring and dissenting in part). “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.” *Id.* (citations omitted).

Accordingly, Justice Scalia determined that “it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law,” and where that is the case, such Restatement provisions “should be given no weight whatever as to the current state of the law, and no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar.” *Id.* Over the next decade, the American judiciary will quietly decide whether Justice Scalia’s view of ALI Restatements is one of universal truth or merely the opinion of one Justice.

### **Project Provisions of Major Concern**

Given the ILR’s view that the entire premise of this proposed Restatement is misguided, it is likely unsurprising that every project provision (i.e. §§ 1-9) gives rise to additional, more particular concerns. A few provisions, however, are especially troubling and illustrative of overarching problems stemming from the unprecedented novelty of this project.

The draft’s treatment of pre-dispute arbitration agreements is particularly unprincipled. The Restatement does not propose to void such agreements outright – because doing so would rather blatantly contradict U.S. Supreme Court precedent embodied in numerous cases such as *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), upholding such agreements – but the

Richard Revesz, Director  
Stephanie Middleton, Deputy Director  
January 16, 2017  
Page 4

Restatement lays groundwork to invalidate such agreements through the development of common law rules that would effectively ignore these preexisting Supreme Court precedents.

For example, the Reporters ignore the effect of *Concepcion* and other precedent interpreting laws such as the Federal Arbitration Act (FAA) by saying that,

The proper interpretation of the FAA and of other federal rules that regulate the procedures for consumers' access to justice are outside the scope of the common law of consumer contracts. This Restatement cannot, nor does it purport to, address such issues. Rather, it restates the principles of consumer-contract law that would determine the enforceability of clauses that limit the ability of consumers to pursue a complaint or to seek reasonable redress, in the absence of constraints overlaid by federal law.

Stated plainly, the Reporters indicate that they are going to *ignore* the FAA and proceed as if it does not exist. They then set forth common law "consumer contract" rules to accomplish their overarching objective, relying when convenient on various state statutes and federal regulations to circumvent the Supreme Court's precedent.

There simply is no principled justification for ignoring the FAA and at the same time basing a number of the proposed Restatement's provisions on state statutory law. If state statutes can provide the basis for a Restatement provision, how can a federal statute be ignored? The apparent reason is that the project's Reporters agree with the policy underlying the state laws but disagree with the policy underlying the FAA – but that is precisely the sort of public policy determination that the ALI's Style Manual expressly prohibits. This rejection of FAA jurisprudence is all the more surprising, because the Supreme Court has made clear that the FAA permits the application of state law unconscionability doctrine to the extent those state law principles are not applied in a manner that discriminates against arbitration or interferes with fundamental attributes of arbitration. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203-1204 (2012) (per curiam).

Moreover, by ignoring the FAA, the draft fails in the goal of providing assistance to courts, because courts are obligated to undertake the task that the draft disclaims: ensuring that state law is applied in a manner permitted by the FAA. The draft thus is more likely to mislead courts than to point them toward the law as it "presently stands."

For example, § 5 proposes a "black letter" rule that would empower a court to void (as unconscionable) any consumer contract term if it "unreasonably expand[ed] the consumer's liability, the business's remedies, or the business's enforcement powers," or "unreasonably limit[ed] the consumer's ability to pursue a complaint or seek reasonable redress for violation of a legal right." Virtually all of these terms are ambiguous and non-descriptive, such that any court that does not wish to follow the Supreme Court's interpretations of the FAA could rely on the Restatement to void the pre-dispute arbitration provision. Courts could

Richard Revesz, Director  
Stephanie Middleton, Deputy Director  
January 16, 2017  
Page 5

similarly rely on the Restatement's broad and ambiguous unconscionability provisions to void other contract terms that they simply do not like.

Another dramatic consequence of § 5 is that it would presumptively invalidate every warranty limitation in a form consumer contract – of which there are many that have been repeatedly upheld by the courts. For example, auto sales contracts typically require that the car be taken to an authorized dealer for service in order for the buyer to invoke the warranty. Under the draft, those provisions, and any other warranty or other limitation, would be assessed by the court under a vague standard directing consideration of “commercial setting, purpose, and effect.” In other words, every single contractual provision that can be characterized as somehow preventing “reasonable redress” will be subject to a *post hoc* economic and commercial analysis by a court. Because courts are unlikely to reach similar conclusions based on such a vague standard, the cost savings that consumers enjoy as a result of implementation of standard contract provisions will be eliminated.

Finally, in addition to providing consumers with new ways to challenge any consumer contract, the draft Restatement proposes a “black letter” remedy provision (§ 9) which would give courts virtually unfettered discretion to refuse to enforce all or part of any consumer contract. This broad authority applies to any violation of any of the Restatement's so-called “mandatory rules” (i.e. another project innovation). The remedy provision would further empower courts to reform contracts involving consumers to address a violating term, and do so in a manner that “operates against the business” where a court concludes the business deliberately inserted an unconscionable term.

Any one of these Restatement provisions would, if adopted, dramatically change state common law. These provisions appear so vague and expansive that a consumer could find some basis to challenge almost any agreement in which he or she voluntarily entered into, but decided later that he or she did not wish to abide by the agreement's terms. The draft Restatement would also provide courts with a new basis to assert unprecedented authority, as a matter of common law, to invalidate and/or rewrite terms in contracts involving consumers. In doing so, the project would introduce major public policy innovations into the law of contracts, contrary to the fundamental design and purpose of an ALI Restatement.

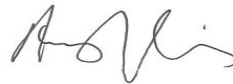
Richard Revesz, Director  
Stephanie Middleton, Deputy Director  
January 16, 2017  
Page 6

### **Conclusion**

The ILR greatly appreciates your willingness to take the time to learn about the very significant concerns we and others in the business community have with the proposed Restatement of the Law of Consumer Contracts. As discussed, the project appears designed to operate to the detriment of businesses that legitimately contract with consumers by recommending that courts adopt broad new common law “consumer contract” rules. The irony of this approach is that the project’s rules, if adopted, would significantly increase business costs and hurt, not help, the overwhelming majority of consumers by raising prices on the wide-ranging products and services the Restatement purports to address.

Many of the project’s fundamental problems stem from classifying the project as a Restatement of existing law rather than as an aspirational Principles project. Even as a Principles project, the project would be endorsing a radical and untested departure in existing law. As a Restatement, however, the project fails on every metric the ALI has established. Therefore, the ILR respectfully urges that the project be changed to a Principles project and that the project’s core provisions, several of which are discussed above, be substantially revised.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Pincus", written in a cursive style.

Andrew J. Pincus