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# HOW TO MAKE A DEAD ARMADILLO: CONSUMER CONTRACTS AND THE PERILS OF COMPROMISE

*Jeffrey W. Stempel\**

*“There’s nothing in the middle of the road but a yellow stripe and dead armadillos”*

## ABSTRACT

*The ALI’s proposed Restatement of the Law, Consumer Contracts (“RLCC”) has managed to alarm both corporate America and consumer advocates, including half the nation’s attorneys general. To some extent, the RLCC is yet another victim of the nation’s increasing polarization and the rise of partisanship within the legal profession. But the RLCC suffers from self-inflicted wounds through questionable endorsement of problematic caselaw on contract formation as well as its goal of a well-intentioned but flawed “Grand Bargain” that arguably seized a middle ground*

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<sup>1</sup> JIM HIGHTOWER, *THERE’S NOTHING IN THE MIDDLE OF THE ROAD BUT A YELLOW STRIPE AND DEAD ARMADILLOS* (1997). Hightower is a former Democratic Texas Agriculture Commissioner and self-identified progressive who co-chaired Ralph Nader’s 2000 presidential campaign and was a supporter of Vermont U.S. Senator Bernie Sanders for the 2020 Democratic presidential nomination. The title of his book, based on a quote he used often on the campaign trail running as an avowed ultra-liberal in conservative Texas, reflects his view that a clear policy position (either liberal or conservative) aids candidates and policymakers more than tame moderation or baby-splitting compromise. As discussed in this article, the saga of the Consumer Contracts Restatement shows Hightower is probably at least half-right, sort of – if that’s not too much of a middle-of-the-road assessment.

*disliked, for different reasons, by both consumer and business advocates. The RLCC stepped into this possible worst of both worlds by seeking to remake contract doctrine but at the same time paradoxically taking an unduly narrow a view of the permissible scope of "restating" the law. In doing so, it bypassed an opportunity to shift the framework of consumer contract law in a manner that could have benefitted consumers and the public interest at little cost to legitimate commercial concerns. All that said, the RLCC nonetheless contains provisions helpful to consumers if applied with sufficient zeal and frequency by courts.*

## I. INTRODUCTION

The Agenda for the 2019 Annual Meeting, the American Law Institute (ALI)<sup>2</sup> included discussion and presumed endorsement of the RLCC.<sup>3</sup> But the presumed coronation of a new Restatement<sup>4</sup> met with more than a little resistance from elements of

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<sup>2</sup> The ALI, established in 1923, is an organization of lawyers, judges, and scholars with roughly 3,000 elected members as well as ex-officio members such as law school deans and jurists. It engages in “producing scholarly work to clarify, modernize, and otherwise improve the law.” It “drafts, discusses, revises, and publishes Restatements of the Law, Model Codes, and Principles of the Law” in an effort to influence courts, legislatures and educators regarding legal. *See* [ali.org/about-ali](http://ali.org/about-ali) (visited March 31, 2020).

<sup>3</sup> RESTATEMENT OF THE LAW, CONSUMER CONTRACTS (AM. LAW INST., Tentative Draft, April 18, 2019). The most recent version of the RLCC is the Tentative Draft. Since inception of the project in 2012, there have been 26 drafts of the document, if one counts redline comparison drafts and the initial Project Outline and Reporters’ memoranda to the ALI Counsel. If one counts only stand-alone documents labeled as drafts, there have been 10 drafts of the RLCC during the nearly 10 years of the project. *See* [ali.org/projects/show/consumer-contracts/#\\_drafts](http://ali.org/projects/show/consumer-contracts/#_drafts) (visited March 31, 2020).

<sup>4</sup> At the risk of oversimplifying, particularly in light of current debate over apt nature and scope, an ALI Restatement is (in my view) a distillation of an area of law that sets forth “black letter” “rules” outlining the doctrine of the area followed by comments clarifying those rules and their rationale as well as competing views as well as providing Illustrations of the black letter rules in operation. Following the comments, Restatements contain a Reporter’s Note (or Reporters’ Note as the task of drafting a Restatement is beyond the scope of a single (and sane) human’s capacity for work).

The ALI puts it a little differently: “Restatements are primarily addressed to courts. They aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court.” RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS at xi (AM. LAW INST., Tentative Draft, 2019) (reprinting “Restatements” from the Revised Style Manual approved by the ALI Council in January 2015) (boldface removed).

This statement, which alone might be credibly accused of oversimplification, is then followed by two full pages of nuanced exposition that should be required reading for all attorneys and policymakers, particularly judges and those who have criticized the RLCC or other recent ALI Restatements. Space limitations prevent wholesale quoting of the Statement but it is important to note that ALI views Restatements as having “four principal elements”: Ascertainment of majority rules; ascertainment of trends; assessment of an area’s jurisprudence in the overall legal landscape; and ascertainment of “the relative

the ALI membership. A substantial cadre of the Institute's academic members, consumer advocates, and state attorneys general viewed the RLCC as unduly favorable to vendors seeking to abuse consumers through unfair contract provisions.<sup>5</sup> Conversely,

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desirability of competing rules," an area where "social-science evidence and empirical analysis can be helpful." *Id.* at x-xii.

A Restatement functions (and I know I will be criticized for saying this in light of the late Justice Scalia's attacks on "modern" Restatements – see Text Accompanying Note ("TAN" 45, *infra*)) as a "Super Treatise" that is authoritative because it reflects much more than the views of a single author or team of co-authors. Rather, it is the product of extensive collaboration involving experts with differing perspectives in the creation of the Restatement and an electorate of experienced attorneys that must approve the Restatement. As a result, Restatements will inevitably reflect some degree of compromise and are highly unlikely to escape the banks of the mainstream of law. Where a Restatement adopts a minority rule as the "better" rule of law, there is always at least some judicial support for the view and often substantial-cum-overwhelming scholarly support for adopting the minority position.

<sup>5</sup> See Jerri-Lynn Scofield, *Consumer Contracts Restatement Delayed: Consumers Win. . . For Now*, NAKED CAPITALISM (May 31, 2019), <https://www.nakedcapitalism.com/2019/05/consumer-contracts-restatement-delayed-consumers-win-for-now.html>; Jenna Greene, *Daily Dicta: 'Fundamentally Flawed': Consumers Notch Win as ALI Postpones Restatement Vote*, THE AMERICAN LAWYER (May 22, 2019) (available on LexisNexis); Adi Robertson, *A Contentious Legal Debate Over User Agreements Has Been Delayed After Elizabeth Warren Called It 'Dangerous,'* THE VERGE (May 22, 2019), <https://www.theverge.com/2019/5/22/18634183/consumer-contracts-ali-restatement-law-elizabeth-warren-attorney-general-opposition>; Alison Frankel, *Final Vote on Consumer Contracts Restatement Is Postponed at ALI Annual Meeting*, ALISON FRANKEL'S ON THE CASE, (May 21, 2019), [https://www.westlaw.com/Document/I6907e5f07c1a11e98bcce5085b3b01ec/View/FullText.html?transition-Type=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/I6907e5f07c1a11e98bcce5085b3b01ec/View/FullText.html?transition-Type=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0); David Dayen, *The Secret Vote That Could Wipe Away Consumer Rights*, AM. PROSPECT (May 20, 2019), <https://prospect.org/culture/secret-vote-wipe-away-consumer-rights/>; David Dayen, *The Secret Vote That Could Wipe Away Consumer Rights*, AM. PROSPECT (May 20, 2019), <https://prospect.org/culture/secret-vote-wipe-away-consumer-rights/>; Alison Frankel, *State AGs Protest ALI Consumer Contract Restatement Ahead of May 21 Vote*, REUTERS (May 15, 2019), <https://www.reuters.com/article/us-otc-ali/state-ags-protest-ali-consumer-contract-restatement-ahead-of-may-22-vote-idUSKCN1SL2VB>.

As one observer summarized, although the ALI Council had approved the RLLC Tentative Draft, as the Annual Meeting vote approached

substantial elements of the business community saw the RLCC as licensing courts to unduly interfere with vendor ability to impose efficient terms upon consumers.<sup>6</sup> Faced with this whipsawing

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Criticism of the proposed rules was brisk and bilateral. Broadly speaking, consumer groups argued that the proposed restatement abandons the doctrine of mutual assent, imposing a presumption that consumers have agreed to online corporate contracts even if they have not explicitly said so. Business groups, meanwhile, complained that the restatement improperly attempts to create new common law, consistently disadvantaging businesses in, for instance, its analysis of unconscionability.

Both consumer advocates and business groups brought motions to convert the ALI's project to restate consumer contract law into a so-called principles project, in which ALI's conclusions would carry less weight with federal judges.

Alison Frankel, *Final Vote on Consumer Contracts Restatement Is Postponed at ALI Annual Meeting*, ALISON FRANKEL'S ON THE CASE (May 21, 2019), <https://www.westlaw.com/Document/I6907e5f07c1a11e98bce5085b3b01ec/View/FullText.html?transition-Type> (noting that motions were withdrawn with ALI decision to postpone final vote until 2020 Annual Meeting (now to be 2020 Annual Meeting) and that ALI leadership continues to expect RLCC to be approved (quoting ALI Council member Steven Weise).

<sup>6</sup> See Daniel Fisher, *Consumer Advocates, Business Interests Form Rare Alliance to Block American Law Institute Project*, PENN RECORD (May 21, 2019), <https://pennrecord.com/stories/512511439-consumer-advocates-business-interests-form-rare-alliance-to-block-american-law-institute-project>; Alan S. Kaplinsky, *ALI's Restatement of the Law, Consumer Contracts: An Ill-Conceived and Poorly Implemented Project*, BALLARD SPAHR CONSUMER FINANCE MONITOR (May 16, 2019), <https://www.consumerfinancemonitor.com/2019/05/16/alis-restatement-of-the-law-consumer-contracts-an-ill-conceived-and-poorly-implemented-project/>; Fred H. Miller, *A Restatement that is Not Really a Restatement*, CONSUMER FINANCIAL SERVICES LAW REPORT (Apr. 18, 2019), <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2019/05/FMiller-Article-in-22CFSLR20.pdf>; Fred H. Miller, *A Critique of ALI's Consumer Contracts Restatement*, CONSUMER FINANCIAL SERVICES LAW REPORT (Mar. 19, 2019), <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2019/05/FMiller-Article-in-22CFSLR18.pdf>.

As with consumer concerns, business concern regarding the pro-consumer provisions of the RLCC (largely in the unconscionability provisions of §5) was in evidence well before the 2019 Annual Meeting. See, e.g., Nicholas Malfitano,

opposition, ALI leadership declined to hold a up-or-down vote on the RLCC and recommitted the Draft to the Reporters for further revision and subsequent consideration.<sup>7</sup> The RLCC was not on the Agenda for the 2020 ALI Annual Meeting (cancelled due to COVID-19 concerns) but is expected to be presented at the 2021 Annual Meeting.<sup>8</sup>

The status of the RLCC remains, at least to me, unclear even though the ALI presents the project as routinely rambling toward completion.<sup>9</sup> The existing Draft appears to retain the solid

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*Criticism Follows Powerful Law Group to Next Project – A ‘Troubling’ Take on Consumer Contracts*, FORBES (Jun. 25, 2018), <https://www.forbes.com/sites/legalnewsline/2018/06/25/criticism-follows-powerful-law-group-to-next-project-a-troubling-take-on-consumer-contracts/#472f457d2f60>; W.J. Kennedy, *Proposed Restatement of Consumer Contract Law Could Give Trial Bar New Weapon*, LEGALNEWSLINE.COM (Feb. 23, 2017), <https://legalnewsline.com/stories/511084723-proposed-restatement-of-consumer-contract-law-could-give-trial-bar-new-weapon>, (Source owned by U.S. Chamber Institute for Legal Reform, which opposes the RLCC).

<sup>7</sup> See Note 5, *supra*; ALI Home Page, Consumer Contracts Project Page, [ali.org/projects/show/consumer-contracts/](http://ali.org/projects/show/consumer-contracts/) (“After a spirited discussion of the 2019 Annual Meeting, the membership voted to approve §1 of Tentative Draft No. 1, subject to the discussion at the Meeting and usual editorial prerogative) (also directing readers to article by Council member Steven Weise defending RLCC (see Steven O. Weise, *The Draft Restatement of the Law, Consumer Contracts, Follows the Law*, ALI REPORTER, Spring 2019 at p. 7) and stating that for an “in-depth description of this project” readers should visit the Consumer Contracts page of THE ALI ADVISER, which collects a variety of articles and commentary, pro and con, regarding the RLCC).

Section One of the RLCC discusses the scope of the project and sets forth definitions of key terms such as “consumer,” “business,” and “consumer contract” (see RLCC § 1) and was thus relatively uncontroversial. The transcript of the 2019 Annual Meeting was not yet published at the time of this article but the “spirited” discussion noted on the ALI website arguably understates the atmosphere of opposition to the RLCC at the 2019 Annual Meeting. There was on the floor substantial doubt that the RLCC would be approved if a vote was held at that time and the ALI’s decision to avoid a vote was seen by many as a wise tactical withdrawal that would permit the Reporters to perhaps revise parts of the RLCC to soften opposition and for the Institute to shore up support for the project.

<sup>8</sup> See Annual Meeting Agenda, ALI Website (<http://www.ali.org>) (visited April 5, 2020).

<sup>9</sup> See Foreword to RLCC Tentative Draft (AM. LAW INST., Tentative Draft, 2019) at xv (“A Discussion Draft containing all the Sections [of the RLCC] was

support of the ALI Council,<sup>10</sup> arguably the locus of power in the Institute. But the 2019 Annual Meeting and commentary regarding the April 2019 RLCC draft and prior drafts reflects substantial opposition<sup>11</sup> that may foreshadow substantial barriers to the approval and publication of the RLCC.

Even if it becomes an approved Restatement, the RLCC now is shadowed by a seeming cloud, one that gives both business and consumer groups significant ammunition in arguing against its application by courts. Although recent Restatements have been in the crosshairs of controversy that potentially undermines their

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presented at the Annual Meeting in 2017. The Council has now approved the whole project, which will be presented for final approval.”).

<sup>10</sup> See, e.g., Stephen Weise, *The Restatement of Consumer Contracts Follows the Law*, THE ALI ADVISER, <http://www.thealiadviser.org/consumer-contracts/the-draft-restatement-of-the-law-consumer-contracts-follows-the-law/> (Apr. 5, 2019) (prominent commercial attorney and member of ALI Council strongly defends RLCC in official publication of ALI without any dissent or counter-argument from other Council members).

<sup>11</sup> See Notes 5 & 6, *supra*.



impact,<sup>12</sup> the RLCC appears particularly vulnerable to becoming a low-impact product of the Institute.<sup>13</sup>

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<sup>12</sup> For example, the ALI *Restatement of the Law, Liability Insurance* (2019) (“RLLI”) has been under attack from elements of the insurance industry and their largely conservative political allies since 2014 and has included attempts (some successful) to have state legislatures pass resolutions condemning the RLLI and statutes restricting court use or citation of the RLLI. See JEFFREY W. STEMPEL & ERIK S. KNUTSEN, STEMPEL & KNUTSEN ON INSURANCE COVERAGE §14.14 (4th ed. 2016 & Supp. 2019) (discussing insurer attacks on RLLI and Ohio anti-RLLI law stating that RLLI does not constitute the public policy of Ohio); *North Dakota Joins Ohio in Rejecting Controversial ALI Restatement*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (April 5, 2019), <https://www.instituteforlegalreform.com/resource/north-dakota-joins-ohio-in-rejecting-controversial-ali-restatement>. (law stating that North Dakota judges “may not apply, give weight to, or afford recognition to” the RLLI “as an authoritative reference”). See, e.g., Arizona House of Representatives, House Bill 2644 (passed House Feb. 27, 2020; consideration by Arizona Senate pending). See also RANDY MANILOFF & JEFFREY STEMPEL, GENERAL LIABILITY INSURANCE COVERAGE: KEY ISSUES IN EVERY STATE Ch. 22 (4th ed. 2018) (discussing substantive provisions of RLLI).

Property owner reaction to the trespass provisions of the ALI *Restatement of the Law, Torts: Liability for Physical and Emotional Harm* § 51 (2010), which stated that landowners owed a duty of reasonable care to trespassers was similar, with this interest group strongly attacking the provision and in some states succeeding in obtaining legislation rejecting the Restatement approach in favor of one in which landowners owed no duty of care to trespassers. See American Legislative Exchange Council (ALEC), Trespasser Responsibility Act (stating that an owner “does not owe a duty of care to a trespasser”); Victor E. Schwarz & Cary Silverman, *The New Restatement: Blunting This Potentially Dangerous Trial Lawyer Weapon* (May 2011) (U.S. Chamber Institute for Legal Reform) at p. 8 (characterizing Torts Restatement rule as “fundamentally unsound”).

<sup>13</sup> By low impact I mean a Restatement that is less likely that the average Restatement to be cited in briefs to courts and is (often as a consequence of not being used by counsel) not frequently cited in judicial decisions.

A Restatement can be influential even if not cited but my trial hypothesis (which I am unlikely to test empirically because of practical difficulties and the immense time commitment) is that where a court is aware of a Restatement and agrees with the Restatement position on an issue, the Restatement is likely to get cited. It bears the seal of approval of the ALI, which is a mainstream and respected organization and its citations will not be questioned or criticized except in rare cases (see TAN 45, *infra*, discussing Justice Scalia’s attack on Restatement in *Kansas v. Nebraska*, 574 U.S. 445 (2015)).

By contrast, courts may be influenced by treatises, law review articles, or other scholarship but be reluctant to cite them in opinions because these are

How did it come to this? To some extent, the RLCC, like other modern Institute projects, has been and likely will be a casualty of the increasing division of the American policy (in law, philosophy, jurisprudence, ideology, politics, lifestyle, and . . .  $\infty$ ).<sup>14</sup> While it may have been illusory, past eras appeared to have relatively broad consensus withing the legal profession. The modern legal profession appears more divided and marked by debate as much as agreement.

In addition, the RLCC, like other recent ALI efforts (e.g., Restatements regarding Liability Insurance and Copyright),<sup>15</sup> addresses an area in which attorneys know quite clearly the camp into which they fall (e.g., insurer lawyer as opposed to policyholder attorney, counsel to a copyright holder versus lawyer for an entity wishing to be free of copyright constraints), making the aspiration of dispassionate, neutral analysis harder to obtain. By contrast, the ALI's signature products (e.g., *Restatement of Contracts*, *Restatement of Judgments*)<sup>16</sup> involve areas where the members assessing a draft are likely to represent both sides of a transaction or issue and will be at least silently driven toward support for a position acceptable to all parties.

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viewed as less authoritative and more personally connected to the authors, who may have reputations as pro-plaintiff or pro-defendant scholars, prompting courts not to cite such works out of concern for providing a ground for attacking the court's opinion. Consequently, interest groups that dislike a Restatement have an incentive to have the Restatement viewed as "just another" treatise, or – better yet – a tainted treatise that should not be considered, relied upon, or cited. A successful attack of this type not only discourages judges aware of the controversy from utilizing a Restatement but also discourages counsel from citing the Restatement, advocacy that would increase judicial consideration of the document, often with courts concluding that the Restatement is in fact quite a reliable and helpful tool for analysis.

<sup>14</sup> Notwithstanding the tradition of legal scholarship favoring citation of even seemingly obvious points (at least to those watching or reading the news), I think the proposition of current considerable division in the United States is rather inarguable. But in keeping with tradition, see EZRA KLEIN, *WHY WE'RE POLARIZED* (2020).

<sup>15</sup> See RESTATEMENT OF THE LAW, LIABILITY INSURANCE (AM. LAW INST., 2019) ("RLLI"; RESTATEMENT OF THE LAW, COPYRIGHT (Preliminary Draft No. 5, Feb. 13, 2020)) ("RLC).

<sup>16</sup> See RESTATEMENT OF THE LAW (SECOND) CONTRACTS (1981) ("RC2"); RESTATEMENT OF THE LAW (SECOND), PROPERTY (1977) (RLP2); RESTATEMENT OF THE LAW, JUDGMENTS (AM. LAW INST., 1982) ("RLJ2").

These trends are exacerbated by a trend toward more outside efforts to influence the content of Restatements. Such efforts marked aspects of the *Restatement (Third) of Torts*<sup>17</sup> and have been a fixture of the *Restatement of the Law, Liability Insurance* (“RLLI”).<sup>18</sup> Although this is not an entirely new phenomenon, it appears to have increased in frequency and severity. Debate about the RLLI has, for example, featured a letter from six governors condemning not just an aspect of the document but urging rejection of the entire project<sup>19</sup> as well as insurer-led efforts to enact state laws barring courts from applying the RLLI to coverage disputes.<sup>20</sup>

But the battle scars of the RLCC are not entirely the product of the seemingly more challenging atmosphere of modern law and politics. Some of the wounds are self-inflicted, even if stemming from the best of intentions. Part I of this article briefly chronicles the development of the RLCC and the controversy surrounding the project leading to its current uncertain status. Part II focuses on the errors (from my perspective) made by project proponents that increased resistance (needlessly in my view).

Part III presents a broader criticism focusing on what seems (as of Spring 2020) to be the lost opportunity of the RLCC, albeit a criticism that presumes a more pro-active role for Restatements that many may reject. Part III also advocates a more avowedly pro-consumer RLCC. Although such an RLCC would continue to

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<sup>17</sup> See Elizabeth Laposata, Richard Barnes & Stanton Glantz, *Tobacco Industry Influence on the American Law Institute’s Restatements of Torts and Implications for its Conflict of Interest Policies*, 98 IOWA L. REV. 1 (2012) (reviewing tobacco industry efforts to affect content of Restatement § 402A regarding product liability, including retention of Reporters as consultants). See also Roberta Cooper Ramo & Lance Liebman, *The ALI’s Response to the Center for Tobacco Control Research & Education*, 98 IOWA L. REV. 1, 1 (2013) (disputing contention that tobacco industry lobbying was effective in affecting Restatement content). 4-6.

<sup>18</sup> See note 12, *supra*. See also Jeffrey W. Stempel, *Hard Battles Over Soft Law: The Troubling Implications of Insurance Industry Attacks on the American Law Institute Restatement of the Law of Liability Insurance*, 69 CLEVE. ST. L. REV. (2021) (forthcoming).

<sup>19</sup> Letter from Governors Henry McMaster (South Carolina), Kim Reynolds (Iowa), Paul R. LePage (Maine), Pete Ricketts (Nebraska), Greg Abbott (Texas), and Gary R. Herbert (Utah) to ALI President David F. Levi (Apr. 6, 2018) (attacking RLLI and recommending its rejection).

<sup>20</sup> See note 12, *supra*.

attract criticism, it would also attract adherents. To the extent law reform organizations such as the ALI go beyond baseline projects (Restatements of the basic law of torts, contracts, etc.) to address more particularized (and often more politicized) areas of law, my suggested approach may in fact be the more productive and “safer” route. Rather than being a path to consensus and acclimation, more timid or hybridized approaches constrained by the status quo may be more likely to produce dead armadillos rather than authoritative or influential publications.

## II. THE RESISTANT ROLLOUT OF AN ARGUABLY MODERATE YET UNDENIABLY CONTROVERSIAL RLCC

### *A. The Genesis and Initial Orientation of the RLCC*

The RLCC had a “unique genesis” in that it accelerated rapidly from the 2011 Young Scholars Medal<sup>21</sup> awarded to Professor Oren Bar-Gill (then at NYU and now at Harvard) for his work involving “the study of contracts in which there is significant imbalance of information between sellers and buyers and in which contract terms are not negotiated by the parties.”<sup>22</sup> ALI leadership was impressed with his work, which emphasized the degree to which ordinary consumers do not read and understand standard form contract terms and the degree they are “seduced” into entering into transactions documented by forms containing terms highly favorable to vendors.

Prompted by the work of Professor Bar-Gill<sup>23</sup> and similar insights from the other professors who became RLCC Reporters (Omri Ben-Shahar (University of Chicago)<sup>24</sup> and Florencia

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<sup>21</sup> The Award, a high ALI honor that includes presentation of award-winning work before the ALI membership at an Annual Meeting, has since been changed to Early Career Scholars Medal.

<sup>22</sup> RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS at xv (AM. LAW INST., Tentative Draft 2019) (“RLCC”).

<sup>23</sup> See, e.g., OREN BAR-GILL, *Seduction by Contract: Law, Economics and Psychology in Consumer Markets* in NYU LAW & ECONOMICS RESEARCH PAPER SERIES 12-33 (2012).

<sup>24</sup> See, e.g., Omri Ben-Shahar & Carl Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* in CHICAGO WORKING PAPER SERIES (2013). See also Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

Margota-Wurgler (NYU) (joining the project in 2014),<sup>25</sup> the ALI approved pursuit of the RLCC and work began with submission of an outline of the Project to the Council in September 2012. The authors characterized contracts as being of “two main types”: “(1) business-to-business (“B2B”) contacts, and (2) business-to-consumer contracts or, simply consumer contracts.”<sup>26</sup> The Reporters described the two types of contacts, despite their historically similar doctrinal treatment, as having “important distinctions relating to formation, interpretation, remedies, and protective rules” sufficient to constitute “two very different species of transaction.”<sup>27</sup> In particular,

[c]onsumer contracts often lack the distinctive features of classical, assent-based contract. It is well known, and empirically established, that consumers rarely read the contracts that govern so many aspects of their everyday day life. And, without reading, there is no meaningful assent to the concrete content of the contracts. Writing on form contracts, of which consumer contracts are a primary example, Karl Llewellyn famously distinguished between the few “dickered terms” that consumers actually assent to and the many boilerplate terms to which there is “no assent at all.” Instead, consumers provide what Llewellyn regarded as “blanket assent” – the agreement to be bound by the unknown terms of the fine print, so long as they do not exceed some boundaries of reason and custom.<sup>28</sup>

Despite the distinctions between consumer contracts and B2B contracts, the Reporters lamented that “there is no clear division in the law of contacts,”<sup>29</sup> proposing the planned RLCC as a solution that would make the distinction and continue an observed

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<sup>25</sup> See, e.g., Florencia Margota-Wurgler, et al. *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. LEGAL STUD. 1 (2014); Florencia Margota-Wurgler, *Are ‘Pay Now, Terms Later’ Contracts Worse for Buyers? Evidence from Software License Agreements*, 38 J. LEGAL STUD. 309 (2009).

<sup>26</sup> Oren Bar-Gill & Omri Ben-Shahar, *Restatement of the Law Third, Consumer Contracts – Outline at 1* (Sept. 2012)

<sup>27</sup> *Id.* at 1.

<sup>28</sup> *Id.* at 2.

<sup>29</sup> *Id.*

trend of distinguishing between different types of contracts and their respective contexts.<sup>30</sup> The Reporters' Outline proposed a RLCC "divided into four major Parts:" Procedure (focusing on the "Quality of Assent"); Substance (focusing on the terms of "the Contract"; Unconscionability; and contract Interpretation and Supplementation. Within this framework, the RLCC was to

clarify the conceptual and normative foundations of consumer contract law, to identify existing patterns within contract law of treating consumer contracts distinctly, the trends that these patterns reveal, and the general principles that can be articulated form these patterns. The purpose is not to reform the law.<sup>31</sup>

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<sup>30</sup> *Id.* at 3.

While the original approach of the Restatement [of Contracts (apparently both the First and Second Restatements)] was to lump together all contracts and distill the unified rules, the current trend is to move beyond the "unification" approach and recognize instead the special policies that underlie some of the branches of contract law. Accordingly, recent ALI projects recognize the importance of special categories of contracts. In particular, the Principles of the Law of Software Contracts address the challenges that are unique to software contracts and to transactions over digital content. The Principles of the Law of Liability Insurance address the specific interpretation and enforcement rules that are unique to the field of insurance contracts. The [RLCC] will carry on this important trend of distinguishing the unique foundations of designated areas.

It is important to recognize, however, that consumer contracts are not just another special category of contracts. Rather, they have emerged as an autonomous field of transactional law . . .

<sup>31</sup> *Id.* at 4. The Outline then provided some detail of the Reporters analysis of issues such as disclosure and consumer ability to absorb and process information, fraud, and treatment of unknown terms unlikely to be read by consumers, identifying "various concerns . . . regarding defects in the assent of the parties." *Id.* at 4-7. It also planned examination of unilateral modification clauses, consumer rights to terminate or withdraw from contacts, termination penalties, warranties, remedies and their limitation, cancelation, liquidated and "supra-compensatory" damages, recovery of counsel fees, choice of law and forum and statutory protections for consumers affecting consumer transactions. An entire section was to be devoted to unconscionability as well as one on Interpretation and Supplementation" that would address the contra proferentem principle, the parole evidence rule, the standards used by courts in determining "reasonable reader" behavior and duties of good faith as well as "pro-consumer" default rules. *See id.* at 6-16.

By November 2013, the Reporters had produced a Reporters' Memorandum that included a "Pre-Draft" of the RLCC<sup>32</sup> and after receiving commentary from Project Advisers<sup>33</sup> and the Members Consultative Group ("MCG")<sup>34</sup> for the Project quickly followed this with a December 2013 revised Reporter's Memorandum for presentation at the January 2014 meeting of the ALI Council.<sup>35</sup> After receiving feedback from the Council, the Reporters produced the Project's first Preliminary Draft,<sup>36</sup> which received further discussion by Advisers and the MCG before presentation

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<sup>32</sup> See Memorandum from Oren Bar-Gill & Omri Ben-Shahar to "Advisers and Members Consultative Group on Restatement Third, The Law of Consumer Contracts," AM. LAW INST. (Nov. 1, 2013).

<sup>33</sup> See *How the Institute Works*, AM. LAW INST. (last visited Oct. 12, 2020), <https://www.ali.org/about-ali/how-institute-works>. (The ALI Counsel, a group of between 40 and 64 leaders of the Institute, not only select Reporters for a Restatement Project but also Advisers, usually 40 or so in number. These Advisers meet regularly with the Reporters to discuss drafts of a Restatement, making suggestions that may prompt revisions. Over the course of a Principles or Restatement project, the reporters present drafts to four groups—the advisers, the members consultative group (MCG), the Council, and the general members of the ALI—at annual meetings).

<sup>34</sup> Unlike the Advisers, who are selected for participation in a Restatement project, the Members Consultative Group ("MCG") is open to any ALI member wishing to view Restatement drafts and participate in meetings with Reporters to discuss the drafts. Typically, Reporters will discuss a particular draft with Advisers on one day followed by discussion with the MCGT on the ensuing day.

<sup>35</sup> See Oren Bar-Gill and Omri Ben-Shahar, Reporters' Memorandum Pre-Draft Provisions for Restatement Third, The Law of Consumer Contracts Submitted to the Council of the American Law Institutes [for meeting of] January 17, 2014 (submission in December 2013) (boldface in original).

<sup>36</sup> See RLCC, Preliminary Draft No. 1 (October 28, 2014). A Preliminary Draft is just that: the Reporter's Draft of a Restatement section for sections to be discussed with Advisers and the MDG. Reporters then typically produce a Council Draft for presentation to the ALI Council, which reviews, discusses, and then votes on the Council Draft before it. The Reporters then precent the Council Draft with revisions either alone or in combination with other Council-approved drafts in a Tentative Draft for review by the ALI Membership at its Annual Meeting. After discussion and further revision, the Reporters eventually submit a Proposed Final Draft to the Council and the membership. If approved, the Proposed Final Draft (as amended by any actions at the Annual Meeting) becomes a published Restatement.

of the initial Council Draft at the Council's Meeting of January 2015.<sup>37</sup>

Meetings with RLCC Advisers and the project MCG in late 2014 prompted significant revision of the RLCC's black letter text and commentary.<sup>38</sup> The January 2015 Council Meeting produced further significant (but arguably not substantial) change and put the RLCC into the basic form and content that continues to-day.<sup>39</sup> Without meaning to minimize the nature of the revisions made in the wake of Council review, it is in my view fair to say that despite considerable revision of the language of the draft RLCC, the basic structure of the grand bargain envisioned by the Reporters remained in place.<sup>40</sup>

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<sup>37</sup> See RLCC, Council Draft No. 1 (Jan. 6, 2015).

<sup>38</sup> See RLCC redline comparison of Preliminary Draft No. 1 (Oct. 28, 2014) with Council Draft No. 1 (Jan. 6, 2015) (on file with author; available at ali.org for ALI members).

<sup>39</sup> *Compare* Council Draft No. 1 (Jan. 6, 2015) *with* current RLCC (April 2019 Tentative Draft). I do not mean to belittle the post-January 2015 work done on the RLCC but my perspective is that the basic organization, thrust, theme, and content of the RLCC has remained largely intact and unchanged during the past five years in spite of criticism. Although the words "Grand Bargain" have been largely excised, the RLCC remains as the Reporters originally envisioned it: a document making contract formation easy (a benefit for business vendors) and depending upon strong judicial policing (a benefit for consumers) to avoid unfairness.

<sup>40</sup> I realize this is a rather sweeping statement in light of the many subsequent Preliminary Drafts and Council Drafts of the RLCC. See Preliminary Draft No. 2 (Oct. 20, 2015), Revised Preliminary Draft No. 2 (April 12, 2016), Council Draft No. 2 (Sept. 19, 2016), Council Draft No. 3 (Dec. 20, 2016), Discussion Draft (April 17, 2017), Preliminary Draft No. 3 (Sept. 28, 2017); Council Draft No. 4 (Dec. 18, 2017); Council Draft No. 5 (Sept. 19, 2018) and the culmination in the RLCC Tentative Draft (April 18, 2019).

And I am not denigrating the revisions made along the way that, if applied by courts, would constitute substantial protection for consumers. See, e.g., Council Draft No. 5 (Sept. 19, 2018) (§ 5(b) (adopting a sliding scale approach to unconscionability), § 5(c) ("An exceptionally high degree of substantive unconscionability is sufficient to make a standard form contract term unconscionable.")).

What I am saying, as elaborated in text, is that the RLCC, largely from its inception through today has maintained the approach of largely approving a regime of ready contract formation using of standardized adhesion contracts that may contain very problematic terms and depending upon an implicitly vigorous (because if not vigorous it is of little value) doctrine of unconscionability



The RLCC, while acknowledging at length that consumers generally do not read, do not understand, and cannot shape the terms of standard form texts,<sup>41</sup> nonetheless endorsed a pro-vendor regime of easy contract formation, in large part out of a view this was the overwhelming majority rule in the courts.<sup>42</sup> With the

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to policy these agreements and adequately protect consumers. The RLCC has taken this route both because of its view of the caselaw and the practical needs of commerce.

<sup>41</sup> See RLCC Council Draft No. 1 (Jan. 6, 2015) at 1 (Introductory Note):

Consumer contracts present a fundamental challenge to the law of contracts, arising from the asymmetry in information, sophistication, and stakes between the parties to these contracts – the business and the consumers. On one side stands a well-informed and counseled business party, entering numerous identical transactions, with the tools and sophistication to understand and draft detailed legal terms and design practices that serve its commercial goals. On the other side stand consumers who are informed only about some aspects of the transaction but rarely about the non-negotiated list of legal terms. These consumers enter the transaction solely for personal or household purposes, without any professional understanding of its legal contours. 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, entered into daily.

<sup>42</sup> See RLCC Council Draft No. 1 (Jan. 6, 2015) at 3 (Introductory Note):

In principle, the law could address the concern for potential abuse in asymmetric contracting environments by using both regulatory techniques – the assent doctrine and mandatory limits over permissible contracting. The law could require more meaningful assent, making it harder and costlier for businesses to incorporate their pre-drafted terms into the transaction; and at the same time the law could prohibit various intolerable substantive terms even if those pass through the heightened filter of mutual assent.

By and large, however, common-law courts have relaxed the assent rules, permitting businesses to use relatively lenient adoption processes. Courts have recognized that, in a world of lengthy standard forms, more restrictive assent rules that demand more thorough advance disclosure and more meaningful informed consent would increase transaction costs without producing substantial benefits. (While, in theory, restrictive assent rules could reverse the tide and lead to shorter, more comprehensive standard forms, in practice

metaphorical ship of contract formation already having sailed, the RLCC's primary protection of consumers would be through endorsement of judicial policing of terms through the unconscionability doctrine, operationalizing the "grand bargain" envisioned by the Reporters that would accommodate the practical needs of vendors while also adequately protecting consumers.<sup>43</sup>

Despite particular revisions during the next four years, this basic structure of the RLCC is what was presented to the ALI prior to the May 2019 Annual Meeting and remains the fulcrum of the current draft RLCC slated for discussion and pending approval at the May 2021 Annual Meeting.

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assent doctrine is unlikely to achieve this goal.) As the length and incidence of standard form contracts grew, it became less plausible to expect consumers to read the disclosed terms, and more sensible to permit formation processes that do not rely on consumer readership.

Except for its arguable overstatement of judicial uniformity regarding resistance to contract formation defenses and the transaction costs of more restrictive formation doctrine, this analysis is largely correct. But to the extent it is correct, it is a brief in support of moving away from traditional contract law altogether and toward viewing consumer contracts as products or statutes. See TAN 112-123, *infra*.

<sup>43</sup> See RLCC Council Draft No. 1 (Jan. 6, 2015) at 5 (Introductory Note) ("Thus, the 'grand bargain' within consumer contract law entails fairly unrestricted freedom for businesses to draft and affix their terms to the transaction, balanced by a set of substantive boundary restrictions, prohibiting businesses from going to far.") (RLCC has a "fundamental tradeoff: as assent rules shift to the more permissive end of the continuum, there is more need and justification for mandatory restrictions and ex post scrutiny of abusive terms.").

*B. Pushback from Left and Right*

From the first drafts of the RLLC, it received criticism from both consumer<sup>44</sup> and business<sup>45</sup> interests. Its policy of relatively

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<sup>44</sup> See, e.g., Memorandum of Dec. 17, 2014 from Elizabeth Renuart (National Consumer Law Center) to Reporters (attacking P.D. No. 2 provision on assent and finding unconscionability provisions insufficiently protective of consumers, stating agreement with broad Levitin critique noted in note 47, see *infra* note 47); Comment of Nov. 9, 2015 from Mark E. Budnitz (noting that *ProCD* and *Hill v. Gateway* have been subject of substantial scholarly criticism); Letter of Nov. 9, 2015 from Prof. Levitin to Reporters (reiterating criticisms of his November 2014 letters and in particular registering disagreement with grand bargain approach); Memorandum of Nov. 7, 2017 from Elizabeth Renuart & Lauren Willis to Reporters (regarding RLCC unconscionability provisions as protective of consumers). See also Comment of U.S. Bankruptcy Judge Catherine Peek McEwen (Dec. 2013) (suggesting that RLCC consider addressing creditor rights of setoff and urging “disallowance of setoff because to do otherwise would discourage” debtors’ counsel acting as private attorneys general for enforcement of consumer protection laws).

<sup>45</sup> See, e.g., Comment of January 8, 2017 from Evan M. Tager (partner in large international law firm finds RLCC unconscionability provisions too favorable to consumers and insufficiently sensitive to case law, labeling RLCC as “paternalistic” and inefficient); Comment of Jan. 8, 2017 by Neal S. Berinhout (opposing RLCC unconscionability provisions as departing from caselaw and unduly favorable to consumers); Letter of Jan. 16, 2017 from Andrew J. Pincus to ALI Leadership on behalf of U.S. Chamber Institute for Legal Reform (questioning need for consumer contracts restatement and finding innovations more apt for Principles project rather than Restatement; attacking RLCC as insufficiently deferential to U.S. Supreme Court arbitration agreement; centering objections on Council Draft. No. 3 (Dec. 20, 2016) as worse for business than predecessor drafts); Comment of Mary 26, 2017 from Michele C. Kane (finding RLCC too slanted in favor of consumers).

But see Comment of Stephen O. Weise to Reporters (Dec. 4, 2013) (making specific observations but not critical of the project or particularly critical of initial Reporters’ Memorandum, a prelude to Preliminary Draft No. 1). See also Comment of Guy Miller Struve (Nov. 3, 2015) (questioning relation of RLCC to UCC Article 2 and raising issue of whether RLCC reference to state consumer protection laws was more pat for a Principles project than a Restatement).

The Pincus draft, like insurance industry attacks on the RLLI, quoted Justice Scalia’s concurring and dissenting opinion in *Kansas v. Nebraska*, 574 U.S. 445, 475 135 S.Ct. 1042, 1064 (2015) (Scalia, J., concurring and dissenting) in which he criticized recent Restatements as departing too greatly from controlling precedent and described the RLCC as making “major” public policy innovations rather than summarizing the law.

easy contract formation and imposition of vendor-drafted terms, even if post-dating formation, was a particular target of not only consumers but scholars.<sup>46</sup>

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The comments of Prof. Robert Hillman (Cornell) (see above) echo business concerns that the RLCC is too critical of disclosure as a means of protecting consumers and undue overreliance on unconscionability for policing contracts, describing draft as “a bit schizophrenic”).

<sup>46</sup> See, e.g., Letter of December 2013 from Prof. David Vladeck (Georgetown) to Oren Bar-Gill and Omri Ben-Shahar, submitted to the ALI as a comment on RLCC Preliminary Draft No. 1. The 10-page letter raises many of the issues that continue to engender criticism of an opposition to the current draft of the RLCC.

See also Letter of Professor Jonathan Rose (Arizona State) to Reporters (December 2013) (criticizing P.D. No. 1 and in particular its favorable treatment the cases of *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (applying Wisconsin law) and *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir.), *cert. denied*, 522 U.S. 808 (1997) (unclear as to applicable contract formation law in case involving arbitration clause), both cases that, as discussed below (TAN 80-101, *infra*), have been heavily criticized); Letter of December 20, 2013 from Professor William J. Woodward (Santa Clara) to then-ALI Director Lance Liebman (criticizing Preliminary Draft No. 1 approach to contract formation, use of *ProCD* and *Hill v. Gateway*), and urging more substantive consumer protection in RLCC and less reliance on market forces for consumer protection; also questioning whether the “synthesis” of the grand bargain is feasible); Professor Alan White (CUNY) to Reporters (urging stronger unconscionability provisions of RLCC); Letter of December 5, 2013 from Professor Thomas W. Joo (UC-Davis) to Reporters, submitted as comment on P.D. No. 1 (specifically questioning RLCC Draft’s reliance on *Hill v. Gateway* and noting different approach of *Klocek v. Gateway*, 104 F. Supp. 2d 1332, *vacated for lack of subject matter jurisdiction*, 2000 WL 1372886 (D. Kan.), *aff’d*, 2001 WL 1568346 (D. Kan)); Letter of December 5, 2013 from Professor Thomas W. Joo (UC-Davis) to Reporters, submitted as comment on P.D. No. 1 (specifically questioning RLCC Draft’s reliance on *Hill v. Gateway* and noting different approach of *Klocek v. Gateway*); Memorandum of December 3, 2013 from Professor Michael M. Greenfield (Washington University) to Reporters, submitted to the ALI as a Comment to RLCC Preliminary Draft No. 1; Letter of Dec. 1, 2013 from Professor Kerry Lynn Macintosh (Santa Clara) to Reporters, submitted as comment (regarding Draft’s unconscionability, deception, and warranty provisions as insufficiently protective of consumers).

Criticisms continued after the issuance of RLCC Preliminary Draft No. 2 during Fall 2014. See, e.g., Letter of Nov. 12, 2014 from Professor Adam J. Levitin (Georgetown) to Reporters (criticizing P.D. No. 2 regarding contract modification and unconscionability provisions); Letter of Nov. 9, 2014 from Prof. Levitin to Reporters criticizing P.D. No. 2 for failing to sufficiently support

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consumer protection, excessive reliance upon unrealistic law and economic theory, support for *ProCD* and *Hill v. Gateway* decisions, unduly pro-business assent provisions and other matters); Letter of Nov. 8, 2014 from Professor Dee Pridgen (Wyoming) to Reporters (raising question of RLCC relationship to RC2, criticizing current draft treatment of contract formation and unconscionability); Letter of Dec. 12, 2014 from Professor David Snyder (American) to Reporters (criticizing RLCC provisions on assent and addition of later terms as well as favorable citation of *ProCD* and *Hill v. Gateway*); Letter of March 9, 2015 from Prof. Jonathan Rose to Reporters (reiterating earlier criticisms and continuing to question RLCC support of *ProCD* and *Hill v. Gateway* decisions); Email of March 27, 2015 from Prof. Levitin to Reporters (noting federal contracting regulations regarding formation and “clickwrap” at odds with RLCC position and criticizing the latter); Letter of Oct. 30, 2015 from Prof. Kelly Lynn Macintosh to Reporters (reiterating earlier criticisms regarding formation provisions of RLCC and contesting at length its support of *ProCD* and *Hill v. Gateway* decisions).

Similar academic criticism followed later drafts. See Memorandum of Professor Christina L. Kunz (Mitchell-Hamline) to Reporters (urging formation and unconscionability provisions more favorable to consumers); Letter of Dec. 1, 2015 from Prof. David Snyder to Reporters (attacking RLCC provisions regarding addition of terms by vendors); Letter of Dec. 18, 2015 from Professor Chris Jay Hoofnagle (Adjunct; UC-Berkeley) (finding grand bargain approach sensible but “lopsided in favor of more powerful contracting parties” in RLCC); Memorandum of Dec. 31, 2015 from “Concerned Members and Advisers” to Reporters (criticism of formation, terms provision, insufficient policing by unconscionability made by Professors Mark E. Budnitz (Georgia State), Sara Jane Hughes (Indiana); Edward J. Janger (Brooklyn); Nancy Kim (California Western); Adam J. Levitin (Georgetown), Bruce A. Markell (Northwestern) (also former Bankruptcy Judge); Nathalie Martin (New Mexico); Patricia McCoy (Boston College); Juliet M. Moringiello (Widener); Margaret Jane Radin (Toronto/Michigan/Stanford) and Alan White (CUNY) (also signed by Elizabeth Renuart (National Consumer Law Center); Henry Sommer (Consumer Bankruptcy Assistance Project) and George Slover (Senior Policy Counsel, Consumer Reports); Letter of December 16, 2015 from “Concerned Members and Advisers to Reporters” (providing several pages of criticism but some in the nature of fine-tuning rather than broad substantive disagreement) (signed by Professors Richard A. Alderman (Houston), Mark Budnitz, William R. Casto (Texas Tech), Joseph W. Dellapenna (Villanova), Jay M. Feinman (Rutgers); Llewellyn Joseph Gibbons (Toledo); Melissa B. Jacoby (North Carolina), Edward Janger; Thomas Joo; Nancy S. Kim; Adam J. Levitin (Georgetown); Peter Linzer (Houston); Patricia A. McCoy; Juliet Moringiello; Margaret Jane Radin; Michael Rustad (Suffolk); Charles Sullivan (Seton Hall); Alan White (CUNY); Lauren E. Willis (Cornell); William J. Woodward, Jr.) (also signed by Elizabeth Renuart, George Slover, and Henry J. Sommer, President of the National

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Consumer Bankruptcy Rights Center): Memorandum of Oct. 19, 2016 from “Concerned Members and Advisers to Reporters (criticizing unconscionability provisions of RLCC) (signed by Professors Peter A. Alces (William & Mary), Budnitz, Daniel J. Bussel (UCLA), Mathew L.M. Fletcher (Michigan State); Margaret Howard (Washington and Lee); Sara Jane Hughes (Indiana); Jacoby; Janger, Kim, Robert M. Lawless (Illinois), Levitin, Linzer, Lynn M. LoPucki (UCLA), Markell, Martin, McCoy, Moringiello, Rafael I. Pardo (Emory), Dee Pridgen (Wyoming), Radin, Charles J. Tabb (Illinois), David Vladeck (Georgetown), Jay L. Westbrook (Texas), White, and Woodward (also signed by Hon. Samuel L. Bufford, Michael Ferry (Gateway Legal Services), Richard L. Field, Elizabeth Renuart, and Henry Sommer); Letter of Oct. 14, 2016 from Prof. Michael to Reporters; Letter of Oct. 12, 2016 from both academics and practitioners criticizing grand bargain concept and specific RLCC provisions (signed by consumer attorneys Scott L. Baena, Robert L. Berry, Mark E. Budnitz, Howard A. Caplan, Sylvia Chin, Philip Cleary, Prof. Jeffrey Davis (Florida), David Dykhouse, Daniel Ehrlich, Joshua Fairfield, Seven C. Filipowski, S.W. Farnsworth III, Prof. Egon Guttman (American), Lee Hardegree, Patricia J. Igoe, Nancy Kim, Keith A. Krauss, Prof. Colin Marks (St. Mary’s), Eric C. Marshall, Kenneth A. Michaels, Jr., F. Truett Nettles II, Hoard P. Ross, Richard Sarkar, Stephen T. Whelan, and Prof. William J. Woodward, Jr.); Letter of Oct. 12, 2016 from Prof. Pridgen to Reporters (criticizing RLCC treatment of adoption of contract terms and unconscionability), Letter of Oct. 19, 2016 from Prof. Lauren E. Willis (Loyola) to Reporters (wide ranging criticism of RLCC, in particular the grand bargain, finding its “a fig leaf of consumer assent in exchange for a strengthened unconscionability doctrine” to be “illusory” protection for consumers and in particular questioning RLCC contention that “highly permissive adoption rules” are a necessity of commerce); Letter of May 18, 2017 from Professor Melvin A. Eisenberg (Cal-Berkely) (describing RLLC §2 as “completely and almost shockingly loaded in favor of sellers and against consumers” and finding unconscionability protections in RLCC too weak); arguing that content of RLCC is inconsistent with Reporters’ own scholarly writings generally more supportive of consumers; regarding arguments for enforcing “boilerplate” terms as “flawed”); Letter of May 17, 2017 from Prof. Michael M. Greenfield to Reporters (“As an Advisor to this Restatement project, I am not convinced that the project should go forward at this time.”); Letter of May 26, 2017 from Prof. Jonathan Rose to Reporters (again criticizing RLCC for giving prominent place to *ProCD* and *Hill v. Gateway*); Comment of Aug. 10, 2017 from Prof. Peter B. Kutner (Oklahoma) (finding RLCC provisions on notice and assent insufficiently protective of consumers); Memorandum of Oct. 11, 2017 from “Concerned Empirical Scholars” (signed by Professors Janger, Levitin, LoPucki, McCoy, Pardo, Robert B. Thompson (Georgetown) and White) (criticizing methodology used in RLCC for determining majority and minority rules).

*But see* Comment of Professor Robert A. Hillman (Cornell) (Dec. 2013) (criticizing P.D. No. 1 for being insufficiently supportive of business prerogative to

*C. The Case Counting Controversy Over Privacy Agreements*

The RLCC regarded itself as involving a “methodological innovation” of being “empirical” in its assessment of the state of the law and determining prevailing doctrine and majority rules.<sup>47</sup> The RLCC Reporters correctly observed that many modern consumer transactions involve consumers “paying” vendors in part by permitting access to the consumers’ personal information, which the Reporters regarded as part of the exchange and a view supported by judicial precedent.<sup>48</sup> As part the RLCC’s empirical analysis, it examined the issue of whether the privacy (or, perhaps more accurately, the anti-privacy) policies of vendors were treated by courts as part of the agreement. They found

51 cases in which consumers brought breach-of-contract claims for violations of privacy notices or in which firms, as defendants sought to enforce their own policies, arguing that they constitute contracts and that consumers’ assent to them operates as a defense against the alleged privacy violations.

The findings reveal that privacy policies are generally regarded as contracts. In 87 percent of cases (35 of 40 where the courts addressed this issue directly (and in 60 percent of all cases), courts concluded that privacy notices could give rise to contractual obligations.

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revise terms); Memorandum of December 4, 2013 from Professor Neil B. Cohen (Brooklyn) to Reporters (raising questions as to clarity of draft and relationship to UCC Article 2 but otherwise not critical); Memorandum of November 13, 2014 from Professor Amelia Boss (Temple) to Reporters (making specific suggestions but not particularly critical of overall thrust of P.D. No. 2); Letter of December 6, 2014 from Prof. Stephen Sepinuck (Gonzaga) to Reporters (same); Letter of Jan. 12, 2015 from Professor Clayton P. Gillette (NYU) to Reporters (raising specific issues but not generally criticizing Draft); Comments of Prof. Christina L. Kunz (Nov. 2017) (providing section by section commentary and suggested revisions but not making broad general criticism of RLCC).

<sup>47</sup> See RLCC Council Draft (Jan. 6, 2015) at 5.

<sup>48</sup> See RLCC Council Draft No. 2 11-12 (Sept. 19, 2016) (“Increasingly, consumers ‘pay’ for services by allowing businesses to collect personal information, and it is therefore necessary to regard the personal-information provisions as part of the contract.”).

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A closer look at the evolution of the case law over time summarizes these results and confirms the trend towards contractual recognition of privacy notices.<sup>49</sup>

Several law professors questioned the methodology and empirical findings as well as what they regarded as unfortunate de facto normative approval of a consumer contract regime that readily made vendor privacy policies – which tend toward making customer data widely available—enforceable.<sup>50</sup> Attempting some degree of brevity in this article, I am not wading into the empirical thicket, one where both sides raise important issues but where on balance I believe the Reporters (who responded aggressively and perhaps even defensively to empirical criticism) probably have the better argument.<sup>51</sup>

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<sup>49</sup> RLCC Council Draft No. 2 (Sept. 19, 2016) at 12-13.

<sup>50</sup> See Letter of Concerned Empirical Scholars, *supra* note 46; Gregory Klass, *A Critical Assessment of the Empiricism in the Restatement of Consumer Contract Law*, GEO. L. FAC. PUBL'NS & OTHER WORKS, (July 2017), <http://scholarship.law.georgetown.edu/facpub/1987/>. See also the continued and expanded criticism in Adam J. Levitin, et al., *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 YALE J. REG. 447 (2019); Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. on Reg. 45 (2019); But see Oren Bar-Gill, Omri Ben-Shahar & Florencia Marotta-Wurgler, *Searching for the Common Law: The Quantitative Approach to the Restatement of Consumer Contracts*, 84 U. CHI. L. REV. 7 (2017); Memorandum of Oct. 27, 2017 from Anton Hajjar to Reporters (also questioning RLCC methodology). See also Memorandum of Oct. 22, 2017 from Reporters to ALI Director Richard Revesz and ALI Deputy Director Stephanie Middleton (contesting Klass analysis and criticisms of RLCC methodology).

<sup>51</sup> I say this even though here, as with the RLCC's lionization of the bad caselaw of *ProCD* and *Hill v. Gateway* (see TAN 80-101, *infra*), I am not a fan of the RLCC's methodology of looking only at citations and results in the courts without giving (in my view) sufficient attention to criticism of cases by courts and – in particular – academic commentators.

Scholarly commentary (including scholarly commentary by practitioners, appreciating that they may be biased and have economic incentives that professors generally do not) should be considered because, at a minimum, it is further information and may involve analysis and discussion that is hard to find in judicial opinions because of structural factors such as lack of time (courts are busy), the constrictions of opinion writing (courts may frown upon too much discussion as dicta and prefer to confine opinions to a “holding”), or the interpersonal dynamic of judging (e.g., trial judges restrain discussion to provide



More important from my perspective is the normative public policy issue of whether the ALI should take a stand against the wholesale manner in which consumers have lost control of personal information, albeit perhaps doing it to themselves.<sup>52</sup> My own preference is for the law to impose a strong substantive limitation on vendor ability to use/sell customer data, although I realize this

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fewer targets on appeal that might result in reversal while a single appellate judge may refrain from dissent even if against a decision). On this last point, see Hon. Bernice B. MacDonald, *Judicial Independence, Collegiality, and the Problem of Dissent in Multi-Member Courts*, 94 NYU L. REV. 317 (2019) (prominent Sixth Circuit judge concedes that judges may often disagree with a panel's result but refrain from writing a dissent for a variety of reasons, including maintenance of court collegiality).

Additionally, law professors, whatever their faults, are in a particularly good position to provide neutral intellectual analysis of legal issues in that we are not bound by precedent nor judicial collegiality, are protected by tenure, and have time to reflect upon arguments over time in an atmosphere less affected by the quality of advocacy. By contrast, courts are busy managing and clearing documents and are educated on issues through an adversary system. With a few exceptions (e.g., Judge Posner, who regularly did his own research rather than relying exclusively on the briefs), courts are informed by party counsel. The quality of advocacy can vary enormously. Further, the same institutional "repeat player" advantages possessed by vendors in contract design and structuring of transactions (e.g., clickwrap) noted by the Reporters also apply to litigation. In general, businesses will be better represented than consumers as well as able to pick cases to seek maximum precedential effect (e.g., settling weak or embarrassing cases while litigating those where the consumer position is less persuasive). For these reasons, empirical analysis of caselaw that looks only at a decision's fate with other courts has significant shortcomings.

<sup>52</sup> Bess Levin, *Mark Zuckerberg Emits Facsimile of Regret that Mass-Surveillance Machine Might Have Been Used for Evil*, VANITY FAIR (March 21, 2018), <https://www.vanityfair.com/news/2018/03/mark-zuckerberg-cambridge-analytica-apology> (referring to reports that Zuckerberg, in a text exchange with an unnamed college friend during the early days of Facebook, allegedly told the friend: "if you ever need info about anyone at Harvard. Just Ask. I have over 4,000 emails, pictures, addresses, SNS." When asked how he had assembled so much personal information, Zuckerberg replied "People just submitted it. I don't know why. They 'trust me.' Dumb f\*cks." *Accord*, Andy Chalk, Facebook CEO: People Who Trust Me Are "Dumb F\*cks", *The Escapist* (May 13, 2020), [https://www.v1.excapistmagazine.com/forms/read/7,194596-Facebook-CEO\\_](https://www.v1.excapistmagazine.com/forms/read/7,194596-Facebook-CEO_) The comments led to an entry in the Urban Dictionary, "getting zuckered," in which the exchange is quoted. See "getting zuckered", URBAN DICTIONARY (July 27, 2010), <https://www.urbandictionary.com/define.php?term=getting%20zuckered>.

may be better viewed as an item for statutory or administrative regulation rather than attempting to expand the scope of unconscionability doctrine.<sup>53</sup>

More important to the RLCC was the degree to which this extensive exchange between the Reporters and their critics reflected significant opposition to the RLCC by a constituency that normally would be expected to support a Restatement focusing on consumer transactions. Although the ALI process is not partisan or political in the sense of exerting personal preferences (rather than reaching analytic decisions), one would normally expect that a project geared toward consumers would have the support of consumer constituencies. The project was not, after, labeled a Restatement of “Business Prerogatives” or “Vendor Support” or “Quick and Efficient Formation of Potentially Onerous Obligations.” One would have expected that the RLCC would at least have the support of consumer counsel and the academy even if it faced opposition from the business community, something to be expected in light of its unconscionability provisions. Instead, the RLCC not only received disdain from vendors and their allies but also slings and arrows from seemingly obvious potential supporters.

#### *D. Resistance to Recalibration*

The RLCC Reporters deserve both points and demerits for their response to criticism. On one hand, they devoted what must have been hundreds of hours to textual revisions of the RLCC in numerous drafts. On the issue of empirical examination of the incorporation of company privacy provisions in transactions, they

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<sup>53</sup> In addition, there is a serious public policy question of whether the consumers’ loss of privacy is necessarily bad. Although I tend to think so, one can argue that the free flow of consumer personal information not only expands economic activity and increases aggregate wealth but also expands consumer choice, albeit at some counter-cost of encouraging consumers to feel a “need” to make unwise purchases. For example, after even a single website visit, consumers often are forever inundated with advertisements regarding the merchandise of the website vendor or similar vendors. On one hand this can be helpful. I may wish to know that for a limited time I can purchase Justin Bieber baseball caps just in time for summer. But on the proverbial other hand, such helpful reminders of opportunities to spend on non-essential goods by preying upon my fandom may result in expenditures that might have been better made for healthier food, a children’s book, or a newspaper subscription.

devoted particular attention to defending their empirical research and conclusions.

On the proverbial other hand, as reflected in their dustup with critics concerning empirical assessment of caselaw, the line between vigorous debate and defensiveness may be easily blurred. As with the previous subsection, I take no position on the privacy policies empirical debate beyond again noting that a really good empirical examination assesses critical commentary and in particular examines scholarly commentary as well as subsequent judicial citation or approval. And unlike the critics, I do not think that the Reporters' assessment regarding privacy policies is incorrect.

But on other matters, particularly the approving tone of the Reporters toward the infamous decisions of *ProCD* and *Hill v. Gateway*,<sup>54</sup> it is fair to label the Reporters' response as unduly defensive. Supporting this assessment through my own citation count is beyond the discussion later in this article.<sup>55</sup> I contend, however, that in this area of minor importance to the RLCC project as a whole, the Reporters' written response to commentary and oral response at the 2017 and 2019 Annual Meetings was unduly dismissive of criticisms and a bit tin-eared. Opposition to the contract formation content of RLLC §2 was not only about the substance of the provision but the manner in which the RLLC approved two cases that are simply hated by consumer advocates and most academics.<sup>56</sup>

To a degree this is understandable. Despite whatever glory it entails, being an ALI Restatement Reporter is a long, arduous task that is at least as burdensome as it is prestigious. This is particularly true for higher visibility projects that attract more attention, generalist projects (e.g., a Restatement about Contracts rather than Indian Law or Foreign Relations) on which a higher percentage of observers claims expertise, and projects that involve opposing camps of interest groups that are aware of their side of the "v"

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<sup>54</sup> *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (applying Wisconsin law) and *Hill v. Gateway* 2000, 105 F.3d 1147 (7th Cir.), *cert. denied*, 522 U.S. 808 (1997).

<sup>55</sup> See TAN 80-101, *infra*, regarding my view that the RLCC unwisely endorsed *ProCD* and *Hill v. Gateway* – which are red flags to many – and gave “respect” (for lack of a better word) to more pro-consumer cases like *Klocek v. Gateway*, 104 F. Supp. 2d 1332, *dismissed for lack of subject matter jurisdiction*, 2000 WL 1372886 (D. Kan.), *aff'd*, 2001 WL 1568346 (D. Kan).

<sup>56</sup> See TAN 80-85, *infra*, discussing opposition to *ProCD* and *Hill v. Gateway*.

in contested cases. The RLCC involved all three ingredients in the recipe for a difficult project. First, it was high profile. Second, it was more generalist than specialized (everyone<sup>57</sup> thinks they know something about contract law). Third, as reflected in the commentary on the RLCC, the topic involves polarized business and consumer interest groups.

Even for projects that lack these factors, Restatements can be a magnet for criticism. The ALI is by definition composed of energetic, accomplished attorneys who think they know a lot about a lot and are willing to express their opinions. The more prominent projects also garner considerable attention from interest groups that may have little restraint in criticizing Reporters, Restatement drafts, or the Institute itself.<sup>58</sup> The Reporter must devote close to a decade of his or her career to a Restatement project, something that imposes substantial opportunity costs as even the energetic class of persons who become Reporters find their scholarly and other productivity (e.g., consulting, expert witnessing, pro bono, acceptance of administrative or government opportunities) reduced by the ALI commitment. Reporters can be forgiven for being stubborn in the face of what may seem uninformed (or at least underinformed) criticism of their painstaking work from a metaphorical peanut gallery of ingrates who fail to adequately understand or appreciate their efforts.

Notwithstanding these burdens and the volume of important work reflected in the RLCC, a fair-minded person might ask why the RLCC Reporters engaged in such pitched battles about case counting regarding privacy policies, why they continued to cheerlead for the problematic *ProCD* and *Hill v. Gateway* cases, why they resisted (although often ultimately grudgingly agreeing to) changes regarding portions of the RLCC, particularly the pro-business contract formation aspects.

To a degree, of course, they were whipsawed. Being more receptive to consumer group and academic criticism of the contract

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<sup>57</sup> Except for fictional attorney James J. “Jimmy” McGill/Saul Goodman, marvelously played by Actor Bob Odenkirk in the television series *Better Call Saul*. See *Better Call Saul*, Episode No. 2 (AMC) (in which he claims to have substantial legal competence in “everything but Contracts.”).

<sup>58</sup> See, e.g., Schwartz & Appel, *supra* note 12; Joyce Tiger, *Tort Lawyers Take Over the American Law Institute*, WALL ST. J., A15 (June 30, 2017). See also Guy Struve, *A New Low in the Opposition to the Liability Insurance Project* (Letter to the Editor), WALL ST. J. (June 30, 2017) (contesting and refusing Tiger assertion).

formation aspects of the RLLC, would make them subject to increased criticism by the business community that disliked the RLLC's unconscionability section and that would be accepted, if at all, only in return for pro-business contract formation provisions in the RLCC. In addition, the Reporters and Council were at least constructively aware from the landowner and insurer response to other Restatements that these interests possess substantial political clout.<sup>59</sup> If consciously considering the politics of Restatement influence, supporters might prefer to avoid antagonizing the business community more than pleasing leftist constituencies.

That said, 20-20 hindsight might posit that the Reporters – and to some extent the Council – could have been more charitable toward the progressive criticisms of the RLCC drafts. As discussed above, when challenged about their work regarding incorporation of privacy policies into transactions, the Reporters figuratively arched their backs in defending their empirical research choices while rather roundly rejecting commentary.<sup>60</sup> As discussed below, they had a similar reaction to criticism in their continued support for trumpeting the anti-consumer *ProCD* and *Hill v. Gateway* decisions that are red flags to many<sup>61</sup> – suboptimal behavior for authors of a document that was supposed to be sensitive to consumer interests. At the May 2017 and May 2019 Annual Meetings, when the RLCC drafts received considerable negative commentary,<sup>62</sup> the Reporters, although perhaps not meaning to, gave many observers the impression of being dismissive of the criticisms.<sup>63</sup>

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<sup>59</sup> See TAN 12-14, *supra*.

<sup>60</sup> See TAN 47-53, *supra*. This is not to say that the Reporters were not correct, at least regarding the bottom line of both bodies of empirical work. See David McGowan, *Consumer Contracts and the Restatement Project*, Univ. San Diego School of Law Research Paper No. 19-424 (2019) (defending RLCC Reporters' empirical methodology and concluding that their basic findings and conclusions regarding case law are largely the same as the findings and conclusions of critics of their methodology).

<sup>61</sup> See TAN 80-101, *infra*.

<sup>62</sup> See TAN 43-45, *supra*, and TAN 98, *infra*.

<sup>63</sup> This is a difficult assertion to support in a footnote without becoming anecdotal and violative of the privacy of ALI colleagues. Suffice to say that during the course of the RLCC project, I have heard a large number of members complain privately that they felt the Reporters were essentially disregarding or excessively minimizing valid criticisms of the RLCC drafts. The strength or weakness of the criticisms and the actual opinions of the Reporters are to some extent beside my point – which is that a perception has taken hold among a significant

As noted above, some of this is understandable. Restatement Reporters work very hard and make substantial sacrifices during the course of becoming ultra-expert<sup>64</sup> about the topic at hand. One can understand that they may bristle more than a little bit when their hard work is criticized, often in commentary they probably think reflects ignorance, misunderstanding, or faulty reasoning. But in addition to intellect and experience, emotional intelligence is part of the Reporter's job. A lighter or more accommodating hand in response to criticism may have helped the path of the RLCC.

More substantively, the Reporters (and to some extent Council) stayed true to their intellectual version of the grand bargain (even if that term was increasingly de-emphasized over the course of the drafting process) of easy vendor imposition of terms upon consumers but protection for consumers through a relatively vigorous unconscionability doctrine. While this devotion to the construct is admirable, it also may have doomed the RLCC to a crossfire of attacks.

*E. The Largely Moderate But Nonetheless Unpopular Resulting Document*

Dissatisfaction continues to be the order of the day for the RLCC despite the Institute's apparent view that the current draft is on its way to final approval after it receives some additional editorial work. The RLCC remains subject to consumer and business criticism that has dogged the project almost since its inception.<sup>65</sup> In addition to the criticisms from consumers and business as well as scholars that have been with the project since the start, a rather important segment of the profession – state attorneys

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number of ALI members (and interested constituencies such as non-member consumer advocates) that the RLCC is unduly slanted toward vendor interests and that the Reporters (and to a some extent, the Council) have been unduly unwilling to listen to what dissidents regard (rightly or wrongly) as constructive criticism. Too many members have been left with the sense that they were not being heard.

<sup>64</sup> By which I mean that the Reporters by definition get the job because they have considerable expertise in a field. They then devote several years and hundreds of hours of study to the field, aided by hundreds of hours of research assistant work, meetings, and commentary. Whether right or wrong, they are indeed "ultra-expert" about the Restatement topic by the end of the process.

<sup>65</sup> See TAN 43-45, 98-100, *supra*.

general – weighed in against the Tentative Draft as the ALI Annual Meeting approached during Spring 2019.<sup>66</sup>

The Attorneys' General Letter described the RLCC as “an abandonment of important principles of consumer protection in exchange for illusory benefits” and urged its rejection by the ALI.<sup>67</sup> The grand bargain on which the RLCC was premised was attacked as both doctrinally insufficient<sup>68</sup> and unlikely to be realized

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<sup>66</sup> See Letter from Letitia James, New York Attorney General, and Jane M. Azia, Consumer Frauds & Protection Bureau Chief, to Members of the American Law Institute (May 20, 2019) (on file with the State of New York Office of the Attorney General). Also signing the letter were Attorneys General Xavier Becerra (California), Kathleen Jennings (Delaware), Karl A. Racine (D.C.), Clare E. Connors (Hawaii), Lawrence G. Wasden (Idaho), Kwame Raoul (Illinois), Tom Miller (Iowa), Andy Beshear (Kentucky) (subsequently elected Governor), Aaron M. Frey (Maine), Brian E. Frosh (Maryland), Maura Healey (Massachusetts), Dana Nessel (Michigan), Keith Ellison (Minnesota), Jim Hood (Mississippi), Aaron D. Ford (Nevada), Gurbir S. Grewal (New Jersey), Hector Balderas (New Mexico), Ellen F. Rosenblum (Oregon), Josh Shapiro (Pennsylvania), Peter F. Neronha (Rhode Island), Thomas J. Donovan, Jr. (Vermont), Mark R. Herring (Virginia), Phil Weisler (Colorado) as well as Hawaii Office of Consumer Protection Executive Directors Stephen H. Levins.

<sup>67</sup> *Id.* at 1.

<sup>68</sup> *Id.* at 3 (arguing that RLCC essentially relieves vendors of obligation to prove consumer consent to standard form terms). The letter further argued:

In exchange for weakening the mutual assent doctrine the [RLCC] purports to offer consumers protection from unscrupulous business practices in the form of the unconscionability doctrine, typically an affirmative defense which contains a procedural and substantive component. . . . Given the central role of unconscionability under the [RLCC], one would expect an expanded and more robust version of the doctrine. Instead, the [RLCC] narrows the doctrine of procedural unconscionability by introducing an untested concept of salience – namely, whether a “substantial number of consumers” would factor a specific term into their purchasing decisions – that has never been applied by any court. And despite the central role substantive unconscionability plays [in the RLCC, it] declines to expand what is currently a very narrow legal doctrine. Both procedural and substantive unconscionability, moreover, are litigation defenses, and the reality of consumer litigation is that few consumers have the incentive, time, or recourse to bring suit.

*Id.* at 3. See also *id.* at 2 (criticizing RLCC for wrongly concluding that the “costs of the doctrine [of requiring more express consumer consent to vendor contract terms] outweigh the benefits” in light of well-documented consumer reluctance-cum-failure to read standard form terms).

in practice.<sup>69</sup> The AGs viewed the RLCC as unduly weakening the law of mutual assent in contract formation without a sufficient corresponding expansion or strengthening of unconscionability doctrine.<sup>70</sup> And, in what by 2019 should have been no surprise to the Reporters and Council, the AGs disliked the RLCC emphasis upon or outright endorsement of *ProCD v. Zeidenberg*.<sup>71</sup>

Discussion of the RLCC at the 2019 Annual Meeting was something other than the lovefest that often accompanies final

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<sup>69</sup> *Id.* at 6. (“[W]e are dubious that ex post judicial scrutiny is sufficient to protect consumers from exploitation in the consumer financial marketplace. The burden of demonstrating unconscionability is generally high, and courts rarely find consumer contracts to be unconscionable.”); *Id.* at 8 (“Most consumers lack the time and resources to litigate disputes, particularly where they have only been defrauded out of small amounts of money [and the] rare consumer who does attempt to vindicate her rights in litigation faces nearly insurmountable economic and procedural obstacles, including the resources to hire counsel, and binding arbitration clauses combined with class-action waivers which force consumers to seek redress individual from private arbitrators incentivized to rule against them.”) (footnote omitted).

<sup>70</sup> *Id.* at 4 (“While the mutual assent doctrine may not be applied by courts as often and as robustly as we believe warranted, it is no dead letter, as courts regularly find contracts unenforceable where they fail to clearly or reasonably communicate their terms and to which consumer did not agree.”) (footnote omitted); *Id.* at 5 (questioning caselaw interpretation of aspect of RLCC); *Id.* at 7 (questioning whether market forces will do as much to eliminate problematic or oppressive terms as posited by RLCC).

<sup>71</sup> *Id.* at 3. The AGs stated:

It is not clear . . . to what extent [the RLCC empirical examination and] case-counting methodology considers qualitative facts, such as the accuracy and wisdom of particular judicial decisions. For example, the [RLCC] adopts its approach of a weakened mutual assent doctrine based in part on the influence of the Seventh Circuit’s decision in *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7<sup>th</sup> Cir. 1996) (Easterbrook, J.) but nowhere engages with the substantial body of academic analysis concluding that *ProCD* was wrongly decided. We question whether the [RLCC]’s lack of clarity as to the role qualitative factors play in its analysis undermines the benefits of a quantitative approach, and we note that academics have identified a number of other troubling flaws with the [RLCC] methodology.

(footnotes omitted) (citing as support for disfavored status of *ProCD* among scholars Eric A. Posner, *ProCD v. Zeidenberg and Cognitive Overload in Contractual Bargaining*, 77 U. CHI. L. REV. 1181, 1193 (2010) (“*ProCD* precipitated a typhoon of academic hostility. It is probably the most criticized case in the modern history of American contract law.”).



passage of a Restatement that normally has the tailwind of favorable momentum. Instead, the Meeting featured considerable criticism of the Draft and a decision by ALI leadership to commit the RLCC for revision rather than to call for an official final vote, a decision many attendees viewed as prompted by concerns that the vote might go against the nearly decade-old project. Although the RLCC was spared this fate, it is not at all clear that it will pass in 2021 if left in its current configuration.

Notwithstanding my objections to aspects of the RLCC and its derivation, the prospect of its rejection is disheartening, and not only because that would be a defeat for the Institute's processes and the work invested by the Reporters and others. The RLCC, whatever its faults, is not a bad document. Although its provisions regarding contract formation are problematic (although not as at odds with caselaw as suggested by critics), the RLCC section regarding unconscionability, is quite favorable to consumers and, if taken seriously by courts, would improve the law.<sup>72</sup> Other RLCC

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<sup>72</sup> See RLCC § 5, making unconscionable terms unenforceable (to the extent set forth in RLCC § 9) to the extent it is:

- Substantively unconscionable, namely fundamentally unfair or unreasonably one-sided, and
- Procedurally unconscionable, because it results in unfair surprise or results from the absence of meaningful choice on the part of the consumer.

In determining that a contract or term is unconscionable, a greater degree of one of the elements in this subsection means that a lesser degree of the other element is sufficient to establish unconscionability. [Further,]

A contract term is substantively unconscionable if its effect is to:

- Unreasonably excuse or limit the business's liability or the consumer's remedies that would otherwise be applicable for:
- Death or personal injury for which, in the absence of a contractual provision in the consumer contract, the business would be liable, or
- Any loss to the consumer caused by an intentional or negligent act or omission of the business;
- Unreasonably expand the consumer's liability, the business's remedies, or the business's enforcement powers that would otherwise be applicable in the event of breach of contract by the consumer; or

provisions regarding Deception (§6), the Parol Evidence Rule (§8), and Terms in Derogation of Mandatory Rules (§9), also would provide considerable consumer protection if applied, as would §7, which would make enforceable many of the statements of fact and promises that accompany a consumer transaction but are not reflected in the words of the standard form agreement memorializing the transaction.<sup>73</sup>

The RLCC may have fallen short of its potential, but it is hardly the error-filled, anti-consumer and simultaneously anti-business disaster alleged by its critics. RLCC proponents have made a good even if not completely persuasive case that it on the whole correctly summarizes the law and provides a more practical means of aiding consumers than attempting to shore up the proverbial levee against the rising tide of cases that on the whole support the RLCC contention that courts largely have ceased giving serious scrutiny to issues of consent in consumer contract formation, particularly where on-line purchasing is involved.<sup>74</sup>

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- Unreasonably limit the consumer's ability to pursue or express a complaint or seek reasonably redress for a violation of a legal right.

In determining whether a contract or a term is unconscionable, the court should afford the parties a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect.

RLCC § 5(b) & (c) (formatting revised for presentation).

<sup>73</sup> See RLCC §§ 6-9.

<sup>74</sup> See, e.g., David McGowan, *Consumer Contracts and the Restatement Project*, U. San Diego Sch. Law Legal Studies Research Paper Series, Research Paper No. 19-424 (September 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3446802](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3446802); Steven O. Weise, *The Draft Restatement of the Law, Consumer Contracts Follows the Law*, ALI ADVISER (Apr. 5, 2019), <http://www.thealiadviser.org/consumer-contracts/the-draft-restatement-of-the-law-consumer-contracts-follows-the-law/>.

In response to the State Attorneys General Letter (*supra* note 66), Professor McGowan poses the question (perhaps itself a bit over the top) that “[t]o compare the AGs’ Letter to the text of the Draft is to wonder whether ‘the very concept of objective truth is fading out of the world. (quoting George Orwell, *Looking Back on the Spanish War*). Regarding Professor Melvin Aron Eisenberg’s comment that the RLCC “if adopted, would drive a dagger through consumers’ rights,” Professor McGowan replies:

Converted to falsifiable form, the statement asserts that consumers have important rights now that the [RLCC] would eliminate. Analytically, one would test the assertion by identifying such rights and comparing them to the provisions that are asserted as eliminating

To the extent it ventures beyond mainstream contract law, the RLCC does so in a middle-of-the-road/moderate manner with the tradeoffs envisioned by the Reporters from the start. But like many moderate politicians, the RLCC has become a convenient target of factions of left and right, factions large enough that there may not remain enough of a center to ratify the Restatement for approval.

### III. THE UNFORCED ERRORS OF THE RLCC

#### *A. The Well-Intentioned but Problematic Grand Bargain*

The grand bargain sought by the Reporters is a classic moderate compromise solution. Regarding consumer contracts, two sides are readily identifiable: (1) vendors who wish to structure the transaction in a self-serving a manner as possible to lower costs and to limit consumer rights and (2) consumers who, to the extent they think about the legal implications of their patronage, want to be treated fairly by vendors, perhaps even more than fairly if loyal customers.

The vendors, even when employing tactics designed to have lopsidedly favorable agreements are not usually or even frequently evil but simply want to codify for themselves as much legal protection as possible.<sup>75</sup> Where the market or direct government regulation prevents this, so be it. Competing vendors will be subject to the same forces so there is little or no damage to sales or profits. Vendors protected by a favorable contract regime of course retain the option of waiving those rights to satisfy a favored consumer but can insist on those rights when dealing with consumers viewed as opportunistic, fraudulent, or economically disadvantageous.

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them. . . . [u]sing that approach, the comparison falsifies the claims.

The Draft wields no dagger.

McGowan, *supra*, at 25.

<sup>75</sup> Consumer advocates, with whom I generally side on these issues, tend to overlook that many consumers are not saints but may abuse goods and frivolously demand refunds, repeatedly miss payments, or cancel orders and appointments after the vendor has already detrimentally relied on their patronage. Although a large bank charge for a bounced check may be unconscionably high, it behooves policymakers to consider that these high charges may have emerged not as an attempt to wring profits from the unfortunate but because bounced checks were a significant headache that banks wanted to relieve by discouraging the behavior by customers.

Rather than fighting to prevent vendors from pursuing this strategy at the contract formation stage, the grand bargain elected to figuratively go with the flow. The RLCC may overstate the dominance of caselaw favoring vendors in this regard, particularly the *ProCD* and *Hill v. Gateway* decisions, but it is clearly correct that this is a popular approach with momentum and probably the dominant approach.

Instead, the theory of the grand bargain was that the RLCC could better protect consumers through application of unconscionability analysis. The problem with this approach is that unconscionability analysis has been under intellectual and interest group attack almost as soon as the doctrine was made a part of the sale of goods provisions of the Uniform Commercial Code.<sup>76</sup> Courts are reluctant to apply the doctrine absent egregious abuses by vendors<sup>77</sup> – a situation unlikely to change with promulgation of the RLCC.<sup>78</sup>

Restatements are “soft” law and lack the force of “hard” law until applied through judicial opinion or codified by legislatures. They are most likely to have impact where existing common law is under-developed, outdated, or under stress. Unconscionability doctrine is thus not a good candidate for great Restatement influence. Most states have established unconscionability doctrine and recent precedent.<sup>79</sup> Although consumer advocates and many

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<sup>76</sup> See JOSEPH M. PERILLO, CONTRACTS §§ 9.37-9.40 (7th ed. 2014); Swanson, *Unconscionable Quandary*, 31 N.M. L. REV. 359 (2001) (reviewing intellectual history of unconscionability, controversy over apt use of the doctrine, and judicial hesitancy to invoke the concept). What is perhaps the most cited unconscionability article (Arthur A. Leff, *Unconscionability and the Code*, 115 U. PA. L. REV. 485 (1967)), although sympathetic to consumers, finds unconscionability a problematic tool. Other scholars were more openly opposed to its use. See, e.g., Robert Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1 (1981); Richard Epstein, *Unconscionability*, 18 J. L. & ECON. 293 (1975). Although unconscionability has many defenders in the academy (see, e.g., John Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969)), the bench has traditionally been cautious about or even resistant to its use in protecting consumers.

<sup>77</sup> See, e.g., TAN 105, *infra* (discussing cases involving markedly one-sided contract provisions courts refused to deem unconscionable).

<sup>78</sup> But see PERILLO, *supra* note 76 at § 9.39 (concluding that courts often apply unconscionability analysis to protect consumers and small businesses).

<sup>79</sup> See PERILLO, *supra* note 76 at § 9.39 (citing numerous unconscionability cases from variety of jurisdictions).

scholars may find current unconscionability doctrine insufficiently protective of consumers, it can hardly be described as under stress, much less under assault. For every litigant or lawyer wishing the doctrine were more protective of consumers, there is at least one business litigant or commercial lawyer seeking to make it less protective of consumers.

Against this backdrop, consumer interests perceive, probably correctly, that the unconscionability section of the RLCC is unlikely to provide much if any more protection than that already imperfectly provided by the concept. Consumer advocates regard this as insufficient gain to justify the RLCC's codification of vendor ability to impose unfavorable and even onerous terms. Although caselaw may have been trending toward vendors for years, in a world without RLCC §2 consumers could realistically continue the fight and hope to reverse pro-vendor contract formation caselaw. But adoption through the RLCC of a pro-vendor position on contract formation and the enforceable content of standardized forms would largely end any hope for consumers hoping to claw contract law back to a jurisprudence requiring more express consent before the consumer is bound to a term.

Thus, even if they are overstating their case, consumer groups – and half of the nation's attorneys general – have substantial ground for viewing the RLCC's intended tradeoff as a bad bargain that is likely to advance vendor interests at the expense of consumer interests. Conversely, vendors that have been winning the contract formation and form content battles for the better part of 20 years (and certainly in the online contracting era) see little benefit from the codification of their victories in the RLCC. But they are concerned – probably overly concerned – that the RLCC's §5 regarding unconscionability will increase judicial application of the concept, negating the favorable terms vendors have worked to insert into their consumer transactions. To the vendor community, obtaining codification of their gains in the realm of contract formation and term inclusion is not worth the risk that courts might actually take up the RLCC on its invitation to apply unconscionability analysis more aggressively.

### *B. Unwise Canonization of Bad Caselaw and Unwillingness to Adjust*

From the outset, the RLCC took a wrong turn in that it accepted as settled majority rule law well-known cases that were well-known not because they were regarded as well-reasoned,

correctly decided, helpful to attorneys or commercial actors, or informative but rather were notorious because they were generally viewed as quite wrong. Beginning with its initial draft, the RLCC favorably cited the *ProCD, Inc. v. Zeidenberg*,<sup>80</sup> and *Hill v. Gateway 2000, Inc.*,<sup>81</sup> decisions that engendered almost uniform scholarly criticism as well as division in the courts.<sup>82</sup>

In spite of this, the early RLCC drafts through to the RLCC draft presented at the 2019 Annual Meeting continued to trumpet *ProCD* and *Hill* as exemplary cases reflecting the state of American contract formation law that permitted vendors to provide terms, even rather onerous terms, after the transaction took place without prior consumer consent and obtain post-contract “consent” based on the consumer’s continued use of a product or service or the consumer’s failure to return an offending or defective product. Vendors selling products with “terms in box” not available until after delivery and unlikely to be read by the buyer are able to place significant post-sale burdens on the consumer.

The mistaken enshrinement of two bad decisions made by a Judge (Frank Easterbrook) widely regarded as very conservative

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<sup>80</sup> 86 F.3d 144 (7th Cir. 1996) (applying Wisconsin law). As the Reporters noted, *ProCD* was not even a consumer contracting case, although it became the base of *Hill v. Gateway*, which involved a consumer purchase of a personal computer. *ProCD* is an oddly problematic case as well in light of the opportunism displayed by its protagonist. Mr. Zeidenberg was hardly a poster child for the wronged consumer. See McGowan, *supra* note 60, Appendix E (providing background summary that leaves reader with the definite and firm impression that Zeidenberg deserved to lose).

<sup>81</sup> 105 F.3d 1147 (7th Cir. 1997) (unclear as to state contract law applied regarding question of enforceability of arbitration clause containing in packing material accompanying delivery of personal computer).

<sup>82</sup> See, e.g., Jean R. Sternlight, *Gateway Widens Doorway to Imposing Unfair Binding Arbitration on Consumers*, FLA. BAR J., Nov. 1997, at 8, 10-12 (arguing that outcome in *Hill v. Gateway* is questionable on federal statutory, common law and constitutional grounds and unreasonably shifts to consumers search cost of ascertaining existence of arbitration clause and return cost to avoid such clause); Thomas J. McCarthy et al., *Sales*, 53 BUS. LAW. 1461, 1465-66 (1998) (*Hill v. Gateway* inconsistent with Official Comment to UCC 2-207), Batya Goodman, *Honey, I Shrink-Wrapped the Consumer: the Shrinkwrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319, 344-52 (1999). See also TAN 66-68, *supra* (noting criticism *ProCD* and *Hill v. Gateway* in State Attorneys’ General Letter and its emphasis the heavy academic criticism leveled at these cases). See also Posner, *supra* note 71 (*ProCD* perhaps most criticized modern contract law decision).

and extremely supportive of business leadership (and thus arguably anti-consumer)<sup>83</sup> is in retrospect puzzling, notwithstanding the Reporters' aspiration of a grand bargain trade off of easy formation in return for substantive policing of term. In their initial memo to the Council, they noted that that [w]hat counts as valid assent, when is affirmative assent required, and what are the legal consequences of "silence" (or a failure to return the product) – are questions that courts have struggled to answer," citing not only *ProCD* and *Hill v. Gateway* but also *Klocek v. Gateway, Inc.*,<sup>84</sup> as well as two articles by mega-scholar James J. White that utterly savaged the reasoning and the results of *ProCD* and *Hill v. Gateway*.<sup>85</sup>

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<sup>83</sup> The outspoken Easterbrook, a former University of Chicago law professor and Deputy Solicitor General during the Reagan Administration has been, relative to the modal federal appellate judge, a magnet for controversy due to his overall strong conservatism and particular controversial stands on topics such as corporate law (where he largely supports management and capital over labor and community constituencies) and statutory interpretation, where he (again necessarily oversimplifying) advocates that special interest groups who have obtained legislative favor should have these gains respected by courts rather than avoided or softened through judicial construction. See Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983). See also Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) (implicitly criticizing Easterbrook approach by advocating more "public regarding" purpose-oriented construction of statutes as means of limiting interest group gains based on statutory language or legislative history inserted due to efforts of lobbyists). See also Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981) (concluding that predatory pricing is rare because unlikely to succeed due to efficiency of markets).

<sup>84</sup> 104 F. Supp. 2d 1332 (D. Kan. 2000), which was later dismissed for lack of subject matter jurisdiction. See TAN 99, *infra*.

<sup>85</sup> See Oren Bar-Gill & Omri Ben-Shahar, Reporters' Memorandum: Pre-Draft of Provisions for Restatement Third, The Law of Consumer Contracts (Submitted to the ALI Council January 17, 2014) ("Reporter's Memorandum") at 6; James J. White, *Contracting Under Amended 2-207*, 2004 WIS. L. REV. 723 (2004); James J. White, *Autistic Contracts*, 45 WAYNE L. REV. 1693 (2000).

I refer to Professor White as a mega-scholar both because of his overall prominence in the academy and because he is considered one of the experts on Article 2 (Sale of Goods) of the Uniform Commercial Code. See JAMES J. WHITE AND ROBERT SUMMERS, *HORNBOOK ON THE UNIFORM COMMERCIAL CODE* (6th ed. 2010).

When someone of this stature finds a case badly reasoned and wrongly decided, this would seemingly prompt reluctance to follow or promote the case. Nonetheless, the RLCC largely did that. Its first draft was presented to the ALI Council in late 2013.<sup>86</sup> That Initial Draft set forth a fully formed section on “Adoption of Standard Contract Terms.”<sup>87</sup> Although the section was revised and lengthened over the next six years of the project, its basic outline and approach was apparent from the Initial Draft on.<sup>88</sup> But the draft Reporters Note at the time included no case citations.

That changed in the RLCC’s first Preliminary Draft.<sup>89</sup> The Reporters’ Note to §2 cites *ProCD* and describes consumer options in a manner most would regard as overly sanguine.

When the standard contract terms arrive later, businesses routinely provide consumers with the option to exit the transaction, after receiving the terms, by returning the product. Courts have endorsed this voluntarily provided exit right and fortified it, demanding that consumers be granted a meaningful opportunity to terminate the transaction in order for the standard contract terms to be binding.

A right to terminate the transaction, in and of itself, is not a substitute for meaningful assent. Indeed, if consumers do not read the standard terms when these finally arrive, then the exit right does not protect them from harsh

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<sup>86</sup> See Oren Bar-Gill & Omri Ben-Shahar, Reporters’ Memorandum: Pre-Draft of Provisions for Restatement Third, The Law of Consumer Contracts (Submitted to the ALI Council January 17, 2014) (The January date is that of the Council Meeting where the “pre-draft” was to be considered but Memorandum was distributed in November 2013) (hereinafter “Initial Draft”) (which I think is a more accurate way to describe the document in that the Pre-Draft is really quite well-formed in the manner of an ALI Preliminary Draft and because I find the term “Pre-Draft” a bit misleading in that it suggests a precis or something similar that is far less complete than the document circulated first in November 2013 and then in somewhat more fleshed out form in December 2013).

<sup>87</sup> See RLCC Initial Draft, *supra* note 86, §2,.

<sup>88</sup> See RLCC Tent. Draft §2 (April 18, 2019). I realize some (perhaps even many) observers will quarrel with my characterization. But despite the changes in §2 that roughly doubled its length, my opinion is that the 2019 §2 of the Tentative Draft presented at the 2019 ALI Annual Meeting was not especially altered from the November 2013 Initial Draft.

<sup>89</sup> RLCC Preliminary Draft No. 1 (Oct. 28 2014).



terms. Still, consumers get something in exchange for the business's prerogative to impose terms – they can renege and undo an undesirable transaction. This *quid pro quo*, however, requires a meaningful opportunity to terminate: Consumers must be made aware of the right to terminate and provided with a reasonable time to exercise this right at a reasonable cost. Most cases addressing the enforceability of delayed terms cite the importance of effectively communicating the right to reject by returning the goods or cancelling the service. When the right to reject is effectively communicated, the standard terms are enforced. See [e.g., *ProCD v. Zeidenberg*, 86 F.ed 1447 (7<sup>th</sup> Cir.); *Bischoff v. DirectTV, Inc.*, 180 F. Supp. 2d 1097, 1101 (D.D. Cal. 2002); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 676 HN.Y.S.2d 569, 572 (N.Y. App. Div.e 1998); *M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wash. 2d 568, 998 P.2d 305, 203 (Wash. 2000)]

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If the consumer signifies assent to the terms, they are binding, despite the absence of both meaningful assent and the possibility of exit.<sup>90</sup>

In this same draft, the Reporters announced that the RLCC would focus on “[i]dentifying precedent in emerging areas of law” through “empirical methodology.”<sup>91</sup> As discussed above, this led to substantial debate and dueling case counting by the Reporters and Law Professors regarding judicial treatment of privacy terms in consumer transactions.<sup>92</sup> As in the prior discussion, I refrain from entering that thicket other than to note the controversy and that respected scholars have questioned the work of the Reporters (who are, of course, themselves respected scholars) in this regard. Although not necessarily a deal-killer for a Restatement, one would ordinarily hope that Institute members and observers could agree on facts even if unable to agree upon implications, prescriptions, or policies.

But my empirical quibble here is much more confined. I believe the Reporters erred by attaching too much importance to

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<sup>90</sup> *Id.* at 13-14 (Reporters' Note to §2).

<sup>91</sup> *Id.* at 14.

<sup>92</sup> See TAN 50-51, *supra*.

*ProCD* and in particular to *Hill v. Gateway* based on the frequency of the citation of the cases. Examining the caselaw, they correctly note that there are cases to the contrary, in particular *Klocek v. Gateway, Inc.*<sup>93</sup> But in drafts subsequent to the Initial Draft and the first Preliminary Draft, the Reporters' Notes elevate *ProCD* and *Hill* while suppressing *Klocek*, justifying the treatment according to the frequency with which the cases are cited. By the time of the 2019 Tentative Draft, which remains the current draft of the RLCC, the Reporters had concluded that

[a] closer look at the evolution of the [pay now, terms later or "PNTL"]<sup>94</sup> doctrine over time reveals a clear trend toward increased enforcement of PNTL contracts and increased influence of the landmark cases, *ProCD* and *Hill*, that pioneered their enforcement. Through 1995, the year before *ProCD* was decided, PNTL contracts were enforced in half the cases (five out of 10). After *ProCD* was decided, the trend shifted dramatically. From 1996 through 2016, courts enforced PNTL contracts in 50 out of 57 cases. In fact, the last time a PNTL contract was not enforced in this sample, simply because of the PNTL formative procedure, was 2005. This analysis reveals that the landmark case denying enforcement of PNTL contract, *Klocek*, decided in 2000, has not generated nearly as much of a following as *ProCD*.

An analysis of citations through January 2015 also indicates that cases enforcing PNTL contracts have been more influential. The most influential cases in this area, according to citations per year by out-of-state and out-of-federal-circuit courts, are those that enforce PNTL contracts. Cases enforcing the PNTL formation procedure, headed by *ProCD* (with a total of 169 out-of-state citations and an average of nine out-of-state citations per year) and followed by *Hill* (with five such citations per year) and *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d

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<sup>93</sup> 104 F. Supp. 2d 1332 (D. Kan. 2000), dismissed on other grounds, *see* 2000 WL 1372886 (D. Kan. 2000).

<sup>94</sup> PNTL or "Pay Now, Terms Later" contracting refers to the practice of forming a basic agreement (e.g, Seller will send Widget to Buyer if paid \$100 plus shipping) with additional terms of service arriving with the Widget with the Seller's expectation that the enclosed terms become part of the contract.

569 (N.Y. App. Div. 1998) (with three out-of-state citations per year), are considerably more likely to get cited out of state in a given year. The dominance of *ProCD* is apparent, and, cumulatively all six cases enforcing PNTL that have at least two out-of-state citations per year are cited an average of 25 times per year. The only reasonably influential case that did not enforce PNTL contracts, *Klocek*, is cited an average of twice per year and a total of 27 times.<sup>95</sup>

Notwithstanding the respect enjoyed by the Reporters' body of scholarly work, this is highly suspect, superficial empirical analysis. Sure, *ProCD* and *Hill* are cited quite a lot relative to *Klocek*. But this almost certainly results from factors independent of the quality of the opinions' analysis.

First, there is the matter of court hierarchy. *ProCD* and *Hill* are federal appellate cases from the important, prestigious, highly visible Seventh Circuit covering Illinois, Wisconsin, and Indiana. *Klocek* is a federal trial court decision from less visible Kansas. American lawyers have a natural tendency to look to appellate cases as sources of legal precedent and to minimize the precedential value of trial court cases.

Second, there is the issue of prominence and power. *Klocek* is a trial court decision from a district (Kansas) that has the same number of people (2.9 million) and cases as one city (Chicago) (2.7 million) (without counting suburbs and the metropolitan area) in which the Seventh Circuit sits. American legal attention tends to be drawn toward more urban enclaves.

Third there is the matter of personality. Judge Easterbrook, the author of *ProCD* and *Hill v. Gateway*, is something of a celebrity in the judicial world. Although outspoken, controversial, and perhaps even grating to some (and perhaps most liberals) at times, he commands attention. As a jurist with an impressively elite background (even as measured by the standards of the federal judiciary and the elite legal academy), he possesses an aura of deference and power that increases the influence of his opinions beyond the caliber of their reasoning. The author of *Klocek*, although a respected trial judge (Kathryn Vratil), has comparatively lower judicial visibility. Although long familiar with the *Klocek* case (it is in the Contracts casebook I use when teaching the

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<sup>95</sup> RLCC Tentative Draft, *supra* note 3, at 51-52 (Reporters' Note to § 2).

course),<sup>96</sup> I could not remember her name and needed to again look up the case to be reminded.<sup>97</sup>

But not all publicity is good publicity. As noted above, Judge Easterbrook is something of a pariah to progressive attorneys because of his outspoken conservatism. This combined with his prominence and prestige made for wide citation of opinions like *ProCD* and *Hill v. Gateway* that seem to reflect popularity while at the same time creating significant opposition based on the author of the cases as well as their content.<sup>98</sup>

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<sup>96</sup> DAVID G. EPSTEIN, BRUCE A. MARKELL & LAWRENCE PONOROFF, CASES AND MATERIALS ON CONTRACTS: MAKING AND DOING DEALS (5th ed. 2018) (excerpting *Klocek* at pp. 194-99).

<sup>97</sup> Which reflects my ignorance (Judge Vratil has enjoyed a distinguished career as a federal trial judge since 1992, taking senior status in 2014) as well as the perhaps unfortunate reality that some judges simply attract more attention than others by virtue of location (e.g., Kansas vs. Chicago), educational pedigree (University of Kansas vs. University of Chicago), exposure to the legal community (e.g., Judge Easterbrook's service as a deputy solicitor and bully pulpit of a professorship at a prestigious law school), occupational status (e.g., trial judge vs. appellate judge), and flair for publicity (e.g., Judge Easterbrook regularly is mentioned in the national legal trade press; Judge Vratil is not).

<sup>98</sup> See, e.g., Proceedings, 2017 ALI Annual Meeting, at 195-96 (Comments of UNLV Law Professor Keith Rowley):

My problem here is with the terms not that could have been clicked on before purchase but weren't but the terms that are not available until after the purchase has been concluded. And the tack that the draft takes seems essentially to follow Easterbrook in *Hill v. Gateway*, which is a wrongly decided case. (*Laughter*)

And no matter how many times Easterbrook cites himself, you know, you don't get two cases, because Easterbrook in *Hill* cites Easterbrook in *ProCD* saying exactly the same thing. That doesn't really count as two [separate courts accepting the reasoning underlying the decisions].

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If the terms don't come until the box with the goods in them arrives, those are terms presented later, which under [UCC Article] 2-207, which Easterbrook incorrectly says can't come into play when there's only one form – wrong. Under 2-207, those are proposals to modify the contract to which the consumer – in our hypothetical, the buyer – must affirmatively assent.

Fourth and probably more important is the impact of subsequent history and the shortcomings of U.S. citation form or understanding of its impact. The *Klocek* decision regarding contract formation was vacated due to lack of subject matter jurisdiction. As explained in a Contracts casebook including *Klocek*:

One might have expected that Gateway would take the district court's decision refusing to dismiss *Klocek*'s complaint and compel arbitration up to the Tenth Circuit. As it happened, Gateway had a better idea. Shortly after this opinion was rendered, Gateway filed a motion to dismiss for lack of subject matter jurisdiction alleging that plaintiff had not satisfied his burden of establishing the requisite amount in controversy to invoke the court's diversity jurisdiction. *Klocek* conceded the point and the case was dismissed. *See* 2000 WL 1372886 (D. Kan. 2000). Left lingering is the precedential value of this decision in light of the subsequent dismissal. Because the court in the order of dismissal did not vacate its earlier opinion, we think *Klocek* continues to have some persuasive force as a source of law and, of course, the subsequent dismissal does not in any way lessen its instructional value, which is important because in our view, this court got it right – even if it ended up not really counting.<sup>99</sup>

Even these authors supportive of the *Klocek* analysis and holding express more than a little concern that an opinion in a dismissed case (even if dismissed on grounds unrelated to the contract

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And now [in the RLCC Draft being discussed on the floor] you're not making them affirmatively assent. You're making them, in order to avoid the terms, negatively deny. And that seems to deprive a consumer [of] protection that they would have under 2-207, and I'm not sure how that's going to work out when you put a Restatement up against a statute [i.e., the Uniform Commercial Code] other than that courts will say, well, the statute is binding."

*Accord*, ALI 2017 Proceedings, *supra* note 98, at 199-200 (Comments of Professor Sharon K. Sandeen (Mitchell Hamline) ("I agree with the comment that was made earlier that the Internet broke contract law, and I'm supportive of this project if it fixes the law. But I'm against it if it codifies the broken law.")).

<sup>99</sup> *See* EPSTEIN, MARKELL & PONOROFF, *supra* note 92, at 200-01.

analysis) will have considerably less influence than an opinion in a case that results in an enforceable result. To most any American lawyer, this not only makes sense but has been confirmed by experience. Students in legal writing classes and associates in law firms are generally advised to be wary of citing cases with anything less than a clean subsequent history with no blemishes, procedural or substantive. One suspects (or at least I strongly suspect) that this carries over to attorneys who become judges and makes them less likely to cite a case dismissed for lack of subject matter jurisdiction.<sup>100</sup>

There are thus practical reasons why *ProCD* and *Hill v. Gateway* may outpace *Klocek* in the citation department, albeit for reasons that have little to do with the comparative quality of the analyses. But in spite of this, the Reporters have continued to defend and even embrace *ProCD* while acknowledging *Klocek* with

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<sup>100</sup> See, e.g., *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791, 808 (D. Idaho 1993) (“If the Court considers the language or legal analysis . . . in [a] vacated . . . opinion, regardless of how well reasoned that decision or language may be, any decision rendered is subject to challenge or criticism on the ground that it was based in part on language, reasoning or analysis from an opinion that had been vacated.”). See Michael D. Moberly, *This is Unprecedented: Examining the Impact of Vacated State Appellate Court Opinions*, 13 J. APP. PRAC. & PROC., 231, 231-32 (2012) (“Like their counterparts in Georgia, Idaho, Illinois, Indiana, Louisiana, Michigan, Nebraska, Ohio, Oregon, and Wisconsin, the Arizona state courts hold that vacated judicial opinion shave no precedential value [and] the same view has been expressed by a number of federal appellate courts”) (footnotes omitted; citing, inter alia, opinions from the Eighth and Ninth Circuits and district courts); Charles A. Sullivan, *On Vacation*, 43 HOUSTON L. REV. 1143, 1151 (2006) (“the question of whether vacated opinions are law remains unresolved”). Professor Moberly observed that characterizing vacated opinions as having no influence was “overly broad” and concludes that vacated opinions can be properly cited. Although this analysis is correct (absent an applicably specific court rule, such as one expressly barring citation to unpublished opinions), it does not change the popular perception that vacated opinions, even if vacated for reasons unrelated to the merits, are disfavored for citation. See Sullivan, 43 HOUSTON L. REV. at 1151 (2006) (“the question of whether vacated opinions are law remains unresolved”). Although the trial court in *Klocek v. Gateway* dismissed for lack of subject matter jurisdiction rather than vacating its excellent contracts opinion, the practical impact may be the same in that the contracts analysis was not applied in any way that ultimately affected the disputants.

a figurative shrug.<sup>101</sup> Similarly, the Reporters continued to embrace the “grand bargain” compromise on which the RLCC was premised even though it was clear that this gave consumer allies concern that once accepted as part of “the contract” problematic or

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<sup>101</sup> For example, in response to Professor Rowley’s comment, RLCC Reporter Professor Ben-Shahar took the view that the RLCC position favoring contract formation in cases of PNTL (pay now, terms later) transactions was:

[W]hat courts do – not just Judge Easterbrook citing himself, but a great majority of courts. Basically, you know, this debate has been resolved in the court, in the case law. So the only effect of deviating from this rule that allows businesses to postpone the delivery of the terms until after the affirmation of assent is to require more clicks. If they can’t just put a link, they’ll have you walk through the click if we say – you know, if that were the law. And that would not provide a shred more of consumer protection because we know form, by the way, a lot of the work that my colleague Florencia Marotta-Wurgler here did, and I did in my own work, that people don’t read it, no matter what. No matter how short, how clear, how lay language it is, how brightly, how large the font, how big the all caps, how contrasting the typeface, it doesn’t matter. People will not read it.

That’s why we thought that as form the consumer side, it would be a a welcome approach to say let’s not fight over the battle that doesn’t matter. Let’s fight the battle that does. How the substantive terms that get incorporated so easily ought to be filtered out through several tools, and we have those tools in the Comments Sections [such as §5 regarding unconscionability].

ALI 2017 Proceedings, *supra* note 98, at 198-99.

Professor Ben-Shahar’s substantive analysis is largely correct. The bulk of caselaw – without including *ProCD* and *Hill v. Gateway* – has tended to bind consumers to terms they never read, whether through on-line contracting or fine print on the back of an invoice. On a substantive, logical level, the RLCC decision to attack unfair terms through post-formation policing rather than attempting to return to a bygone day of more express communication and negotiation prior to formation makes sense. But his response fails to deal with the anxiety consumer advocates and legal scholars express and the particularly grating approval of the problematic *ProCD* and *Hill v. Gateway* – two cases that were not needed to make the point desired by the Reporters. Why they clung to these cases after the 2017 Annual Meeting continues to puzzle.

even anti-consumer terms would tend to resist judicial modification, constriction, or negation.<sup>102</sup>

More troubling than the Reporters' empirical miscue in failing to appreciate that the rightly decided *Klocek* would not get its fair due is the degree to which simple case counting – or even complex and sophisticated case counting—washed from the project too much of the substantive analysis that should have been part of a comparison between *ProCD/Hill* and *Klocek*, particularly when expert scholars endorse *Klocek* and criticize *ProCD* and *Hill*.

Had this been done, the RLCC Reporters and Council might have been forced to reconsider whether to surrender to vendors on the matter of contract formation, even if the majority of cases support what might be termed the “cram-down” approach to consent. Of course, this would be inconsistent with the grand bargain on which the RLCC has been premised from the outset. And siding with consumers on issues of contract formation plus attempting to strengthen unconscionability-based policing of contract terms would almost certainly increase vendor opposition to the RLCC. But perhaps the grand bargain came at too high a price.

As noted above, the RLCC Reporters (and to some extent the Council) have been reluctant to make significant revisions of or commentary in response to criticisms. To be fair, this resistance has been shown to both consumer advocates and vendor interests.

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<sup>102</sup> In response to criticism of RLCC Draft §2 at the 2017 Annual Meeting, Professor Ben-Shahar sought to reassure concerned members that these concerns would be assuaged by other, planned sections of the RLCC.

Maybe that's a time when I was planning to respond to that. Practically the rest of the Restatement, and primarily §§ 5, 6, 7, and 8, address that concern, whether the terms are unfair, whether they are unconscionable, and they scrutinize basically the substance of the bargain.

So, of course, this is what some of you referred to. We used this language, the “grand bargain,” within this Restatement. What you, some people, characterized and we also recognize [are] fairly permissive assent rules with fairly restrictive relative to – you know, the restrictive end of what we see courts doing, substantive scrutiny of the terms.



Although the words “grand bargain” have largely been excised from the RLCC, the concept continues to dominate the RLCC, as it has since 2012. But, as noted above, this has placed the document in the crossfire of criticism throughout the process and continues to raise the risk of its disapproval by the membership.

### *C. Failure to Pick a Side*

Restatements should be fair and nonpartisan and generally “restate” rather than “rewrite” the law. But they should also favor the better rule of law as well as positive evolution of the law. The concept is well put in the Institute’s own statement on the subject.

[I]n the quest to determine the best rule, what a Restatement can do that a busy common-law judge, however distinguished, cannot is engage the best minds in the profession over an extended period of time, with access to extensive research, testing rules against disparate fact patterns in many jurisdictions.

Like a Restatement, the common law is not static, but for both a Restatement and the common law the change is accretional. Wild swings are inconsistent with the work of both a common-law judge and a Restatement. And while views of which competing rules lead to more desirable outcomes should play a role in both inquiries, the choices generally are constrained by the need to find support in sources of law.

[A] restatement will also effect changes in the law, which it is proper for an organization of lawyers to promote and which make the law better adapted to the need of life.<sup>103</sup>

Although the ALI is clear to note the limits of its law reform role, it also clearly envisions such a role and self-consciously refuses to be confined to merely summarizing case law in the manner of Corpus Juris or other treatises that set forth “the law” without much assessment or critical commentary on decisions, lines of cases or differing jurisprudential philosophies or analyses.

The RLCC to some extent followed the ALI’s guidance in seeking its grand bargain tradeoff of declining to fight about

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<sup>103</sup> *Restatements*, reproduced in RLCC, *supra* note 3.

contract formation but endorsing what it regards as a more robust concept of unconscionability and a reduced reluctance of courts to police unfair terms. But at the same time, the RLCC seemed to be almost slavishly seeking to follow a perceived “majority” rule of easy contract formation and easy vendor insertion of terms unread, unrealized, and unappreciated by the consumer. This approach was based on empirical case-counting that failed to evaluate the reasoning of leading cases. It has been innovative—but in a horse-trading or log-rolling manner reminiscent of legislative compromise rather than that of adopting a better rule of law through doctrinal innovation or reasoned selection of a more persuasive line of cases or analysis.

In short, the RLCC started on a path of being a some-things-to-all-interest-groups compromise that left none satisfied and stayed on that path in spite of criticism. At that point, it might have behooved the project to assess the relative intellectual strength of the criticisms and side with the more persuasive analysis. As noted above, commercial opposition to the RLCC appears overdone if not misplaced entirely. The unconscionability provisions of the RLCC, although hardly the evil portrayed by critics, are also not particularly tough on business.

The RLCC, if adopted in its present form, is unlikely to hurt consumers (as claimed by RLCC critics) but neither is it likely to benefit consumers very much in view of traditional judicial reluctance to find contract terms unconscionable. And critics may be right if the RLCC prompts abandonment of what little remains of consent-based protections to unfair terms without also prompting an uptick in judicial policing of such terms.

Certainly, there is cause to doubt the efficacy of the RLCC’s proposed greater supervision. Courts simply have not been very receptive to unconscionability defenses. They should be. But they’re not. Consider a recent case in which the plaintiff sued over a loan taken out from a litigation finance company. The effective rate of interest was 72% and, unlike many litigation finance loans, repayment was required even if the plaintiff failed to obtain a settlement or judgment.<sup>104</sup> Because this astoundingly high interest rate did not violate Missouri’s usury law, the court found no substantive unconscionability. Because plaintiff had counsel (the lawyer representing him in the tort action) and the terms of the loan,

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<sup>104</sup> The finance company presumably had a security interest in any plaintiff recovery, although the opinion does not address this issue.

albeit many in fine print, were textually clear, the court found no procedural unconscionability. Hence, this rather “advantageous” loan for the lender was not restrained by the court.<sup>105</sup> Other examples of judicial resistance to unconscionability arguments abound.<sup>106</sup>

This is not a particularly compelling brief for a document on consumer contracts premised on protecting consumers through a more robust unconscionability doctrine likely to fall on largely

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<sup>105</sup> See *Wright v. Oasis Legal Finance, LLC*, 2020 U.S. Dist. LEXIS 50648 (E.D. Mo. March 24, 2020). The judge rejecting unconscionability analysis, Rodney Sippel, does not have a background suggesting undue allegiance to vendors. Appointed by President Bill Clinton, he worked as an administrative assistant to House of Representative majority and minority leader and former presidential candidate Richard Gephardt (D. Mo.) before practicing law in St. Louis. Judge Sippel likely represents quite well mainstream judicial tolerance to contract terms many consumers would regard as unfair and oppressive. I appreciate the counter-argument that no one forced Mr. Wright to borrow money from Oasis. But 72% is a bit high, even for this type of lending.

<sup>106</sup> See, e.g., *Marshall v. Mercury Fin. Co.*, 550 So. 2d 1026, 1027 (Ala. Civ. App. 1989) (interest rate of 29.48% on promissory note was not unconscionable); *Marshall v. Mercury Fin. Co.*, 550 So. 2d 1026, 1027 (Ala. Civ. App. 1989) (interest rate of 29.48% on promissory note was not unconscionable); *Jones v. Johnson*, 761 P.2d 37, 40 (Utah Ct. App. 1988) (“The parties stipulated that the home had a fair market value of \$40,000 at the time of the contract. Since Johnson had paid \$3,016.58 at closing and assumed a \$14,100 mortgage, he would then, arguably, be able to profit by approximately \$23,000.”); *Remco Enters. v. Houston*, 677 P.2d 567, 572-73 (Kan. Ct. App. 1984) (“In the present case, the contract called for defendant to pay \$1,768 for the set that had a retail value of \$850. This allowed plaintiff a profit of \$918, or an increase of 108% over the retail price, a near 2:1 ratio. . . . The 108% markup in the present case does not shock the conscience of this court when the circumstances surrounding the execution of the contract, including its commercial setting and its purpose and actual effect, are considered.”). See also *In re Colin*, 136 B.R. 856, 858-59 (Bankr. D. Or. 1991) (“Moreover, this court believes that price alone may not render a contract unconscionable.”); *Lecates v. Hertrich Pontiac Buick Co.*, 515 A.2d 163, 173 (Del. Super. Ct. 1986) (“The touchstone of unconscionability cannot be ‘harshness of the result’ without more since, as mentioned, disclaimer clauses are *designed* to be harsh. Unless one says that *all* losses should be spread or split, as some have recommended in special situations, a harsh result in and of itself cannot identify the impermissible.”); *Accord*, ALI 2017 Proceedings, *supra* note 98, at 199 (Comments of Professor Sharon K. Sandeen (Mitchell Hamline) (“[C]ourts don’t do the unconscionability analysis. I mean, we teach it in law school, but I tell my students ignore it in practice because it won’t be a winning argument, which is a sad state of affairs.”)).

deaf judicial ears. This risk (if not inevitable reality)<sup>107</sup> readily explains why consumer advocates and legal scholars (who tend to side with consumers more than business on these matters)<sup>108</sup> have failed to rally round the RLCC. If a consumer contracts Restatement is not beneficial to consumers, one must ask whether there should be an RLCC separate from the RC2 at all.

The Institute would in this instance be better served by a Restatement that takes a side. As between vendors and consumers, my vote is for more aggressively embracing consumer protection as its guiding principle rather than attempting a hybridized compromise that the business community has resisted and will likely resist even if bent in its direction. Business has been winning more than losing in the courts in contract disputes and is therefore

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<sup>107</sup> If the RLCC is officially adopted by the ALI, its unconscionability provisions could prompt courts to apply the doctrine more vigorously more often. Restatements have traditionally been influential. *See* Stempel, *Hard Battles*, *supra* note 18 (noting widespread citation of Restatements by courts). But they nonetheless remain only suggestive and need not be followed by courts. Consequently, a RLCC with vigorous unconscionability protections for consumers might quite literally look good on paper but not be put into action by courts.

<sup>108</sup> A discussion of the sociology of the legal profession is of course mercifully beyond the scope of this article. The conventional wisdom is that law faculty tend to be more “liberal” (although that is an imperfect term in this context) than lawyers as a whole and that this tends to account for the academy tending to favor consumers, debtors, plaintiffs, and employees as contrasted to vendors, creditors, defendants, and employers. My own view is that this is correct and it occurs because law faculty, freed of the need to advocate for a commercial client and able to devote extensive attention to a field, tend to reach the right conclusions and that law favoring the former class of persons (“have-nots” in the terminology of Marc Galanter) tends on average to be superior to law that favors the latter class of persons (“haves”). As Upton Sinclair put it: “It is difficult to get a man to understand something, when his salary depends upon his not understanding it.” Upton Sinclair, I, CANDIDATE FOR GOVERNOR: AND HOW I GOT LICKED (1935) (describing famous muckraking author’s unsuccessful run for Wisconsin Governor), noted in <https://www.goodreads.com/quotes/21810-it-is-difficult-to-get-a-man-to-understand-something>. *See also* Marc Galanter, *How the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974) (“Whatever the cause, it seems empirically correct that the academy tends to lean “left” on legal doctrine compared to practicing attorneys and judges. Bankruptcy law provides an analogy. When bankruptcy reform bills are addressed by Congress, legal scholars tend to support legislation more favorable to debtors while businesses aided by top legal talent, argue for rules more favorable to creditors”).

unlikely to support an RLCC that does anything less than bend the law in favor of business. By contrast, consumer interests hungry for support in litigation with more powerful vendor interests would likely have given strong support to an RLCC that more clearly aided its cause.

Although a more pro-consumer RLCC would be criticized by vendors as “biased,” “partisan,” or doing more than “restating” the law, such a document can be defended on substantive grounds and would probably have more chance to be approved by the membership. Whether it would be applied in consumer contracts disputes is a more difficult question.<sup>109</sup>

#### IV. THE RLCC’S FAILURE OF VISION AND LOST OPPORTUNITY

Although the RLCC is not in final form, any revisions prior to the 2021 ALI Annual Meeting are unlikely to make the type of revisions that would cure what I regard as its deficiencies. It continues to suffer from the following problems.

##### *A. Neither Fish nor Fowl*

As noted above, the RLCC remains opposed from left and right.<sup>110</sup> In addition perhaps gaining political benefit by “picking a side,” the document would be improved by developing doctrine that more consistently established a regime protecting either consumers or businesses. My own strong preference is to back consumers, who have largely been on the losing end of battles with vendors for the past three decades. This would also be the more

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<sup>109</sup> For example, the RESTATEMENT OF THE LAW, LIABILITY INSURANCE (2019) (“RLLI”), has been a magnet for insurance industry criticism, that has included introducing anti-RLLI legislation in state legislatures that would seek to bar court use of the document. The effort succeeded in Ohio (*see* Ohio Rev. Code. § 3901.82), via a floor amendment to a highway naming and funding bill while similar legislation (House Bill 2644) passed the House of Representatives in Arizona, the Senate in Oklahoma (Senate Bill 1692) and both chambers in Kentucky (House Bill 150). *See* Stempel, *Hard Battles*, *supra* note 18.

<sup>110</sup> *See* ALI 2017 Proceedings, *supra* note 98 (reflecting criticism from the floor asserting both that RLCC was insufficiently protective of consumers and criticism that it was unduly harsh toward business and insufficiently deferential to U.S. Supreme Court caselaw enforcing arbitration clauses in standard contracts).

persuasive assessment of the issues surrounding standard form consumer transactions, which operate as contracts of adhesion that are ordinarily unread and unappreciated by consumers.

*B. Insufficient Appetite for Reform and He Lost Opportunity for Reconceptualizing Consumer (and other) Contracts*

A law reform organization seeking to improve a body of law might consider not only summarizing it but also reconceptualizing it, especially if the traditional framework is flawed. As the RLCC Reporters identified early on, treating consumer contracts as the equivalent of negotiated, customized contracts among business has proven problematic. But rather than embracing a view of contract formation highly favorable to vendors and attempting to reduce damage to consumers from oppressive contract terms though an unconscionability doctrine often in desuetude in the courts, the RLCC could have pursued a number of more promising configurations of consumer contracts.

1. Consumer Contracts as Products

Scholars have long noted, persuasively in my view, that contracts – including many if not most contracts involving business or government entities – operate more as products designed to accomplish a specific set of ends rather than a memorialization of a carefully or extensively negotiated agreement of the parties.<sup>111</sup> For reasons that are perhaps too obvious, I find this concept of the dominant modern “contract” (particularly consumer contracts) persuasive.<sup>112</sup>

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<sup>111</sup> See, e.g., Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970); Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389 (2007). The writings of Karl Llewellyn prior to Professor Leff’s article – and perhaps the entire Uniform Commercial Code, can be seen as in this vein. See William Twining, *Karl Llewellyn and the Realist Movement* (1973) (noting that Llewellyn’s approach to contracts was to promote interpretation consistent with purpose of the agreement and its operation in practice); UCC § 1-103 Construction to Promote Its Purposes and Policies; Applicability of Supplemental Principles of Law (expressing preference for purpose-based construction of sales agreements consistent with custom and practice).

<sup>112</sup> See Jeffrey W. Stempel, *The Insurance Policy as Thing*, 44 TORT, TRIAL & INS. L.J. 813 (2009) (endorsing and elaborating upon this approach).

Consumers shop for a particular item or service and only incidentally “contract” for it, often (as is the case for buying groceries or gasoline) without any negotiation at all. Even consumers making a large purchase that involves some significant dickering (e.g., a home or car) are not contracting so much as they are simply purchasing the product or service. The contract is more of a receipt than an agreement, albeit one that both parties expect to contain reasonable protections of their respective interests (e.g., creditor’s remedies for the seller if buyer defaults and a warranty of merchantability for the buyer if the seller’s product fails to provide adequate performance).

Further, the contract-as-product or contract-as-thing approach recognizes what too many have forgotten: the verbiage of even the most lengthy list of terms and conditions is not really “the” contract of the parties.

People think of such a piece of paper as being a “contract.”

But the piece of paper is not a “contract.” \* \* \* At most, the piece of paper is a memorialization of the contract \* \* \* a contract is a promise or set of promises that the law will enforce.<sup>113</sup>

Expanding on this observation, which is consistent with the definition of contract used in the RLCC,<sup>114</sup> the RLCC could have counter-attacked against the modern judicial slouching toward treating vendor writings unread by consumers as part of the terms of a “contract” and could have instead insisted on more express informed consent. A consumer is not making much of a genuine “promise” when he or she clicks on a page to move forward with a transaction or fails to howl after reading fine print on the back of a form or notice the adverse change in terms of a credit card arrangement inserted into a monthly billing.

An RLCC provision supporting heightened consent requirements in order for terms to become part of “the contract” might place more burden on business only if the business was

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<sup>113</sup> David G. Epstein, Bruce A. Markell & Lawrence Ponoroff, *Making and Doing Deals: Contracts in Context* 12 (5th ed. 2018).

<sup>114</sup> See RLLC § 1 (defining “contract” as “A promise or set of promise for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”).

planning on sliding problematic terms into its transaction forms. Otherwise, there would be little need for business to engineer the transaction to include problematic terms with the goal of making them judicially enforceable.

Put another way, if vendors are planning only to deploy reasonable terms and engage in reasonable conduct toward consumers, they have nothing (or at least relatively little) to fear from a contract-as-product regime, just as they have nothing to fear from a regime of enhanced judicial supervision based upon unconscionability.

My “relatively little” hedge acknowledges that under either regime, there will of course be occasional court decisions that strike down a term that makes business sense and benefits consumers as a group but is stopped by judicial error or undue post hoc sympathy for a particular consumer. But these instances will be rare – particularly so in light of the judiciary’s historical reluctance to deploy unconscionability on behalf of consumers. As a practical matter, vendors, as a product of their sophistication and repeat player status, typically can deploy more legal horsepower than consumers and will seldom lose at the trial level unless they deserve to lose.<sup>115</sup> And when they do, there is appeal (another device more pragmatically useful to vendors as repeat players than to consumers as one-shot players).<sup>116</sup> In short, business fears of having reasonable terms

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<sup>115</sup> A common business refrain is fear of jurors who do not understand or appreciate their position. But contract construction is considered a matter of law for the judge to decide. Although there may in particular cases be contested factual issues relevant to a dispute that require jury participation, a judicial decision on whether a contract is “defective” in the manner of a consumer good will almost always be, like a determination of unconscionability, a matter solely for the judge. See JOSEPH M. PERILLO, *CONTRACTS* §§ 3.2(a), 3.9, 3.15 (7th ed. 2014); E. Allan Farnsworth, *Contracts* §§ 7.14 (4th ed. 2004).

<sup>116</sup> Prosecuting an appeal often makes a consumer claim uneconomical in that the additional transaction costs beyond trial expense can result in transaction costs exceeding the stakes of the (often relatively small) consumer claim. If unable to pursue a class action (something increasingly likely due to class action waivers in standard form agreements and court decisions increasingly resistant to class treatment of claims on grounds of insufficient commonality or typicality) (see *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)), many consumers will be unable to appeal as a practical matter. Attorneys willing to take a consumer case on a contingency fee at the trial level often specify that they are not required to continue as counsel on appeal where, after having lost at trial, the economics of the contingent fee become very unattractive, at least in small cases. And small cases are the type that typically get less searching appellate scrutiny.



thwarted by judges unduly solicitous of consumers are simply not credible. In addition, a vast proportion of consumer transactions are subject to arbitration clauses that are routinely enforced, providing vendors with what are essentially their own decisionmakers.<sup>117</sup>

In response to suggestions of product-like regulation of consumer contract terms, vendors undoubtedly will raise the same objections leveled at unconscionability-based regulation: the assertion that this degree of increased judicial involvement and post hoc scrutiny of transactions interferes with “freedom of contract” at the core of Anglo-American values. Puuhleeese. If nothing else, the extensive empirical work surrounding the RLCC (by both Reporters and critics) has demonstrated that freedom of contract – other than the basic choice of whether to patronize vendor at all – is a romantic myth. Like bygone concepts of a flat earth, this myth needs to be jettisoned or at least revised to account for modern reality. Even the “freedom” to choose a vendor when shopping is illusory to a large extent. Only hermits are likely to navigate modern society without a mobile phone, a credit card, or online purchases of goods. And vendors will be selected based on factors other than contract terms that, even if those terms are “available” for review via clicking through but not provided to the consumer in advance of basic shopping and purchase decisions.<sup>118</sup> In addition, where a market is highly concentrated with only a few major vendors and those vendors insist upon substantially the same terms and conditions of sale, consumers effectively have no ability to shop based on “contract” provisions.

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<sup>117</sup> By this, I mean no disrespect to the integrity of respected arbitration organizations such as the American Arbitration Association or Judicial and Mediation Services. But no matter how fair or wise these and other arbitral forums may be, they are the forums chosen by vendors – and presumably vendors chose them because they thought they would be well-treated in these forums relative to courts. Further, some arbitration organizations or in-house dispute resolution mechanism established by vendors have been credibly accused of being unduly favorable to the vendors who provide repeat business.

<sup>118</sup> A sentiment captured in part by one comment at the 2017 ALI Annual Meeting. See 2017 ALI Proceedings, *supra* note 98, at 206 (Comments of Professor Samuel Isaacharoff (NYU)) (“Personally, I know very few people who come home at the end of the day and say, “Honey, I just got a great deal on a forum-selection clause.” (*Laughter*)[.] And I would say the same [in that] nobody says, “I got a really cheap arbitration agreement . . . .”) (*italics in original*).

A contract-as-product approach is not necessarily inconsistent with the grand bargain sought by the Reporters and would have the advantage of making an RLLC that continued to champion unconscionability policing a clearly pro-consumer document, which would in turn give the RLCC a constituency of supporters. Instead, consumer advocates and legal scholars have become the most vocal detractors of the project, their voices even louder than the “usual suspects” of the vendor community that predictably dislike any legal initiative giving more rights to consumers or injury victims.

The RLCC’s failure to consider reconceptualizing consumer contracts as something different than classical commercial agreements emerging as a result of business activity and pronounced negotiation is puzzling in the at the Reporters at the outset of the project recognized that:

the legal terms of consumer contracts are not the product of bilateral negotiations. Rather, they are the product of market forces, influenced by sociological and psychological factors. These forces ought to be central in designing the legal regulation of standard form contracts. The law of consumer contracts should be grounded in a sophisticated understanding of the nature of competition and its limits, including the limitation of consumer rationality. Competition may be relied upon to produce the bundles of price/terms that consumer demand when consumers are aware of the terms and their value, but less so otherwise. For example, sophisticated sellers, competing for consumer demand, may design form contracts to maximize not the true (net) benefit to the consumer, but the (net) benefit as perceived by the imperfectly rational consumer.<sup>119</sup>

In light of their appreciation of this fact as well as their appreciation of other aspects of consumer choice that runs counter to the classical contract model, it is unfortunate that the Reporters did not pursue a strategy (although this may have required a Principles project rather than a Restatement) of reconfiguring the concept of “contract” in the consumer context. Although this would have been criticized as a “radical” move by some, it is arguably no more of a departure from traditional contract law than the “grand

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<sup>119</sup> Reporter’s Memorandum, *supra* note 85, at 3.

bargain” that the Reporters sought to achieve. But unlike the grand bargain, a “contract-as-product” approach would likely provide more protection to consumers<sup>120</sup> and a more objective yardstick for evaluating the fairness of consumer transactions.

## 2. Consumer Contracts as Private Legislation

Another promising but overlooked approach would be to appreciate the degree to which vendors set industry-wide contract terms in the manner of a legislature. So understood, much

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<sup>120</sup> The Reporters presumably will disagree and argue that policing consumer contracts according to unconscionability – at least as they envisioned when authoring the RLCC – would provide equal or greater protection. I am more than a bit skeptical of that the judiciary will warm to a more regulatory role in policing problematic contract terms. Instead, a more product-center analysis and regulatory response may be required. As Senator Elizabeth Warren (D-MA), an acknowledged consumer transactions expert (whatever one’s politics and view of her presidential candidacy) (full disclosure: I was a volunteer for the 2020 Warren campaign in Nevada) put it:

It is impossible to buy a toaster that has a one-in-five chance of bursting into flames and burning down your house. But it is possible to refinance an existing home with a mortgage that has the same one-in-five chance of putting the family out on the street – and the mortgage won’t even carry a disclosure of that fact to the homeowner. Similarly, it’s impossible to change the price of a toaster once it has been purchased. But long after the papers have been signed, it is possible to triple the price of the credit used to finance the purchase of that appliance, even if the customer meets all the credit terms, in full and on time. Why are consumers safe when they purchase tangible consumer products with cash, but when they sign up for routine financial proceeds like mortgages and credit cards they are left at the mercy of their creditors?

See Elizabeth Warren, *Unsafe at Any Rate: If it’s good enough for microwaves, it’s good enough for mortgages. Why we need a Financial Product Safety Commission*, DEMOCRACY (Summer 2007), <https://www.democracyjournal.org/magazine/5/unsafe-at-any-rate> (proposing Financial Product Safety Corporation similar to Consumer Product Safety Commission). This reasoning formed the backbone of her successful efforts to establish the Consumer Financial Protection Bureau, which has proven when in the hands of officials supporting its mission to be effective in protecting consumers, something it has done in large part by implicitly viewing consumer contracts as products and policing consumer transactions according to this model.

consumer contracting is similar to requirements imposed by vendors with almost sovereign-like power.

For example, a prospective purchaser of mobile phone service in the United States may shop by price (e.g., taking advantage of a T-Mobile sale) or coverage/reliability (e.g., choosing Verizon even though it is more expensive in order to have greater confidence that calls will “get through” and not be dropped). But a prospective customer hoping to shop based on service agreements will find little choice. The major service providers all use very similar forms with nearly congruent terms regarding arbitration, waiver the right to pursue class action relief, modification of terms, late fees, early termination, and so on.<sup>121</sup> These types of contracts provide “no escape from adhesion”<sup>122</sup> unless one is willing to forgo mobile service altogether. Other consumer items often have similar uniformity of terms in consumer agreements.

In effect, vendors are “legislating” the terms of their products or services in a manner similar to vendors using their contracts as part of product design. The contract-as-product and contract-as-statute concepts are similar but the latter could additionally

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<sup>121</sup> See Mandy Walker, *The Arbitration Clause Hidden in Many Consumer Contracts: And the consumer rights you’re giving away as a result*, CONSUMER REPORTS (Sept. 29, 2015) (noting uniformity of arbitration clauses and other terms in various vendor agreements provided not only by mobile phone service companies like Verizon and AT&T but also Amazon, Groupon, Netflix and General Mills (where “agreement” to terms came as a condition of downloading coupons for discounts on cereal and other products)).

<sup>122</sup> See Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 63 TULANE L. REV. 1377 (1991) (advocating recognition of this as a defense for parties adhering to standard form terms offered on take-or-leave basis).

When consumers are both unable to negotiate specific contract terms and unable to select vendors of a particular good or service based on contract terms, they have no realistic choice or ability to “escape” adhesion other than forgoing the desired goods or services. Where the item in question is not a practical necessity, a consumer’s ability to “vote” with his or her feet and walk away from a transaction may itself be enough choice favor enforcement of the term so long as it is not lopsidedly favorable to the vendor.

For example, if a seller of Justin Bieber bobblehead dolls requires signing a document (conspicuously) requiring arbitration in Uzbekistan in the event of dispute, the prospective buyer has the rather obvious remedy of saying “no” and shifting attention to a Harry Styles bobblehead. But where the product is mobile phone service, parking anywhere within a mile of the stadium or concert hall, gasoline, groceries, prescription drugs, auto or appliance repair, simply saying “no” is not a practical remedy for the consumer.

enrich contract construction by making more flexibility available<sup>123</sup> to courts.

For example, considering the statute-like aspects of consumer contracts opens up the prospect of considering the drafting history, purpose, and function of particular terms. This illuminates the degree to which a term is “reasonable” by providing information as to its respective utility for businesses and consumers and provides guidance regarding whether enforcement of a term unduly disfavors consumers or is a necessary aspect (a necessary “evil,” if you will) for making a product or service available at reasonable cost and in reasonable quantity.

In addition to making courts more likely to consult the “legislative history” of a contract term, appreciating the statute-like

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<sup>123</sup> On a literal level, of course, all of these alternative conceptions of consumer contracts (and contracts generally) have been theoretically available to courts since the dawn of law. But in using the term “availability” as regards contract-as-statute and other conceptions of contract, I am in particular thinking about the “availability heuristic” noted by cognitive scientists.

This cognitive trait draws people to information that has been more recently available to them. *See generally*, Daniel Kahneman, *Thinking Fast and Slow* (2011); Cass Sunstein & Richard Thaler, *Nudge: Improving decisions about health, wealth, and happiness* (2008); Cass Sunstein, *Behavioral Economics and the Law* (2000); Amos Tversky & Daniel Kahneman, *Heuristics & Biases*, 185 SCIENCE 1124 (1974). As Nobel Prize winner Kahneman bluntly puts it: “what you see is what there is,” meaning that people often ignore and fail to utilize existing information and knowledge because it is cognitively distance while at the same time over-emphasizing material that is cognitively front-and-center in the perception.

This trait can have obvious negative consequences. For example, after reading in the morning paper of a shark attack in Miami, a swimmer in Jacksonville (or maybe even Cape May, New Jersey) will perceive the risk of shark bites as much greater than is actually the case (as determined by overall statistics over time).

Similarly, a jurist who has just read a case or treatise emphasizing strict textualism (likely) or aggressive use of the unconscionability doctrine (less likely) will be more inclined to analyze a case with such methods and is highly unlikely to be aware of or utilize other methods of construction.

But if law reform organizations like the ALI and authorities such as the RLCC give some reasonable prominence and legitimacy to alternative or supplemental concepts of contract such as contract-as-product and contract-as-statute (or the more established reasonable expectations approach discussed at TAN 133-152, *infra*), these constructs are more likely to be in the forefront of the judicial mind and correspondingly more likely to enrich a court’s analysis.

aspects of consumer contracts can serve to remind courts of the value of canons of construction. The canons, although applicable to contracts as well as statutes, tend to be used more frequently in statutory interpretation matters than in contract construction matters. But there is no reason that the canons, if valuable, in the statutory arena, should not be equally available for use in resolving contracts disputes.

### 3. Consumer Contracting as a Regulated Industry

One might also regard consumer contracting as a regulated industry. As the RLCC Reporters noted in their initial project memorandum,<sup>124</sup> scholars and practicing attorneys<sup>125</sup> have long observed, consumer contracting and judicial attitudes<sup>126</sup> toward

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<sup>124</sup> See Reporters' Memorandum, *supra* note 85, at 3 ("It is important to recognize, however, that consumer contracts are not judged another special category of contracts"). In addition, the Reporters noted that:

[C]onsumer contracts are treated differently by states and regulations that apply to specific areas of contracting: insurance, consumer credit, doorstep sales, timeshares, funeral services, residential real estate, automobile warranties, and many others. Further, Federal Law has created a variety of protections that are largely applicable only in consumer contracts, concerning warranties, fraud and deception, unfair and abusive practices, enforcement tactics, and mandated disclosure. Other legal systems – most notably, the European Community – have increasingly treated consumer contracts for a new uniform sales law for the EU ("The Common European Sales Law"), drafters have carved out over 50 special rules for consumer contracts.

*Id.* at 3 (citing Regulation of the European Parliament and the Council on a Common European Sales Law, Annex I: Common European Sales Law and EU Directive 2011/83).

<sup>125</sup> Finding an apt citation for the practicing attorney part of this statement is a bit challenging (the RLCC Reporters have already made the case that the legal academy recognizes that consumer contracts are different) but the support for the RLCC project by the practitioner and judge membership of the ALI implicitly takes the same view that consumer contracts are different enough from business contracts to warrant a separate restatement.

<sup>126</sup> The conventional wisdom among attorneys is that a consumer seeking a more sympathetic interpretation of an unfavorable but relatively clear contract term will generally receive a more sympathetic ear than a business (particularly a larger or arguably sophisticated business) in a similar position. The ALI's own *Restatement of the Law of Liability Insurance* §39 (2018) ("RLLI") reflects this.

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Section 39 provides that the underlying limit, satisfaction of which is required before reaching the “attachment point” of excess insurance, may presumptively be satisfied by payments from either the underlying insurer or the policyholder, a rule that can be important if the underlying insurer is insolvent (and thus never pays) or if the policyholder and underlying insurer compromise a coverage dispute, resulting in only partial payment by the underlying insurer. This general rule allows the policyholder to obtain the benefit of the excess insurance it purchased in the face of such developments.

But RLLI §39 also provides that where an excess insurance policy states that the underlying limit can only be satisfied by payments made by the underlying insurer, the provision is enforceable. My own strong view is that literal enforcement of such policy language is an abomination. See Jeffrey W. Stempel, *An Analytic “Gap”: The Perils of Robotic Enforcement of Payment-by-Underlying-Insurer-Only Language in Excess Insurance Policies*, 52 TORT TRIAL & INS. L.J. 807 (2017). Arguments against this aspect of §39 by me and other ALI members were rather soundly rejected at the 2018 ALI Annual Meeting, with the most frequent response being that businesses that purchase excess liability insurance, usually with the involvement of brokers and with the ready availability (even if unused) or legal counsel, should be charged with reading and understanding such terms. It is hard to imagine this argument carrying the day in the case of an individual with a homeowner’s policy and a personal umbrella policy.

For example, assume Homeowner Policyholder has a party at which Guest slips on negligently discarded banana peel, resulting in serious brain injury to the guest, an investment banker. Guest sues, bringing a case with unquestioned seven-figure value but Homeowner’s insurance policy has liability limits of only \$200,000 – and becomes insolvent or raises a “bacteria/virus” exclusion in policy because its claims adjuster noted mold on the banana peel.

In the former case, Homeowner Policyholder, if able, would probably want to pay \$200,000 to trigger the million-dollar umbrella policy limits necessary to resolve the case rather than face multi-million potential liability and a threat to whatever middle-class wealth Homeowner Policyholder and her family have managed to accumulate. Similarly, Homeowner Policyholder might compromise the primary insurer’s weak (as I see it) invocation of the virus/bacteria exclusion for 80-90 cents on the dollar in order to then have available the umbrella policy limits.

But if the umbrella policy has payment-by-underlying-insurer-only language, application of RLLI §39 would foreclose both scenarios. Even if the average court, like the ALI, is inclined to require a commercial policyholder to strictly comply with such umbrella policy language, I am hopefully skeptical that even a strongly textualist court would see not only the unfairness of the situation but also the degree to which it undermines the risk management goals and purpose of excess liability insurance.

consumer contract disputes often differ from the archetypical wheel-and-deal business contract model.

Congress and state legislators have recognized this as well by enacting a significant amount of legislation designed to protect consumers.<sup>127</sup> In addition, statutes that impose penalties on businesses that fail to satisfy obligations promptly or that remove barriers to consumer exercise of rights can be seen as pro-consumer regulations similar to the fee-shifting provisions of civil rights and anti-discrimination laws.

Against this backdrop, it is not surprising that the RLCC Reporters chose to venture into the land of consumer protection by seeking to include substantive consumer protections in the RLCC. Although this was criticized by the business community as lying outside the realm of a Restatement,<sup>128</sup> there seems little doubt that American public policy and the body politic, at least much of the time, supports substantive protection for consumers that is not provided by the marketplace.

Although the RLCC embraced some of this thinking through efforts to emphasize protections such as the unconscionability doctrine, the RLCC did not go the extra step of considering whether a similar consumer protection ethos might be appropriate concerning questions of contract formation. Instead, as noted above, the RLCC embraced a particularly harsh line of caselaw (e.g., *ProCD* and *Hill v. Gateway*) that rankled many observers not only for its anti-consumer policy but also for its arguable misconstruction of prevailing judicial attitudes.<sup>129</sup>

#### 4. Consumer Contracts and the SocioEconomic Order

Widely used, highly standardized contracts to a degree become something more than contracts. They become part of an entire web of commerce and socioeconomic activity. This is particularly pronounced for insurance policies, which are expected to fulfill a particular risk management role<sup>130</sup> that if unfulfilled can lead to rather dramatic consequences, including even wholesale

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<sup>127</sup> See Reporters' Memorandum, *supra* note 85, at 3.

<sup>128</sup> See TAN 6-8, *supra* (noting business community criticisms of the RLCC).

<sup>129</sup> See TAN 80-101, *supra* (discussing RLCC Reporters' decision to give preeminence to these cases and adverse reaction of many observers).

<sup>130</sup> See Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489 (2010).



unavailability of goods or services<sup>131</sup> as well as other ripple effects if policyholder and victim claimants are undercompensated.<sup>132</sup>

Consumer contracts that govern and affect lending (interest calculation and collection), property rights (e.g., secured transactions in real or personal property) distribution and availability of products like mobile phones and credit cards, or services such as recreational activity have a similar niche in the economic world even if not always equaling insurance in lynchpin status. Consumer contracts are not so much agreements as means of socioeconomic ordering.

Under these circumstances, a law reform effort involving consumer contracts might reasonably be expected to consider this role of consumer transactions in the course of configuring a consumer contracts Restatement and drafting Restatement provisions. These considerations might not always auger in favor of pro-consumer legal rules: the function of a given consumer contract may necessarily be sufficient protection for a fledgling business (e.g., protection of internet service providers from defamation claims). But in many instances, consideration of contract function will support a more favorable application of contract doctrine for consumers in order to foster more satisfactory socioeconomic outcomes.

Whoever's metaphorical ox is gored, an RLCC that expressly considered and attempted to account for this role of consumer transactions would logically produce better black letter and commentary.

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<sup>131</sup> See *Social Instrument*, *supra* note 130, at 1492 (describing suspension of police services in one community due to lapse in police department's workers' compensation insurance).

<sup>132</sup> For example, if an insurance policyholder's fire loss claim is erroneously denied, the homeowner may be unable to rebuild and may be forced to sell the damaged property, perhaps even descending into homelessness in extreme cases. In similar fashion, a tort victim injured by a policyholder that possesses little wealth will be undercompensated if the tortfeasor's liability insurer avoids coverage. The victim in turn will often turn to government or other assistance programs that, even if they ultimately provide fair compensation, do so at the expense of taxpayers and the opportunity cost of using government funds to pay tort compensation rather than to build/repair roads or provide adequate schooling or sufficient police and fire protection for communities.

## 5. The Unfulfilled Promise of Reasonable Expectations Analysis

A particularly potentially fruitful line of inquiry essentially overlooked (or implicitly rejected) by the RLCC is invocation of the reasonable expectations “doctrine” which provides that the objectively reasonable expectations of a contracting party will be honored even if there are terms in a written instrument that would negate those expectations if read literally.

The reasonable expectations concept (I have traditionally resisted calling it a full-fledged doctrine) was first denominated by Judge (then Professor) Robert Keeton as applying to insurance policy construction.<sup>133</sup> Predictably, insurers and strict textualists opposed the concept,<sup>134</sup> succeeding in suppressing it<sup>135</sup> after it had enjoyed rather substantial success in the wake of Keeton’s prominent article.<sup>136</sup> Although suppressed, the reasonable expectations concept retains considerable intellectual vitality among scholars<sup>137</sup> as well as at least some implicit support among consumers and in the

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<sup>133</sup> See Robert E. Keeton, *Insurance Law Rights as Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970).

<sup>134</sup> See, e.g., Stephen J. Ware, *A Critique of the Reasonable Expectations Doctrine*, 88 U. CHI. L. REV. 1461 (1988).

<sup>135</sup> See Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323 (1986).

<sup>136</sup> See, e.g., *Atwater Creamery Co. v. Western Nat’l Mut. Ins. Co.*, 366 N.W.2d 271 (Minn. 1985); *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa 1975); *Corgatelli v. Globe Life & Accident Ins. Co.*, 533 P.2d 737 (Idaho 1975); *Kievit v. Loyal Protective Life Ins. Co.*, 170 A.2d 22 (1961). See also *Max True Plastering Co. v. United States Fidelity & Guar. Co.*, 912 P.2d 861 (Okla. 1996) (surveying jurisdictions and finding widespread support for use of reasonable expectations analysis where policy language unclear); Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes*, § 1.03[h] (19th ed. 2020) (same); Jeffrey W. Stempel & Erik S. Knutsen, *Stempel & Knutsen on Insurance Coverage*, §§ 4.09 (4th ed. 2016) (same); Randy Maniloff & Jeffrey Stempel, *General Liability Insurance Coverage: Key Issues in Every State*, Ch. 20 (2011) (same).

<sup>137</sup> See, e.g., Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Rule*, 5 CONN. INS. L.J. 181 (1998); Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981).

courts,<sup>138</sup> particularly as applied to policyholders, consumers, or parties with less sophistication, lower bargaining power, or fewer resources.<sup>139</sup>

The Keeton “strong” version of reasonable expectations, with expectation overriding even clear contrary text,<sup>140</sup> has failed to attain doctrinal supremacy (hence my reluctance to call it a doctrine) but has an important role where text is unclear. The majority rule of American insurance law is that ambiguous policy language should be construed to be consistent with the policyholder’s reasonable expectations.<sup>141</sup> Although associated with insurance policies, reasonable expectations analysis of this “moderate” bent has considerable stature throughout contract law.

Although strong form “Reasex”<sup>142</sup> thinking is not the majority rule of contract law, one can make an excellent case that it should be – at least for consumer contracts if not business-to-business contracts.<sup>143</sup> If one views a Restatement as doing more than

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<sup>138</sup> See, e.g., *Atwater Creamery Co.*, 366 N.W.2d at 271; *Kievit*, 170 A.2d at 22.

<sup>139</sup> In addition, courts may be more receptive to giving commercial contract parties the benefit of reasonable expectations analysis. See HONG Q. HAN, POLICYHOLDER REASONABLE EXPECTATIONS Ch. 2 (2018) (discussing English courts’ use of reasonable expectations concept in business contract disputes).

<sup>140</sup> See Keeton, *supra* note 133 (courts will honor the reasonable expectations of the policyholder even though “painstaking study of the policy provisions would have negated those expectations.”).

<sup>141</sup> See, e.g., *Max True Plastering Co. v. United States Fidelity & Guar. Co.*, 912 P.2d 861 (Okla. 1996) (collecting cases and concluding that courts overwhelmingly use policyholder reasonable expectations in construing ambiguous policy language); Jeffrey W. Stempel & Erik S. Knutsen, *Stempel & Knutsen on Insurance Coverage*, § 4.09 (4th ed. 2016) (same); Barry R. Ostrager & Thomas R. Newman, *Handbook of Insurance Coverage Disputes*, § 1.03[h] (19th ed. 2020) (same).

<sup>142</sup> The uncertainty as to whether reasonable expectations is a concept, an approach, a perspective, or a doctrine can make brief reference to it cumbersome. For the remainder of this article, I use “Reasex” to refer to the rough idea of construing contracts – and consumer contracts in particular – according to the objectively reasonable expectations of the non-drafting party.

<sup>143</sup> In rejecting Reasex – or, more precisely, the strong Keeton conception of Reasex – some courts have argued that insurance policyholders already have ample protection from the contract doctrines of contra proferentem (ambiguous policy language is construed against drafter of the policy, which is almost always the insurer); see RLLI, *supra* note 3, § 4 and the “absurd result” canon of

simply identifying the majority rule and regards it as legitimate for a Restatement to adopt a “better” rule of law so long as that better rule enjoys some judicial and intellectual support,<sup>144</sup> the path is open (although hardly clear) for its embrace by the ALI, particularly in a Restatement of consumer contracts. Even if one disputes this degree of discretion in a Restatement, adoption of strong form Reasex in a Principles project would seem to be perfectly proper.

I realize this begs the question of whether a strong form of Reasex does in fact enjoy the support of the ALI membership. Perhaps not. Maybe even probably not. For example, the RLLI self-consciously did not embrace strong form Reasex in its provisions regarding insurance policy construction.<sup>145</sup> But Reasex should at least have been considered in the RLCC as a means of addressing

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construction, which posits that a court will not apply even clear text where this produces an absurd result.

These are unconvincing arguments as applied to a strong Keetonian form of Reasex. See Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181 (1998) (defending strong form Reasex and arguing that Reasex analysis should be applied at the outset to aid in determining the clarity of text, which may appear clear in isolation but not when context and contracting party expectations are considered).

But even if I am wrong, it remains puzzling that many insurers dislike even the “moderate” version of Reasex, which applies the concept only after finding policy text to be ambiguous. If text is ambiguous, the drafter of the unclear language would presumably rather have an analysis of the reasonableness of the non-drafter’s expectations than automatically have the language construed against it (so long as the non-drafter has proffered at least one reasonable interpretation favoring its position in the litigation). Of course, only a minority of courts automatically invoke contra proferentem against the drafter of unclear language. Normally, extrinsic evidence is first admitted to attempt to resolve the issue. See *Stempel & Knutsen*, *supra* note 136, § 4.04.

<sup>144</sup> Which appears to be the ALI position. See note 103, *supra* (noting ALI position on Restatements). This standard – existence of at least some judicial support (and implicitly, existence of strong intellectual support) was invoked in defense of the RLLI, which was approved by the ALI membership at its May 2018 Annual Meeting even though it in at least one case endorsed a viewpoint reflected in dissents but not majority opinions. See RLLI § 27, cmt. e Reporters’ Note (adopting perspective of dissents regarded as better reasoned than majority opinions where no court appeared to have applied the position of the dissenters).

<sup>145</sup> See RLLI § 3 and Reporters’ Note at 24 (“strong version of the reasonable-expectations doctrine . . . is rejected in this Restatement”).

the disadvantages faced by consumers. Like the contract-as-product, contract-as-statute, and contract-as-social-institution, Reasex has much to recommend it as a framework for assessing consumer transactions.

As the Reporters and many others have noted, consumers generally do not read the text of contract terms.<sup>146</sup> Nor would they necessarily understand either the literal meaning or the implications of those terms.<sup>147</sup> And if they did, cognitive traits such as “optimism bias” (e.g., a belief that one will never be late with payment or default on an obligation)<sup>148</sup> or “self-serving bias” (e.g., assuming continued employment in order to justify stretching to buy a home or car on credit)<sup>149</sup> make it unlikely that the average consumer would elect to walk away from a desired purchase based on a provendor term, even one that could have devastating consequences if the consumer defaulted on the obligation.

Under these circumstances, one can make a very compelling case for mandating that consumer contracts be consistent with the *objectively* reasonable expectations of consumers. The key

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<sup>146</sup> See Reporters’ Memorandum, *supra* note 85.

<sup>147</sup> For example, insurance policies sold to consumers use terms that are technical in nature and would be readily understood only by lawyers or persons in the insurance business, and even in these groups there may be different understandings or connotations of the term. Examples include terms like “newly acquired auto,” “covered auto,” “non-owned auto,” “bailee,” “supplementary payments,” “collapse,” “ordinance or law,” “malicious mischief,” “mold,” “pollution,” “latent defect,” “inherent vice,” and “earth movement,” that are either not necessarily understood by lay readers or depended on specialized definitions in the auto or homeowner policies from which this list is drawn.

The net effect is to have a paper “contract” (the insurance policy) full of language likely to be baffling to laypersons and contain provisions that are likely too complex for lay understanding. The “cross-collateralization” provisions of the furniture sale on credit contract in the famous *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (which contained a complex cross-collateralization clause that gave the vendor a security interest in all merchandise purchased from the vendor, even paid items, until the last item was paid) provide an example.

<sup>148</sup> See Sunstein, *supra* note 123 (describing optimism bias). See also Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (judges are not immune to the cognitive heuristics and biases affecting laypersons).

<sup>149</sup> See Jennifer K. Robbennolt & Jean R. Sternlight, *Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision Making* 71, 225, 427 (2012) (describing self-serving bias); Sunstein, *supra* note 123, at 8 (same).

word, often ignored by critics of Reasex, is *objectively*. Insurers and other vendors are correct in arguing that idiosyncratic customer expectations should not be able to defeat a vendor's intended operation of a contract, which is designed to allow the vendor to operate efficiently and profitably. Here, there is persuasiveness to the classic law-and-economics argument that judicial saving of the individual can harm the collective by restricting goods and services, making them more expensive, or encouraging other defensive business behavior that is worse for consumers.

But where only objectively reasonable consumer expectations are protected, sound and justifiable business practices are vindicated while uses of contract terms for questionable, anti-consumer, or "greedy" business practices are forbidden, at least if the consumer takes legal action. An objectively reasonable consumer expects (or is at least not surprised by or offended by) modest late fees or interest when late with rent or car payments. But the same hypothetical reasonable person might be quite surprised and angry to find out that when she complains about a defective computer she cannot sue in her local courts but instead must pursue arbitration in a distant forum arguably slanted in favor of the vendor.

Further, because rational people, even if wronged, almost never are willing to shoulder the burdens of litigation in response to small losses, even broad judicial adoption of Reasex will be under-enforced in practice. Even under a dominant Reasex regime, businesses would undoubtedly continue to use anti-consumer terms that would not hold up in court.<sup>150</sup> But a strong Reasex orientation would at least provide increased incentive for better vendor (and consumer)<sup>151</sup> behavior as well as an arguably more efficient and effective means of adjudicating consumer contract disputes.<sup>152</sup>

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<sup>150</sup> Bailey Kuklin, *On the Knowing Use of Unenforceable Contract Terms*, 56 U. CINN. L. REV. 845 (1990).

<sup>151</sup> Advocating literal application of the language in contract language is normally the province of vendors that have written the language to their advantage. But the reverse may on occasion be true. An opportunistic consumer may seize on inexact language or words open to literal application at odds with their purpose and obtain unreasonable benefits or benefits unintended by either vendor or consumer at the outset of the transaction.

<sup>152</sup> Although it is a topic needing more extensive discussion on another day, I cannot help but note the misleading mythology of textualism, which is promoted as being both efficient and constraining the personal preferences of judges. Ha. In the time taken to engage in extensive text-only analysis and

## 6. Withdrawing From High Ground: Continuing Retreat from the Second Restatement

A particularly puzzling aspect of the RLCC is its pivot away from the ALI's presumably authoritative statement on contracts, the *Restatement of Contracts* (RLC2).<sup>153</sup> To be sure, the RLC2, a contextualist document in the spirit of Corbin,<sup>154</sup> has its textualist critics.<sup>155</sup> Although highly influential, its contextualist

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debate (which may include motions for rehearing and appeal), a court could consider context and extrinsic information that often easily resolves issues of textual meaning. In addition, where a court is unwilling to allow consideration of extra-textual information that may contradict the court's preferred reading of the words, the judge has greater power to impose personal preferences than when faced with the possible constraints of context and specific evidence of the intent and purpose of a contract.

<sup>153</sup> See RESTATEMENT (SECOND) OF CONTRACTS (AM. LAW INST. 1981) (hereinafter "RLC2").

<sup>154</sup> To oversimplify, contract construction theory has been something of a long-standing battle between formalists (who are often but not necessarily strict textualists) who favor strict application of contract terms according to their "plain" meaning, and functionalists, who favor a contextualist interpretation informed by party intent and the purpose of the contract in question. See Jeffrey W. Stempel, Erik S. Knutsen & Peter N. Swisher, *Principles of Insurance Law* Ch. 2 (5th ed. 2020) (discussing formalist-functionalist divide).

To perhaps further oversimplify, Yale Law Professor Arthur Linton Corbin (1874–1967) is generally regarded as the leading traditional scholar of the functionalist or contextualist school. See, e.g., Arthur L. Corbin, *Corbin on Contracts* (1940) (multi-volume treatise); Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L. QTRLY 161 (1965). Corbin, a founder of the ALI, was also a Special Adviser and Reporter for the Remedies sections of the RLC2.

The two lead Reporters of Second Restatement were Prof. Robert Braucher (Harvard Law School and later a Justice on the Supreme Judicial Court of Massachusetts) and Professor E. Allan (Columbia Law School) were, like Corbin, functionalists and contextualists. See, e.g., E. Allan Farnsworth, *Contracts* (4th ed. 2004); E. Allan Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 939(1967).

As Professor Perillo has summarized: "It is fair to say that just as the first Restatement largely reflected the views of Professor Williston, the Second Restatement has drawn heavily on the views of Professor Arthur L. Corbin." PERRILLO, *supra* note 76, at 15.

<sup>155</sup> See, e.g., PERRILLO, *supra* note 76 §§ 3.10–3.17 (noting that many jurisdictions are not in accord with RLC2 regarding contract interpretation methodology).

approach has arguably been rejected in a majority of states.<sup>156</sup> But it nonetheless remains the ALI position on contract construction – albeit one perhaps under some siege.

For example, the recently promulgated RLLI contains a section on contract interpretation.<sup>157</sup> Why, one might ask, would the ALI’s work on liability insurance require its own contract construction provision when the ALI already had expressed its views on contract construction in a Restatement published 30 years before work on the RLLI began?

The answer is comprised of several strands. One is that insurance, like consumer transactions, are considered sufficiently separate subsets of contract that merit specific treatment that is not provided in the more generalist RLC2. Another is that the contextualist RLC2, despite its importance, has arguably lost ground during the past 40 years in the face of counter-arguments and the increasing number and prominence of formalist/textualist jurists, in particular the late Antonin Scalia.<sup>158</sup> Another strand is mere passage of time. Even if the RLC2 had no critics, it remains a 40-year-old document that current Reporters and the ALI may be reluctant to rely upon exclusively. In addition, the sociology of Restatement projects augers in favor of having project-specific contract construction provisions as respective Reporters of more recent projects will understandably wish to place their imprint on contract construction question.

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Continuing the historical oversimplification, Harvard Law Professor Samuel Williston (1861-1963) is often described as the exemplar of classical formalist contract law and an opposite of Corbin. *See generally Williston on Contracts* (1920). As a result, modern formalists are commonly seen as the descendants of Williston while functionalists are seen as the descendants of Corbin. But this oversimplification not only ignores nuance but can be misleading. Williston was not as open to consideration of context and extrinsic evidence as Corbin and the two were in considerable conflict regarding the parol evidence rule (that consideration of extrinsic evidence was barred if a contract was reduced to a sufficiently integrated writing). But he was more open to consideration of party intent and contract purpose than commonly supposed.

<sup>156</sup> *See* PERILLO, *supra* note 76 at §§ 3.10–3.17 (RLC2 approach not universally followed; neoclassical formalism/textualism is dominant in many states).

<sup>157</sup> *See* RLLI, *supra* note 3, § 3 (endorsing a “plain meaning” approach to insurance policy interpretation).

<sup>158</sup> Who was both a formalist and a textualist. *See, e.g.,* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); *see also* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (2012).



Although the ALI has not officially retreated from the RLC2 and its contextualism and purposivism, neither has it clung to the 1981 work. The RLLI is a case in point. Section 3 of the RLLI endorses a “plain meaning” approach which at first glance appears highly formalist and textualist<sup>159</sup> although the RLLI black letter text itself is receptive to consideration of nontextual factors bearing on meaning.<sup>160</sup> Upon further examination, RLLI §3 provides for considerable use of background information and context to aid in determining the plain meaning of an insurance policy, or even whether the policy has a plain meaning.<sup>161</sup>

Unlike the RLLI, the RLCC does not yet contain an interpretation provision per se that expressly advances a particular approach to consumer contract construction, although it contains not only its unconscionability provision (RLCC §5) but also limitations on the parole evidence rule (RLCC §8)<sup>162</sup> and a provision for dealing with “any term [that] excludes, limits, or violates any mandatory rule.”<sup>163</sup> Unfortunately, the focus on the more formalist

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<sup>159</sup> See RLLI §3(1) (“If an insurance policy term has a plain meaning when applied to the facts of the claim at issue, the term is interpreted according to that meaning”) (boldface removed) and § 3(2) (defining plain meaning as “the single meaning to which the language of the term is reasonably susceptible when applied to the facts of the claim at issue in the context of the entire insurance policy.”) (boldface removed).

<sup>160</sup> For example, § 3(1) provides that language is construed according “to the facts of the claim at issue” while § 3(2) permits consideration of such facts “in the context of the entire insurance policy.”

<sup>161</sup> See RLLI, § 3, cmt. b (finding generally accepted sources of meaning to include dictionaries, court decisions, statutes, regulation, treatises, law review articles, and other secondary legal authority and deeming these not to be impermissible “extrinsic” evidence) and cmt. c (endorsing liberal use of custom, practice, courses of dealing and course of performance evidence) and cmt. 3 (endorsing consideration of purpose of text to aid interpretation).

<sup>162</sup> And it’s a helpful rule for consumers:

A 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 final expression of the agreement regarding the subject matter of that term and does not have the effect under the parole evidence rule of discharging obligations that would otherwise arise as a result of the prior affirmation of fact or promise.

RLLC § 8.

<sup>163</sup> RLLC § 9, which gives courts substantial discretion to strike or modify oppressive terms on behalf of consumers.

portion of the RLCC (§2) regarding contract formation has led to underappreciation of these provisions that could be quite pro-consumer – if taken seriously by courts.

But because so much attention has focused on attack on the RLCC from the left, the document is seen as one implicitly embracing of formalism and textualism in its consistent focus on the textual content of consumer contract documents, including modification or addition of terms by the vendor. Casual observers can be forgiven for concluding that the RLCC method of construction is to simply read the text of the document and apply it, which gives the RLCC an aura of *de facto* textualism and implicit enforcement of a formalist approach. The RLCC not only has no discussion of alternative conceptions of contract but also lacks extensive discussion of contract construction generally and says little about the RLC2, which in the context of a Restatement involving contracts can be seen as an implicit rejection of the contextualist RLC2.

On closer reading, the RLCC – except for its provisions on contract formation and inclusion of terms – emerges as a rather pro-consumer document that has been unfairly attacked by its critics, at least regarding its net substance. If adopted in whole, the RLCC’s grand bargain would, in the hands of reasonable judges, probably provide considerable protection to consumers. The problem is practicality. Once contracts are recognized (RLCC §2), the text of contract documents (e.g., the long boilerplate list of “terms and conditions” accompanying many consumer transactions) has force unless challenged, which will not happen often enough in a world of arbitration clauses and limits on class action relief. As a result, the pro-consumer aspects of the RLCC (§5 on unconscionability, §6 on deception, §7 holding vendors to their promises regarding a transaction, §8 regarding the parole evidence rule, and §9 dealing with terms in derogation of mandatory rules) may seldom see the light of judicial scrutiny. And when they do, the historical hostility of the bench to invoking unconscionability and other tools for policing contracts may make these pro-consumer portions of the RLCC a dead letter.

The RLCC could have been improved through express invocation of portions of the RLC2 as applied to consumer contracts.<sup>164</sup> For example, RLC2 §§200-208 set forth a framework that

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<sup>164</sup> This would, in the eyes of the RLCC’s consumer and government critics, probably include Contracts Restatement §§ 17-23 regarding mutual assent. But the Reporters, and presumably the Council that approved the Reporters’

would provide relatively good protection of consumer interests, that includes not only rebuke of unconscionable terms and conditions<sup>165</sup> but also construing ambiguity against the vendor,<sup>166</sup> a duty of good faith and fair dealing,<sup>167</sup> a preference for interpretation favoring the public,<sup>168</sup> and a set of interpretative rules that although text-focused provide some limitations on the power of standardized forms.<sup>169</sup>

Most germanely, RLC2 §211, though hardly hostile to standardized forms and contracts of adhesion,<sup>170</sup> restrains the enforceability of standardized terms by providing that where the party employing a standard term “has reason to believe that the

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vision of the project, specifically intended to embrace a line of cases taking a distinctly pro-vendor view of assent in return for the Reporters’ co-vision of endorsing a regime of protection of consumers through the unconscionability doctrine.

<sup>165</sup> See RLC2 § 208 (If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.”).

<sup>166</sup> See RLC2 § 206 (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.”).

<sup>167</sup> See RLC2 § 205 (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”).

<sup>168</sup> See RLC2 § 207 (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred”).

<sup>169</sup> See, e.g., RLC2 § 200 (“Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning); § 201 (Whose Meaning Prevails); § 202 (Rules in Aid of Interpretation); § 203 (Standards of Preference in Interpretation).

<sup>170</sup> See RLC2 §211(1). Subject to §211(3), discussed in text, providing that “where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms including in the writing.”). In addition, RLC2 §211(2) arguably favors vendors by promoting a uniform approach to contract construction rather than separate rules for consumer and commercial contracts or distinguishing between knowledgeable or ignorant consumers, stating that standard forms are “interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.”).

party manifesting such assent would not do so if he knew that the writing contained a particular term” the term does not become “part of the contract.”<sup>171</sup> If fully embraced by courts, this portion of the RLC2 would arguably provide as much or more protection for consumers as a strong form of Reasex.

But instead of reiterating and embracing such consumer protective portions of the RLC2, the RLCC essentially ignored this and other reasonably pro-consumer provisions of the RLC2, missing a chance to clothe itself in this progressive product of the ALI. The effect is tantamount to a rejection of these aspects of RLC2 and arguably diminishes rather than enhances consumer rights, a result further undermining the professed goals of the RLCC project.

## V. CONCLUSION

Regarding particular topics, the ALI and other law reform organizations may no longer be able to don a cloak of purported neutrality based on counting cases and summarizing “the law.” The same legal “mainstream” that includes Clarence Thomas also includes Sonia Sotomayor, just as it included Ronald Dworkin and Robert Bork as well as Alexander Hamilton and Andrew Jackson. Case law and commentary will often be split. Even where there is a dominant majority rule, its wisdom should remain subject to re-examination by those “restating” the law as well as those setting forth “principles” of the law.<sup>172</sup>

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<sup>171</sup> RLC2 §211(3).

<sup>172</sup> In this regard, Justice Scalia’s criticism of modern Restatements (and implicitly other aspects of recent ALI work) (*see* TAN 45, *supra*) is misplaced. Scalia compares “modern” restatements to law review articles, assuming applies the coup de gras to them as failing to authoritatively assemble “the law.”

This ignores that much of even a “controversial” restatement is non-controversial. For example, landowner interests have been very critical of one part of the Torts (Third) Restatement, its duty-to-trespassers provision and have obtained legislation against it. *See* note 12, *supra*. But the bulk of that Restatement has been non-controversial. Similarly, the RLLI has been subject to attack by insurers. Although their attack has been (shamefully, in my view) on the entire RLLI, their substantive complaints have focused on only a few provisions of a 50-section document. The bulk of the RLLI is regarded by those familiar with insurance as mainstream and non-controversial.

Equally importantly, the Scalia critique implicitly assumes that a more opinion-based writing such as a law review has considerably less value than a

Although many areas of law still remain subject to consensus summary, others resist such common ground and require law reform organizations to make substantive choices that go beyond merely aggregating and summarizing case law. For some legal issues, organizations like the ALI need to decide which “side” they are on rather than attempting to split the metaphorical baby on matters of law and policy. Consensus may be hard or even impossible to obtain – but perhaps consensus should not be the goal. Clear positions and supporting rationale may better serve lawyers, judges and policymakers, even if many in the profession oppose some of those positions and supporting arguments.

For an organization like the ALI, which produces “soft” law that suggests rather than commands application, making these choices, however hard and at least temporarily divisive, may be a more productive route than seeking the midpoint of opinion. No court is required to approve of a Restatement, much less apply it as a rule of decision. Restatements, like other legal concepts and products, compete in an arena of vigorous debate. Compromise reached by swapping a pro-business position in return for a pro-consumer concession, as was arguably done through the lens of the “grand bargain” approach to the RLCC, may not only bring resistance from the two sides that were supposed to be appeased but may make for sub-optimal public policy as well.

More efficacious positions in a Restatement will presumably enjoy greater acceptance than less persuasive provisions. Rather than unduly compromising, pulling punches, or watering down its positions, a Restatement should stake out, advance, and support the “better” or “best” rules of law as determined by the membership after careful study and analysis. This approach may leave more of the organization’s members displeased more often but the resulting work product is more likely to improve the law. Ironically, such an approach might also improve the odds of a Restatement’s approval by ALI membership and use by courts.

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“just-the-facts” compilation ala Jack Webb (the lead detective in the 1950s television series “Dragnet” who was constantly admonishing witnesses to report only facts as opposed to subjective commentary). But where the profession and policymakers divide on matter of legal rule or doctrine, opinionated analysis may be much more illuminating than mere case-counting.