

January 10, 2018

Council Members
American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104-3099

Re: Council Draft No. 4 of the Restatement of Consumer Contracts (Dec. 18, 2017)

Dear Members of the ALI Council:

The undersigned consumer, civil rights, housing and community organizations write to express our serious concerns about the current Council Draft of the Restatement of Consumer Contracts. The draft, if followed by courts, would make it harder for consumers to challenge unfair and unconscionable practices in the marketplace and easier for unscrupulous businesses to get away with misconduct. The draft would also make it harder for honest businesses to compete against unsavory competitors.

A Restatement of the Law is intended to be a summary of the law as it presently stands or might appropriately be stated by a court. Restatements are intended to be respectful of precedent and to weigh the competing views of courts that have addressed the issues.

Instead, this Draft undermines the well-accepted factors that courts and legislatures have developed to determine whether contract terms are procedurally unconscionable, and replaces them with a theory spun out in a law review article that cites not a single judicial decision in its support.

Our organizations work to protect our constituents from unfairness in the marketplace every day. We see how some businesses treat consumers fairly and reasonably and others do not. We have a number of concerns about the provisions of the draft that address when consumers are deemed to have agreed to the terms of a contract; when new terms may be added; and, how provisions may be modified.

Overreaching contract terms are imposed on consumers every day through obscure and complicated language that consumers do not understand and have no choice about whether to accept if they want a product or service. Yet the Draft takes an extremely loose view of when consumers have actually understood and agreed to a contract term. Moreover, the Draft would allow a business to insert new terms after the fact as long as the consumer was told beforehand that it might do so, and the consumer has an opportunity to review the new terms and either continue under the existing terms or terminate the contract. This after-the-fact “choice” is also likely to be marred by a lack of understanding or of true choice. Notably, the consumer is *not* given the same right to impose new terms upon the business.

The Draft justifies these lenient standards on the ground that courts will be able to strike down contracts that are unconscionable or deceptive. The entire premise of this proposed Restatement is that a permissive view of when consumers have agreed to a contract will be policed by the doctrines of unconscionability and deception. However, the Draft undermines rather than strengthens these doctrines.

There are four primary problems with the Draft's approach: (1) the definitions of procedural and substantive unconscionability are too restrictive; (2) the Draft fails to state that consumers may raise unconscionability and deception affirmatively to challenge the specific terms or the contract as a whole; (3) the Draft severely limits the remedies available once a court finds a term or contract to be unconscionable or that the business engaged in deception; and 4) the Draft places the burden of proof on consumers even though only businesses have access to most of that proof.

In sum, the proposed Restatement embodies an expressly preferential treatment of businesses over consumers. The Restatement relies on the mantra of "freedom of contract" to avoid any meaningful consumer protections. For these reasons, we urge the Council to not approve this Draft.

Thank you for your consideration.

Advocates for Basic Legal Equality, Inc.
(Ohio)

Legal Aid Justice Center (Virginia)

American Family Voices

NAACP

Baltimore Neighborhoods, Inc. (Maryland)

National Black Justice Coalition

Center for Justice & Democracy (New York)

National Center for Transgender Equality

Florida Alliance for Consumer Protection

Sargent Shriver National Center on Poverty
Law (Illinois)

Georgia Trial Lawyers Association

Workplace Fairness (Maryland)

Housing and Family Services of Greater New
York