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VIA ELECTRONIC MAIL & OVERNIGHT MAIL

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Re: Restatement of the Law of Consumer Contracts
Council Draft No. 5 (September 19, 2018)

Dear Director Revesz and Deputy Director Middleton:

On January 12, 2018, thirteen State Attorneys General (the “States”) submitted a letter to the American Law Institute (“ALI”) in which we expressed our concerns with Preliminary Draft Number 3 of the Restatement of the Law of Consumer Contracts (the “Prior Draft”), and urged the ALI to reject it. We understand that the ALI discussed the Prior Draft at a meeting in January but did not approve it. We recently learned that the reporters have submitted a revised draft – designated Council Draft Number 5 (the “Revised Draft”) – that the ALI council intends to vote on later this month.

While the Revised Draft is an improvement from the Prior Draft, it fails to address many of the concerns articulated in our prior letter (a copy of which is enclosed and incorporated by reference). Most fundamentally, the Revised Draft fails to strike the appropriate balance between commercial efficiency and consumer protection, and the undersigned States urge you to reject it.

The States’ Principal Concern with the Prior Draft

Commerce in the digital age is increasingly governed by form contracts drafted by the online merchant and presented to the consumer on a take-it-or-leave-it basis. This fact gives rise to a tension in the law between the desire to encourage efficient practices and to protect consumers from patently unfair contractual terms. The Prior Draft sought to resolve this tension through what it called a “grand bargain.” The grand bargain involved the interplay between two contract-based legal doctrines: mutual assent and unconscionability.

The Prior Draft proposed abandoning the mutual assent doctrine, based on the assertion that the doctrine was meaningless in the digital age, when consumers do not read standard form contracts and likely could not understand them even if they did. As we argued in our letter, advances in technology are no reason for abandoning a foundational principle of contract law that only binds a party to contractual terms to which she assented. And far from being a dead letter, our States have relied upon the doctrine in numerous enforcement actions where material terms of a contract were buried in the fine print.

In exchange for abandoning the mutual assent doctrine, the Prior Draft proposed to protect consumers from unfair terms with the unconscionability doctrine, which contains substantive and procedural prongs. As we argued in our letter, however, the unconscionability doctrine is an extremely narrow defense with a high burden of proof, and the Prior Draft proposed no expansion of it. Moreover, unconscionability is a litigation defense,¹ and most consumers lack the time and resources to litigate disputes, meaning they would never have the opportunity for any *ex post* review of the contract's terms.

The Revised Draft Retains the Grand Bargain, If Not By Name

Although it no longer uses the term “grand bargain,” the Revised Draft continues to advocate for the same radical re-balancing of mutual assent and unconscionability as the Prior Draft. The Revised Draft asserts that, while the mutual assent doctrine was once “a meaningful mechanism” to protect consumers, the ubiquity of standard form contracts has “diluted the effectiveness and plausibility” of the doctrine, and concludes that “adoption procedures designed to achieve informed consent would yield relatively little value to, and might even impose burdensome transaction costs upon, the typical consumer.”² Accordingly, consumers should be *presumed* to have assented to whatever terms the business included in the contract.³

In exchange for essentially abandoning mutual assent, the Revised Draft purports to offer consumers *ex post* protection in the form of the unconscionability doctrine, which, according to the Revised Draft, “represents one of the primary safeguards necessary in an environment in which complex terms are adopted without meaningful scrutiny by consumers.”⁴ Yet, the Revised Draft does not acknowledge that the burden of demonstrating unconscionability is generally high and courts rarely find consumer contracts to be unconscionable. Indeed, the Revised Draft reinforces the narrow scope of this litigation defense.

As to the substantive prong of the unconscionability doctrine, the Revised Draft notes it will only be met in “extreme” cases where a consumer can demonstrate the “one-sidedness of a particular term” based on the contract as a whole, the price, and the “context surrounding the

¹ See Revised Draft § 5(e) (“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.”).

² See *id.*, § 2, Comment 13, at p. 33.

³ While the Revised Draft does not use the term presumption, it clearly implies the operation of one. See *id.*, Reporters’ Introduction, at p. 7 (characterizing the sections of the Revised Draft covering adoption and modification of contract terms as “provid[ing], *initially*, for enforcement of the standard contract terms”) (emphasis added).

⁴ See *id.*, § 5, Comment 1, at p. 74.

contract.”⁵ Placing such a heavy burden on consumers undermines any protection the substantive unconscionability doctrine purportedly provides, and ignores the realities of consumer litigation (namely, that few consumers have the incentive or resources to bring such cases).

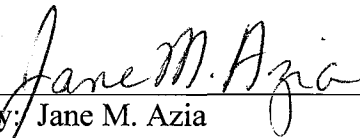
The Revised Draft’s approach to procedural unconscionability is equally problematic. The Revised Draft maintains a substantively identical test for procedural unconscionability as the Prior Draft’s adoption of “salience.” A contractual term that “affects the contracting decisions of a substantial number of consumers” is likely to be subject to market competition, which eliminates the need for judicial oversight.⁶ Thus, the price of a product will rarely satisfy this prong. As we argued in our prior letter, this blind reliance on market forces to determine procedural unconscionability is based on questionable economic assumptions and constitutes a marked departure from current law. More importantly, the Revised Draft’s approach toward procedural and substantive unconscionability fails to offer consumers meaningful protection to compensate for the protection taken from consumers by abandoning the mutual assent doctrine.

* * * * *

We appreciate the ALI’s efforts to bring more clarity and coherence to an important area of law, but we do not believe the Revised Draft represents a positive step forward, and we urge you to reject it.⁷

Respectfully submitted,

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⁵ See *id.*, § 5, Comment 3, at pp. 74-75.

⁶ See *id.*, § 5, Comment 6(b), at p. 81.

⁷ We respectfully request that you share this letter with all members of the ALI council who will be voting on the Revised Draft, and post the letter to ALI’s internal comment page for the Revised Draft.

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January 12, 2018

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Re: **Restatement of the Law of Consumer Contracts,
Preliminary Draft Number 3**

Dear Director Revesz and Deputy Director Middleton:

On behalf of the undersigned State Attorneys General (the “States”), we write to set forth our concerns regarding Preliminary Draft Number 3 of the Restatement of the Law of Consumer Contracts (the “Draft Restatement”), which we understand the American Law Institute (the “ALI”) intends to vote to approve or reject at its meeting later this month. Our views on the Draft Restatement are informed by our substantial experience – as the chief consumer protection officers of our respective States – dealing with the reality of consumer contracts in the digital age, including consumers’ complete lack of bargaining power over contractual terms, consumers’ relative lack of business sophistication, and the nearly insurmountable barriers most consumers face to seeking redress through litigation.

Our offices receive thousands of complaints from consumers and regularly prosecute cases where businesses use unilaterally imposed contractual terms to engage in predatory and unscrupulous behavior. While we appreciate the ALI’s attempt to provide much-needed clarity to an area of the law that impacts millions of Americans on a daily basis, we believe the Draft Restatement represents an abandonment of important principles of consumer protection in exchange for illusory benefits, and we urge the ALI to reject the Draft Restatement.

A. The Draft Restatement's "Grand Bargain"

According to the United States Census Bureau, Americans spent almost \$395 *billion* in online transactions in 2016.¹ Most of these transactions were governed by standard form contracts drafted solely by the online retailer and presented to consumers on a take-it-or-leave-it basis. Consistent with our experience as consumer protection officers – and, indeed, as consumers ourselves – the Draft Restatement recognizes that these ubiquitous standard form contracts differ from other contracts due to asymmetries in sophistication, resources, and information.² These asymmetries give rise to a tension in the law between two competing objectives: how to encourage efficient and streamlined contracting practices between consumers and businesses, while also protecting consumers from blatantly unfair contractual terms. The Draft Restatement purports to resolve this tension by means of a “grand bargain,” under which businesses have nearly unfettered discretion to bind consumers to contractual terms while also “restrict[ing] this drafting freedom by a set of substantive boundary principles, prohibiting businesses from imposing intolerable terms or undermining the core bargain presented to consumers.”³ The Draft Restatement attempts to accomplish this goal by adjusting the balance in what it calls the “hydraulic framework” between two contract-based legal doctrines that have historically been employed to protect consumers – mutual assent and unconscionability.⁴

The mutual assent doctrine is based on the foundational principle of contract law that a party is bound to only those contractual terms to which she assented.⁵ The doctrine requires courts to engage in a fact-intensive analysis to determine whether the consumer had actual or inquiry notice of the term, and, if so, whether the consumer manifested any indication of intent to be bound by the term.⁶ No such analysis would be required under the Draft Restatement, whose

¹ See Press Release, U.S. Census Bureau, *Quarterly Retail E-Commerce Sales: 4th Quarter 2016* (Feb. 17, 2017), available at <https://www2.census.gov/retail/releases/historical/ecom/16q4.pdf>.

² See Draft Restatement, Reporters' Introduction, at p. 1.

³ See *id.* at p. 5.

⁴ See *id.*, § 2, comment 12, p. 30.

⁵ See, e.g., *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 28-29 (2d Cir. 2002) (Sotomayor, J.) (“Whether governed by the common law or by Article 2 of the Uniform Commercial Code [], a transaction, in order to be a contract, requires a manifestation of agreement between the parties. Mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract.”) (internal citations and quotation marks omitted).

⁶ See, e.g., *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1034-35 (7th Cir. 2016) (Wood, C.J.) (“Translated to the Internet, we might ask whether the web pages presented to the consumer adequately communicate all the terms and conditions of the agreement, and whether the circumstances support the assumption that the purchaser receives reasonable notice of those terms. This is a fact-intensive inquiry: we cannot presume that a person who clicks on a box that appears on a computer screen has notice of all contents not only of that page but of other content that requires further action (scrolling, following a link, etc.)[.] Indeed, a person using the Internet may not realize that she is agreeing to a contract at all, whereas a reasonable person signing a physical contract will rarely be unaware of that fact. We need, therefore, to look more closely at both the law and the facts to see if a reasonable person in [plaintiff's] shoes would

three official Reporters – all prominent academics in the field of law and economics – assert that the costs of the doctrine outweigh the benefits, because consumers do not read standard form contracts and, even if they did, could not make informed decisions about the terms given that most form contracts are drafted in unintelligible legalese.⁷ The Draft Restatement endorses the view that it is “more sensible to permit formation processes that do not rely on consumer readership,”⁸ and effectively proposes a rebuttable presumption of assent, provided the barest notice and termination requirements are met.⁹ In our view, this non-reciprocal arrangement is fundamentally unfair, as only businesses will have the ability to impose contractual terms on consumers without assent.¹⁰

In exchange for weakening the mutual assent doctrine, the grand bargain 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.¹¹ While the contours of the doctrine may differ from state to state, in general procedural unconscionability looks at the contract formation process, and substantive unconscionability looks at the substantive terms of the contract.¹² Given the central role of unconscionability under the Draft Restatement, one would expect an expanded and more robust version of the doctrine. Instead, the Draft Restatement 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.¹³ And despite the central role substantive unconscionability plays in the “grand bargain,” the Draft Restatement declines to expand what is

have realized that he was assenting to the Service Agreement when he clicked ‘I Accept & Continue to Step 3.’”).

⁷ See Draft Restatement, § 2, Reporters’ Notes, at p. 31 (“Informed assent to the standard contract terms is, by and large, absent in the typical consumer contract.”).

⁸ See *id.*, Reporters’ Introduction, at p. 3.

⁹ Although the Draft Restatement does not use the word presumption, it does refer to the provisions of the Draft Restatement concerning assent as “provid[ing] for prima facie enforcement of the standard contract terms.” See *id.* at p. 7.

¹⁰ Sections 2 and 3 of the Draft Restatement govern the adoption of “Standard Contract Terms,” which are defined as contract terms drafted by the business. See *id.*, § 1(a)(5) (defining “Standard Contract Terms” as follows: “Terms in a consumer contract that have been drafted prior to the transaction *by any party other than the consumer* and govern transactions between the business and multiple consumers.”) (emphasis added).

¹¹ The Draft Restatement does not take a position as to whether unconscionability could be raised by a consumer in lawsuit brought by the consumer (as a “sword”) or whether it can only be invoked by a consumer as a defendant in a lawsuit (as a “shield”). See *id.*, § 5, Reporters’ Notes, at p. 82.

¹² See *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 391-92 (E.D.N.Y. 2015) (describing procedural and substantive unconscionability under New York state law).

¹³ See Draft Restatement, § 5, comment 6, at p. 68.

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 resources to bring suit.

The Draft Restatement attempts to justify its “grand bargain” based on questionable empirical analyses conducted by the Reporters.¹⁴ These empirical analyses were designed to identify patterns and trends in consumer contract law by applying an “influence tracking” methodology that counts the number of times judicial decisions on issues of consumer contract law are cited.¹⁵ It is not clear, however, to what extent this case-counting methodology considers qualitative factors, such as the accuracy and wisdom of particular judicial decisions. For example, the Draft Restatement adopts its approach to 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 (7th Cir. 1996) (Easterbrook, J.),¹⁶ but nowhere acknowledges the substantial body of academic commentary concluding that *ProCD* was wrongly decided.¹⁷ We question whether the Draft Restatement’s lack of clarity as to the role qualitative factors play in its analysis undermines the benefits of a quantitative approach,¹⁸ and we note that consumer advocates and academics have identified a number of other troubling flaws with the Draft Restatement’s methodology.¹⁹

¹⁴ See generally Oren Bar-Gill, Omri Ben-Shahar & Florencia Marotta-Wurgler, *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*, 84 U. Chi. L. Rev. 7 (2017) (describing the Reporters’ empirical approach to the Draft Restatement).

¹⁵ See Draft Restatement, Reporters’ Introduction, at pp. 6-7.

¹⁶ See *id.*, § 2, Reporters’ Notes, at pp. 38-39.

¹⁷ See, e.g., 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.”).

¹⁸ See William Baude, Adam S. Chilton & Anup Malani, *Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews*, 84 U. Chi. L. Rev. 37, 43-44 (2017) (noting that a quantitative approach to doctrinal problems can help readers evaluate truth of claims, assess uncertainty of certain claims, reduce error, and reduce actual or perceived bias).

¹⁹ For example, one study examined the data sets used by the Draft Restatement to study judicial treatment of privacy policies and found that 35 of the 51 decisions in the data set – or 69% – were issued in the procedural context of deciding a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). As the author observes, this high proportion of decisions on motions to dismiss is significant, because “[t]he question before the court in these cases was not the actual legal effect of the privacy policy, but whether the plaintiff pled facts sufficient to survive the motion. And though some of the Rule 12(b)(6) decisions take judicial notice of the substance of the privacy policy, others identify factual issues as sufficiently pled but expressly leave their resolution for a later stage in the proceedings.” See Gregory Klass, *A Critical Assessment of the Empiricism in the Restatement of Consumer Contract Law*, Geo. L. Fac. Publ’ns & Other Works, 15 (July 2017), <http://scholarship.law.georgetown.edu/facpub/1987/> (internal footnotes omitted).

B. Problems with the Draft Restatement

1. Weakening the Mutual Assent Doctrine Ignores Centuries of Black Letter Law and Deprives Consumers of a Meaningful Benefit

We have several concerns regarding the Draft Restatement's essential abandonment of the mutual assent doctrine – the “touchstone of contract,” as then-Second Circuit Judge Sotomayor characterized it.²⁰

First, we see no cause to abandon the mutual assent doctrine due to changes in commerce and technology. 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 consumers did not agree.²¹ Indeed, State Attorneys General have brought numerous enforcement actions, under our respective consumer protection statutes and laws, where material terms of a consumer contract are buried in the fine print under circumstances where consumers would never have assented to them. These actions have included such wide-ranging issues as cellular telephone contracts that hide early termination fees, “free” trial offers where contracts obligate consumers to ongoing monthly fees, predatory mortgage loans with teaser rates that are unaffordable in the long-term, direct marketing offers that include fees that dramatically increased the final price of the products, and subprime credit card contracts that imposed substantial fees on consumers for, *inter alia*, setting up their account and paying their bills online. Any presumption that consumers have assented to these material terms is a fiction. While the Draft Restatement appears to regard the doctrine of mutual assent as an antiquated relic from a bygone era, we echo the holdings of courts that “[w]hile new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.”²²

Second, we are concerned that cases cited by the Draft Restatement do not support the proposition for which they are offered. For example, the Draft Restatement asserts that most

²⁰ See *Specht*, 306 F.3d at 28-29.

²¹ See, e.g., *Noble v. Samsung Elecs. Am., Inc.*, 682 F. App'x 113, 118 (3d Cir. 2017) (“Because the contractual provision here appears on the ninety-seventh page of a ‘Health and Safety and Warranty Guide’ that gives no notice of something claiming to be a binding bilateral agreement and waiver of legal rights, we will not presume that consumers read or had notice of that purportedly binding agreement. . . . The Clause, in short, is not a valid contractual term.”) (internal footnote omitted); *Savetsky v. Pre-Paid Legal Servs., Inc.*, Case No. 14-Civ.-03514-SC, 2015 WL 604767, at *5 (N.D. Cal. Feb. 12, 2015) (“Because the outward manifestations of consent present in this case would not lead a reasonable person to believe [plaintiff] has consented to the agreement, the Court finds there was no valid and enforceable agreement to arbitrate.”) (internal citations and quotation marks omitted); *Berkson*, 97 F. Supp. 3d at 367 (“It is concluded that the average internet user would not have been informed, in the circumstances present in this case, that he was binding himself to a sign-in-wrap.”).

²² *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004).

courts to have considered the enforceability of pay-now-terms-later (“PNTL”) contracts have upheld them, and cites as an example *Schnabel v. Trilegiant Corp.*, 697 F.3d 110 (2d Cir. 2012). In *Schnabel*, however, the court held that the plaintiffs were *not* bound by the terms of an arbitration provision emailed to them after they made their purchase, because they never assented to the provision.²³ While the *Schnabel* court did acknowledge circumstances under which PNTL contracts have been and could be upheld,²⁴ the court also expressed a degree of skepticism that a business could be free to impose post-transaction terms on a consumer based on an expansive conception of the consumer’s “duty to read.”²⁵ It is not at all clear, then, why *Schnabel* should be included in a list of “cases in which courts enforced PNTLs,”²⁶ given that the *Schnabel* court neither enforced a PNTL nor offered a wholesale endorsement of the justification for doing so. While we have not reviewed all of the cases cited in the Draft Restatement, we have discovered a similar issue in at least one other instance.²⁷

Also troubling is the Draft Restatement’s analysis of so-called browsewrap²⁸ case law. The Draft Restatement asserts that “[c]ourts generally enforce browsewraps as long as reasonable notice is provided.”²⁹ Yet one court that extensively examined the state of the law across jurisdictions came to precisely the opposite conclusion: “courts generally have enforced browsewrap terms only against knowledgeable accessors, such as corporations, not against

²³ See *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 126 (2d Cir. 2012) (“The case law does not support such a ‘terms later by email’ conception of contract formation under these conditions.”).

²⁴ See *id.* at 124 (“Courts, including this one, have concluded as a matter of law in some circumstances that parties were on inquiry notice of the likely applicability of terms to their contractual relationship even when those terms were delivered after that relationship was initiated. These decisions appear to have in common the fact that in each such case, in light of the history of the parties’ dealings with one another, reasonable people in the parties’ positions would be on notice of the existence of the additional terms and the type of conduct that would constitute assent to them.”).

²⁵ See *id.* at 128 (“No court, so far as we are aware – in Connecticut, California, or elsewhere – has concluded that the ‘duty to read’ covers situations like this one and, for the foregoing reasons, we decline to do so here.”).

²⁶ See Draft Restatement, § 2, Reporters’ Notes, at p. 39.

²⁷ For example, with respect to so-called clickwrap cases – *i.e.*, cases in which consumers click an “I Agree” button – the Draft Restatement cites a number of cases to support the assertion that “courts routinely enforce clickwraps,” including *Bonck v. White*, 115 So. 3d 651 (La. Ct. App. 2013). See Draft Restatement, § 2, Reporters’ Notes, at pp. 35-36. In *Bonck*, however, the court denied the defendant’s motion for summary judgment based on the terms of the insurance contract at issue there, and held there were questions of fact as to whether the contract was enforceable. See *Bonck*, 115 So. 3d at 655.

²⁸ “Browsewrap” refers to instances in which a website purports to bind consumers to terms and conditions by virtue of the consumer’s use of the website. See *Berkson*, 97 F. Supp. 3d at 395 (“Browsewraps can take various forms but basically the website will contain a notice that—by merely using the services of, obtaining information from, or initiating applications within the website—the user is agreeing to and is bound by the site’s terms of service.”) (internal citation and quotation marks omitted).

²⁹ See Draft Restatement, § 2, Reporters’ Notes, at pp. 36-37.

individuals.”³⁰ Unfortunately, we are unable to determine the source of this disagreement because the Draft Restatement supplies a citation to only a single case where a browsewrap was supposedly enforced, *Major v. McCallister*, 302 S.W.3d 227 (Mo. Ct. App. 2009).³¹ Notably, *Major* did not involve a “pure” browsewrap agreement, where the mere act of browsing a website constitutes acceptance of the website’s terms of use, because the consumer had clicked a “Submit” button next to hyperlinked text stating, “By submitting you agree to the Terms of Use.”³²

Finally, we believe that weakening the requirement of mutual assent is not only contrary to fundamental principles of contract law but will encourage a veritable race to the bottom, as market forces will drive businesses – which will know they can bind consumers to all but the most odious terms – to draft standard form contracts with egregiously self-serving terms.

2. The Draft Restatement’s Conception of Unconscionability Provides Insufficient Protection to Consumers

In exchange for effectively abandoning the requirement of assent, the Draft Restatement purports to offer consumers protection in the form of procedural and substantive unconscionability, doctrines courts can use to police contracts to ensure consumers are not bound by unconscionable terms. We have several concerns with the Draft Restatement’s reliance on unconscionability as a means of protecting consumers from abusive terms in adhesion contracts.

First, we 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.³³ In light of these facts – which, indeed, one of the Reporters for the Draft Restatement has previously recognized³⁴ – the Draft Restatement’s reliance on the doctrine as a panacea for exploitation of consumers is wholly unfounded.

³⁰ See *Berkson*, 97 F. Supp. 3d at 396.

³¹ See Draft Restatement, § 2, Reporters’ Notes, at p. 37.

³² See *Major v. McCallister*, 302 S.W.3d 227, 229 (Mo. Ct. App. 2009).

³³ See, e.g., *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001) (reversing a district court holding that an arbitration provision that was silent on fees and costs was unconscionable, and noting that “[u]nconscionability is a narrow doctrine whereby the challenged contract must be one which no reasonable person would enter into, and the inequality must be so gross as to shock the conscience.”) (internal citations and quotation marks omitted).

³⁴ See Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. 1, 71 (2008) (noting that though “[u]nconscionability review is most commonly applied to contracts between consumers and sophisticated corporations . . . courts have been very circumspect in applying unconscionability review to credit contracts”).

Second, we fundamentally disagree with the Draft Restatement's introduction of salience – a non-legal, untested doctrine – as the test for procedural unconscionability.³⁵ The Draft Restatement defines procedural unconscionability as “amounting to unfair surprise or depriving the consumer of meaningful choice,”³⁶ and whether a contractual term is procedurally unconscionable turns on the concept of salience, with salient terms requiring few judicial protections:

A term that can affect the contracting decisions of a substantial number of consumers is more likely to be subject to forces of market competition, even if it is not negotiated and even if it appears in the contracts of all businesses in the relevant market. Such a term is therefore policed by market forces, and so policing by courts – through the unconscionability doctrine – is ordinarily unnecessary and leads to undesirable results, including a reduction in consumer choice.³⁷

By contrast, terms consumers do not consider in making their purchasing decisions – non-salient terms – are not subject to market discipline, and therefore require more exacting judicial review. We question these assumptions. In our experience, market forces alone are often insufficient to redress unfair provisions, and even in the best-case scenario may take years to occur, causing significant consumer harm in the process. We regularly bring cases where businesses attempt to justify their unlawful conduct on the ground that the conduct was purportedly disclosed in the fine print of a contract, such as negative option billing or teaser rates. As a practical matter, enforcement initiatives are often not undertaken until we become aware of a critical mass of affected consumers and then take time to resolve. Had we waited for the market to self-correct, an untold number of consumers would have been harmed by conduct that would not appear to be procedurally unconscionable under the Draft Restatement.

In any event, putting aside whether the economic assumptions underlying the concept of salience are valid, placing salience at “the heart of the procedural test”³⁸ for unconscionability amounts to a significant weakening of the doctrine. For example, because price is typically the most salient term for consumers, a finding of procedural unconscionability with respect to price would never be possible, regardless of the presence of factors courts typically look at in considering procedural unconscionability, such as unequal bargaining power, lack of consumer sophistication, high-pressure tactics, or indicia of duress. Under the Draft Restatement's

³⁵ We note that introducing a concept that has never been applied by any court under any circumstances appears inconsistent with the principal goals of a Restatement, which are to ascertain the majority and minority rules, ascertain trends in the law, determine which rule provides a coherent body of law, and recommend which rule is the more desirable. *See* Draft Restatement, Restatements, at pp. xi-xii.

³⁶ *See* Draft Restatement, § 5(b)(2).

³⁷ *See id.*, § 5, comment 6, at p. 68.

³⁸ *See id.*, § 5, Reporters' Notes, at p. 80.

approach, the primary factor for a court to consider is whether a substantial number of consumers finds a term salient – a marked departure in the law unlikely to offer consumers any meaningful protection. We find this possibility particularly troubling based on our experience protecting consumers from false and misleading pricing practices such as negative option billing, teaser rates, and hidden fees. Moreover, no court has ever applied the concept of salience to procedural unconscionability, meaning judges will be left to develop a coherent body of law based on an unfamiliar and untested concept, which will almost certainly result in the type of confusing and inconsistent results the ALI seeks to avoid.

3. The Realities of Consumer Litigation Make Clear that Litigation Defenses Offer Consumers No Meaningful Protection

The Draft Restatement justifies its abandonment of mutual assent by encouraging courts to police contractual terms after the transaction through the doctrines of unconscionability and consumer deception. Needless to say, such judicial policing could only occur in the context of litigation. The Draft Restatement's optimistic view of the protection afforded to consumers by the doctrines of unconscionability and deception is belied by the reality of consumer contract litigation.

Most consumers lack the time and resources to litigate disputes, particularly where they have only been defrauded out of small amounts of money,³⁹ meaning they would never have the opportunity for any *post hac* evaluation of the contract's terms. 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 individually from private arbitrators incentivized to rule against them.⁴⁰

Moreover, even if a consumer overcame these obstacles, unconscionability (both procedural and substantive) and deception are generally affirmative defenses as to which the consumer bears the burden of proof. In particular, as discussed above, to prove procedural unconscionability under the Draft Restatement's new salience standard, consumers must demonstrate whether a particular contractual term "can affect the contracting decisions of a substantial number of consumers,"⁴¹ a showing that would be extremely difficult for an

³⁹ As former Seventh Circuit Judge Posner has observed, "only a lunatic or a fanatic sues for \$30." *Carnegie v. Household Int'l, Inc.*, 376 F.2d 656, 661 (7th Cir. 2004).

⁴⁰ See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 407 (2005) (noting that the "collective action waiver – and particularly its implicit ban on spreading across multiple plaintiffs the costs of experts, depositions, neutrals' fees, and other disbursements – forces the individual claimant to assume financial burdens so prohibitive as to deter the bringing of claims. In the absence of the waiver, the claimant may spread these costs across thousands of coventurers (or have them advanced by lawyers, as happens in practice). In the presence of the waiver, these costs fall on her alone. And these costs, in a complex commercial case, will exceed the value of the recovery she is seeking.") (internal footnotes omitted).

⁴¹ See Draft Restatement, § 5, Reporters' Notes, at p. 80.

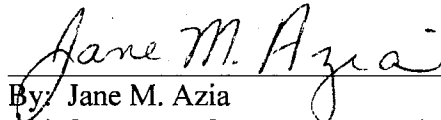
individual consumer to make absent submission of expert or survey evidence. Similarly, substantive unconscionability requires a consumer to prove that a contractual term “undermine[s] the consumer’s benefit from the bargain,”⁴² which would, in at least one example provided in the Draft Restatement, require a consumer to prove that a particular fee “lacked any reasonable relationship to the lender’s risk-adjusted cost of making the loans.”⁴³ As a practical matter, requiring this degree of proof renders the purported consumer protection offered by the Draft Restatement illusory.

* * * * *

We take seriously our responsibilities to protect the interests of consumers, and we welcome efforts to provide clarity to the important area of consumer contract law. Unfortunately, we do not believe the balance struck by the Draft Restatement adequately protects consumers, and we urge the ALI to reject it.⁴⁴

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⁴² See *id.*, § 5, comment 3, at p. 61.

⁴³ See *id.*, § 5, illustration 18, at p. 72. More generally, the Draft Restatement provides that, “[w]hen it is claimed or appears to the court that the contract or any term may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect.” See *id.*, § 5(e).

⁴⁴ We respectfully request that you share this letter with all members of the ALI council who will be voting on the Draft Restatement, and post the letter to ALI’s internal comment page for the Draft Restatement.

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