

October 12, 2018

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

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

Dear Members of the ALI Council:

We, the undersigned consumer, civil rights, housing, legal services, advocacy, and community organizations, urge the Council to reject the seriously flawed current Council Draft of the Restatement of Consumer Contracts. Many of us work to protect consumers from unfairness in the marketplace every day. We have a keen on-the-ground feel for how some businesses treat consumers fairly and reasonably and how other businesses do not. We are also painfully aware of the dearth of legal resources available to consumers to defend themselves from mistreatment by businesses. The combined legal resources available to assist consumers are very limited and are able to help very few people.

Previous consumer comments detailed the ways in which Draft No. 4 unnecessarily restricted the scope of procedural and substantive unconscionability, failed to provide that unconscionability and deception can be raised affirmatively, circumscribed the remedies available for violations of these doctrines well beyond what the general common law otherwise provides, and failed to address burdens and standards of proof.<sup>1</sup>

Those comments also expressed several concerns regarding the assent, addition of new terms, and modification of terms provisions (Sections 2-4). These sections took an extremely loose view of the terms to which the consumer has agreed. That Draft justified these lenient assent standards on the ground that the doctrines of unconscionability and deception would act as counterbalances to predatory terms, abuse, or overreaching by businesses. Indeed, the entire premise of Draft No. 4 was that the unconscionability and deception doctrines were essential to “police” the market in light of the permissive assent rules found throughout. However, Sections 5 and 6 of the Draft undermined rather than strengthened these doctrines.

Unfortunately, Council Draft No. 5 does nothing to address these concerns. It continues to embody the same level of preferential treatment of businesses over consumers. Although the Reporters have dropped the “grand bargain” phrase, in favor of a claim to merely be following in the footsteps of Karl Llewellyn, his approach of using doctrines against unfairness and

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<sup>1</sup> These comments raised concerns related to Council Draft No. 4 and appeared in two letters dated January 10, 2018. They were posted to the Comment webpage for this project on January 11, 2018. The each letter is listed under the file name “Nonmember comment - CD No. 4 - multiple organizations.”

overreaching does not work in light of the many practical hurdles consumers face in seeking redress.<sup>2</sup>

Draft No. 5, as did its predecessor, cripples the enforcement of the unconscionability and deception doctrines by rejecting the use of these doctrines affirmatively except, apparently, in the limited circumstance where the consumer paid an unconscionable fee and seeks to recover it.<sup>3</sup> Moreover, Section 9 of Draft No. 5 severely limits unconscionability and deception remedies by merely instructing the courts to refuse to enforce the offending term or the contract or replace the offending provisions with other terms. These provisions, without more, do not realistically deter business overreaching at contract inception or police the marketplace after the fact. These remedies are especially feeble when considered in conjunction with the lack of broad affirmative enforcement, the burdens of proof imposed on consumers, and silence regarding standards of proof.<sup>4</sup>

In light of the lack of improvement in the proposed Restatement over several years, we strongly urge the Council to reject Draft No. 5 and, if the project continues, appoint a new set of Reporters.

Thank you for your consideration.

Advocates for Basic Legal Equality, Inc. (Ohio)	Center for Justice and Democracy (New York Law School)
Allied Progress	Center for Responsible Lending
Americans for Financial Reform	Consumer Action
Arkansans Against Abusive Payday Lending	Consumer Federation of America
Arkansas Community Institute	Consumers for Auto Reliability and Safety
Berkeley Law Consumer Advocacy & Protection Society	D.C. Consumer Rights Coalition

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<sup>2</sup> These include a dearth of attorneys willing to take on cases that involve small individual damages based on common law claims where there is no right to seek attorney fees from the losing defendant.

<sup>3</sup> Council Draft No. 5, § 5, cmt 12; § 6, cmt 7.

<sup>4</sup> These concerns were discussed in more detail in our January comments.

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California Reinvestment Coalition

Public Citizen

East Bay Community Law Center  
(California)

Public Justice Center (Maryland)

Florida Alliance for Consumer Protection

Public Law Center (California)

Georgia Watch

South Carolina Christian Action Council

Greater Boston Legal Services  
(on behalf of its low-income clients)

Southern Poverty Law Center

Housing and Family Services of  
Greater New York

U.S. PIRG

Legal Aid Justice Center (Virginia)

Virginia Citizens Consumer Council

Legal Services of New Jersey

Virginia Poverty Law Center

Legal Services NYC

West Virginia Center on Budget and Policy

National Association of Consumer Advocates

Woodstock Institute

National Consumer Law Center  
(on behalf of its low-income clients)