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May 10, 2019

The American Law Institute
4025 Chestnut Street
Philadelphia, Pennsylvania 19104-3099

Attention: Richard L. Revesz, Director
Stephanie A. Middleton, Deputy Director

RE: Restatement of the Law, Consumer Contracts, Tentative Draft (April 18, 2019)

To the American Law Institute Community:

I am a voting member of the American Law Institute ("ALI") and a Professor of Law at the University of Miami School of Law in Coral Gables, Florida. I specialize in contract law and other business subjects. I write concerning the Restatement of the Law, Consumer Contracts, *Tentative Draft* (April 18, 2019) ("RLCC").

For the reasons set forth below, the RLCC should not be approved in its present form. At a minimum, the database must be reviewed for errors and the description of the empirical results in the reporters' notes must be redrafted. My research is the third independent assessment which questions the research, methodology and presentation of the empirical research supporting RLCC.¹

I am concerned about both the quality of the empirical research for this project and the presentation of the results of this research to the ALI. I find much of the presentation of the results slanted toward advocacy for passage of the project rather than focused on an objective search for the truth of the matter. To illustrate my concerns, I have focused primarily on the analysis of a subset of the data: state case law.

RLCC states, at p.51, lines 30-31 that: "The post-*ProCD* decisions of the state-supreme and appellate courts point to a convergence and to the emerging dominance of the *ProCD* approach."

At best, this statement is an exaggerated marketing claim made to sell RLCC to the ALI membership. Based on my very preliminary analysis of state cases contained in EXHIBIT A to this letter, I believe this claim is misleading. To be sure, there is a modest post-*ProCD* tilt in the data over all, but consideration of the state law cases in their entirety reveals an unsettled doctrinal landscape. I invite you to look at the data and decide for yourself.

It is particularly difficult to advocate for a *ProCD* approach when the post-1996 state supreme courts are evenly divided (3 to 3) on the issue (with the reporters having apparently missed two of the state supreme court cases which reject the *ProCD* logic and miscoded a trial court case as a supreme court case favoring *ProCD*).

¹ See e.g. Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. ON REG. 45 (2019); Adam J. Levitin, Nancy S. Kim, Christina L. Kunz, Peter Linzer, Patricia A. McCoy, Juliet M. Moringiello, Elizabeth A. Renuart & Lauren E. Willis, *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 YALE J. ON REG. 447 (2019).

Moreover, a majority of appellate courts that actually ruled on a clause rejected the *ProCD* logic by a vote of 2 favor; 4 against (1 favor; 4 against if you eliminate a case which is not useable as precedent under applicable court rules.)

Even if you concede an overall *ProCD* tilt when considering all cases, in any split of authority with a large number of observation instances it would be unusual to find an exact 50-50 split. The exercise should not be the simple numerology of identifying a bare majority. The reasoning behind the decisions matter, particularly when the reasoning for *ProCD*, the signature case to support RLCC, makes an obvious, significant (and, frankly, embarrassing) error in interpretation of the UCC (as discussed more fully below). I welcome corrections and comments on my work.

The problem with the description of state case law data raises a larger concern. The reporters claim that their empirical research overwhelmingly supports endorsement of the "rolling contract" analysis of contract formation for "pay now, terms later" (or "PNTL") agreements, primarily as reflected in the text of RLCC in Section 2(b). A rolling contract analysis supports the enforcement of later arriving terms.

The signature case supporting a rolling contract analysis is *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) ("*ProCD*"). RLCC strongly endorses and supports the legal analysis in this case. The leading contrary case is *Klocek v. Gateway, Inc.*, 104 F.Supp.2d 1332 (D. Kan. 2000) ("*Klocek*"). My review of state case law shows that the competition between the *ProCD* logic and the *Klocek* logic is robust, not settled.

Judge Gorsuch (now Justice Gorsuch) stated in 2014: the "rolling contract formation theory may be about as controversial an idea as exists today in the staid world of contract law. Some states endorse the theory, but others reject it—holding that a seller's later-arriving written contract constitutes at most only a proposal to modify a preexisting oral contract, and that a buyer's assent to the proposed modification won't be inferred simply from the buyer's continuing the preexisting oral contract." *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 982 (10th Cir. 2014) (discussing *ProCD*).

Justice Gorsuch correctly noted a real divide in state law. As indicated in EXHIBIT A to this letter, a modest number of state supreme court and state appellate court cases address the issue. They are divided. They are not statistically significant. Moreover, the apparent mistakes, omissions and confusion in the data presentation of RLCC lead me to question whether the database has sufficient integrity to sustain a large project.

Greater attention to the presentation of the data in the reporters' notes would greatly improve them. For the analysis of PNTL agreements, there should be four separate sets of data presented: first, a table of state case law results; second, a table of federal case law results; third, a table showing combined state and federal data; and, fourth, a master set showing the impact of incorporation of unpublished opinions into the first three sets. Each case should be coded for "dicta" [i.e. 0/1], with the results made available. As it stands, a reader cannot decipher the data. Moreover, each aspect of the presentation should refer the reader to a single overall question: (i) Does the case embrace the *ProCD* logic? or (ii) Does the case refuse to enforce late arriving terms?

It appears that "(i) Does the case embrace the *ProCD* logic" was the coding standard used in the dataset reflected in the Excel spreadsheet of November 15, 2017 which I describe below under "Methodology". I cannot, however, be sure of this because RLCC impermissibly mixes the two at p. 50-51, as discussed in more detail below.

This choice makes a huge difference for orderly presentation of data. If the question is whether the case embraces the *ProCD* logic then (perhaps) *Marion Power Shovel Co. v. Huntsman*, RLCC p. 50, lines 25-27, should appear as support for *ProCD* and the RLCC, as indicated by the reporters. However, *Marion Power* also is a case in which the court refused to enforce late-arriving terms. Support for *ProCD* is found in *dicta*. Ignoring *dicta*, *Marion* should appear against *ProCD* in RLCC at p. 51, line 16, because that is where the reporters purport to list the courts which refused to enforce late arriving terms. It can not be that the coding standards are mixed up in such a way as to cause this confusion.

The presentation to the reader should clearly and unequivocally present data responsive to one question at a time. The reporters should confirm the coding of the cases and present data in the same manner as the data was coded. If they coded for both tests, it would be interesting to see the differences. Coding for "embrace of the *ProCD* logic" will create a more favorable dataset for the RLCC approach because it allows for consideration of *dicta*. Coding for whether a court refused to enforce late-arriving terms will create a less favorable dataset for the RLCC approach because it focuses on specific holdings. What you simply cannot do is mix the presentation of data without articulation of the coding standard, as the reporters have done at RLCC p. 50-51.

State cases are an important subset of the data because they provide binding precedent for interpretation of Article 2 of the Uniform Commercial Code and the common law of contracts.² RLCC should begin its data presentation with this set of state cases, and build up from there.

Compounding the problem for a database already light on state court cases, preliminary independent research indicates that the reporters' database omits several relevant state cases, including a state supreme court case from Kansas, *Wachter Management Co. v. Dexter & Chaney, Inc.*, 282 Kan. 365, 144 P.3d 747 (2006), a state supreme court case from Illinois, *Razor v. Hyundai Motor Am.*, 222 Ill.2d 75 (2006), and an appellate case from Nebraska, *McCaulley v. Nebraska Furniture Mart, Inc.*, 21 Neb. App. 125, 838 N.W.2d 38 (2013). Significantly, the Nebraska legislature cites this case in its annotations to s. 2-207 of the Nebraska UCC. See ANNOTATIONS, <https://nebraskalegislature.gov/laws/ucc.php?code=2-207>. Additionally, I find no reference to *Howard v. Ferrellgas Partners, L.P.* in the materials. *Howard*, a consumer case, suggests that *Wachter* should be applied in a consumer case and it confirms that Kansas follows the *Klocek* case—the leading alternative to *ProCD*. *Trujillo v. Apple Computer, Inc.*, 578 F.Supp.2d 979 (N.D.Ill. 2008) confirms the applicability of *Razor* (as noted by Professors Ayres and Klass in their textbook, *STUDIES IN CONTRACT LAW*).

The reporters make much of the fact that *ProCD* (and related cases supporting the *ProCD* logic) receive many more citations than the leading contrary case, *Klocek*. They take this citation level as an indication of "influence" to bolster the case for dominance of the *ProCD* approach. See RLCC p. 52. The heavy level of citation, however, likely reflects another problem with *ProCD*, not a strength.

Consideration of the drafting history of the UCC shows that Karl Llewellyn was concerned with creating a clear and workable statute to which both lawyers and business people might easily refer for answers. See generally Karl Llewellyn, *Why a Commercial*

² Federal courts are followers, not leaders, when construing state statutes or state common law. Judge Posner correctly stated this role when he considered the UCC "battle of the forms" in *Northrop Corp. v. Litronic Industries*, 29 F.3d 1173, 1178 (7th Cir. 1994) (adopting the majority view in state court decisions rather than his own preferred view of the law). This is an important reason to build the empirical analysis on a foundation of state case law.

Code?, 22 TENN. L. REV. 779 (1953). This would reduce the increased cost and expense associated with the need to consider arcane case law doctrine to answer questions.

A more likely reason for the relatively modest citation level of *Klocek* is that the UCC is clear on the point. The presence of a clear statute reduces the need to cite case law as precedent for a decision. *Contra* the *ProCD* logic, UCC s. 2-207(2) is clear that, in a consumer case, later supplied terms are mere proposals for addition; no elaborate citation to case law is needed to answer the question. Reference to the clear language of the UCC is sufficient, or it should be.

Of course, elaborate citation to case law is needed to justify doing violence to the plain language of the UCC on this point. Thus, the heavy citation level to *ProCD* is explained by the need for a court to go in search of precedent when the desire arises to head off in a policy direction against the statute. It is a simple case of Lady Macbeth protesting too much.

Indeed, the clarity of the UCC on this point is one reason for the overwhelming opposition to the *ProCD* logic in the academic community. RLCC misstates the intense level of academic opposition at RLCC p. 49, lines 33-34. See e.g. John E Murray, Jr., *The Dubious Status of the Rolling Contract Formation Theory*, 50 DUQ.L.REV. 35 (2012) (cited by Judge Gorsuch in *Howard*). This, of course, is another example of advocacy by the reporters, rather than a search for the truth. The concern over *ProCD* is only heightened because, on another point, *ProCD* misstates the UCC in a way which even *ProCD* supporters must acknowledge (i.e. UCC s. 2-207 does apply to a case involving a single piece of paper). *ProCD* at 1452 wrongly states: "Our case has only one form; UCC § 2-207 is irrelevant."

A restatement project typically is focused on common law alone—so it is natural to look to citation level as an indicator of acceptance. However, where a statute governs or interacts with the common law, one must approach the implication of case citation level with much more care. Mere numerology simply will not do.

Database Problems

Below I set forth my particular database and data presentation concerns in detail so that the reporters may answer or rebut my criticisms. Additionally, I hope to provide information helpful to the ALI membership to inform a "YES" or "NO" vote on the project in its current state.

Methodology

I started work with a 2017 Excel spreadsheet provided to me which, I believe, contains the database used to support RLCC (at least as of November 15, 2017). The subset of that database is titled "PRELIMINARY. FOR INTERNAL ALI USE ONLY. SHRINKWRAP CASES."

From this spreadsheet listing of "shrinkwrap cases" I extracted all of the cases coded as "State." I have added to these materials two state cases referenced at RLCC p. 51 (*Goode* and *Hobbs*) which did not appear in the shrinkwrap database subset from November 2017, and three other state cases from independent research (*Wachter*, *Razor* and *McCaulley*). For transparency, the state cases from the version of the database provided to me are excerpted and reprinted, with my color coding, together with the added cases, as EXHIBIT A. I never received a reply to my e-mail offering to discuss case law omissions from the database. This is why I use the materials identified above.

The easiest way to illustrate my concerns is to move directly to specific comments on the RLCC. The comments, taken together with EXHIBIT A, support Justice Gorsuch's observation that state law governing rolling contracts is unsettled. They also explain my concern over the presentation of data to the ALI.

RLCC p. 50, lines 4-12

RLCC states: "As of 2019, the higher courts of **12** states, including **seven** supreme courts, have addressed the enforceability of PNTL contracts."

This is not correct according to my research.

By my count, 23 total cases appear in the state case database. The higher courts of **15** states have addressed the enforceability of PNTL contracts, including **nine** supreme courts. Additionally, three trial court cases appear. These represent decisions in a total of **17** states.

Those states and court levels are: Alabama (SC 2; AC 1), Arkansas (SC 1), Delaware (TC 1), Illinois (SC 1), Indiana (AC 2), Kansas (SC 1), Oklahoma (SC 1; AC 1), Maine (SC 1), Massachusetts (AC 1), Missouri (AC 1), Montana (SC 1), Nebraska (AC 1), New York (AC 1; TC 1), Rhode Island (SC 1), Texas (AC 1), Virginia (TC 1), Washington (SC 1).

The database needs to be checked because my count does not include *Rinaldi*, a Delaware trial court case, initially wrongly coded as a supreme court case by the November 15, 2017 database. The court decisions in three states are split: Alabama court decisions are split, 2 in favor of *ProCD*; 1 against *ProCD*; New York decisions are split, 1 in favor of *ProCD*; 1 against *ProCD*; and, the Indiana decisions are split, 1 in favor of *ProCD*; 1 against *ProCD*.

RLCC states: "PNTL contracts have been **enforced** in **four** out of **six** state supreme courts . . ."

This is not correct according to my research. **Five** state supreme courts **have indicated a willingness to enforce** PNTL contracts; **four** state supreme courts **have indicated they would not enforce** PNTL contracts. Of these state supreme courts, **three** state supreme courts have **actually enforced** a PNTL contract; **three** state supreme courts **have declined to enforce** a PNTL agreement. The other supreme court cases were *dicta*.

RLCC states: "PNTL contracts have been **enforced** in . . . **four** out of **five** state appellate courts."

This is not correct according to my research.

Six state appellate courts have **indicated a willingness to enforce** PNTL agreements. **Four** state appellate courts have **indicated they would not enforce** PNTL agreements. Of these state appellate courts, only **two** actually **declined to enforce** a PNTL agreement (and one of those cases is not citable under applicable court rules); all **four** state appellate courts who took a position against a PNTL agreement actually **declined to enforce**, and did not merely express opposition in *dicta*. Indeed, if one looks at clauses actually enforced (and not *dicta*) a majority of appellate courts reject *ProCD*.

I can not figure out what the reporters are trying to do by reference to adding "circuit courts" at RLCC p. 50, line 5. I deduce, by the later reference to *Brower*

in line 13 that the reporters intended to add in federal cases. This is sloppy mixing and matching—a genuine dog’s breakfast. State and federal data should be presented clearly and separately, and then aggregated in a straightforward manner.

Compare RLCC p. 50, lines 21-22 with RLCC p. 51, line 14

The reporters’ notes purport to set up a contrast between “Cases in which courts accepted the proposition that PNTL contracts are enforceable when the conditions of notice and termination are met” and “The cases in which courts refused to enforce late-arriving terms.” These are two different tests; the former allows consideration of *dicta*, while the later requires a holding on point. RLCC sets up an improper apples and oranges comparison.

An appropriate uniform standard might be “ProCD logic embraced-yes or no.” This, indeed, appears to be the coding standard used in the Nov. 15 shrinkwrap database I was given. For the presentation of data, I recommend using the same standard as that used to code the data. Frankly, presentation of data coded in two different ways might be very useful.

RLCC p. 50, lines 21-22

INSERT a heading: **Cases which embrace the logic of ProCD** or **Cases which do not enforce late arriving terms**

REPLACE the first sentence with: **The following cases embrace the logic of ProCD:** or **The following cases support enforcement of late arriving terms:**

RLCC p. 50, lines 25-27

Depending on the coding standard used, delete the reference to *Marion Power Shovel Co. v. Huntsman*. This case does not support enforcement of later supplied terms in a PNTL transaction. The case supports the opposite view. It denied enforcement of written warranty terms contained in a manual supplied after payment of the purchase price. *Marion* at 787. Indeed, the case probably should be moved to RLCC p. 51, line 14, and inserted as a case in which a court “refused to enforce late-arriving terms.” Alternately, if the reporters wish to keep a citation to *Marion*, a different coding standard should be clearly articulated, with more clarity about how *dicta* will be used. A case might be made that *Marion* supports the *ProCD* logic.

RLCC p. 51, line 4

The reference to *Hobbs* can stay, but it raises the question of whether cases should be coded and sorted based on whether they are *dicta* or a holding. To give a complete picture of the relative support for the logic of *ProCD* a presentation with and without weighting may be appropriate. By color coded comments in EXHIBIT A I try to separate the “solid” results from the “dicta” results. This is a very preliminary result and I am still considering how best to describe what is going on, how to code for it, and whether it should be weighted in any way.

RLCC p. 51, lines 14-25

RLCC purports to list the cases “in which courts refused to enforce late-arriving terms.”

CONSIDER CHANGING THE CODING STANDARD--INSERT a heading: **Cases which reject the logic of ProCD.**

On line 14, if the coding standard is changed, REPLACE the opening clause with:
The following cases reject the logic of ProCD:

At a minimum, the following five (5) state cases should be added to the list of cases which do not enforce late arriving terms (if that standard is retained):

Marion Power Shovel Co. v. Huntsman, 437 S.W.2d 784 (Ark. 1969); *Licitra v. Gateway, Inc.*, 734 N.Y.S.2d 389 (N.Y.Civ.Ct. 2001); *Terrel v. R & A Mfg. Partners, Ltd.*, 835 So.2d 216 (Ala.Civ.App. 2002); *Lively v. IJAM, Inc.*, 114 P.3d 487 (Civ. App. Okla. 2005); *McCaulley v. Nebraska Furniture Mart, Inc.*, 21 Neb. App. 125, 838 N.W.2d 38 (2013).

These additions weaken the case for adoption of RLCC. Following the changes suggested above, the text of RLCC would identify nine (9) cases in which a court did not enforce late arriving terms, as against twelve (12) cases which embrace the *ProCD* logic. This weakens the case for RLCC. Even if *Marion* is left in the *ProCD* camp and removed from the "did not enforce late-arriving terms" camp, the numbers are not overwhelming: eight (8) to thirteen (13). **In any event, I would replace the reporters' narrative description of state case law results in its entirety, substituting a summary table like that appearing on the first page of EXHIBIT A.**

I note that *Rogers v. Dell Computer Corp.*, at lines 21-25 is not really a great case to support a failure of a court to enforce later arriving terms. As I read the case, it was not possible for the court to decide. It is not a case in which there was a clear prior agreement, and terms arrived later. It amounts to *dicta*, though *dicta* against the logic of *ProCD*. Both *Marion* and *Rogers* illustrate how difficult it can be to code for *dicta* and then interpret those results. You must be very clear about what exactly you are coding for.

Given issues about coding and categorization, I think the best view of state law is provided by looking at the cases in EXHIBIT A after 1996. This results in ten (10) cases favoring the *ProCD* logic and six (6) cases against the *ProCD* logic. That does not seem to me an overwhelming case, and it presents a simplified way of looking at things. This data point, plus the recognition of contrary case law within three of the states makes the case for state case law being unsettled—and not converging around the *ProCD* logic.

My recommended state case additions likely are a "minimum." The reasoning in these cases appears applicable to a consumer case. However, as RLCC aspires to application or extension outside the consumer area to other situations of information and power imbalance (such as a large corporation dealing with a small business) it is probably proper to include other cases in this list as well. See RLCC p. 18, lines 6-10 (advocating for application of RLCC beyond the context of consumer contracts). For that purpose, I would consider addition of the following state cases:

Marek v. Alexander Laufer and Son, Inc., 683 N.Y.S.2d 50 (App. Div. 1st Dept. 1999); *Wachter Management Co. v. Dexter & Chaney, Inc.*, 282 Kan. 365, 144 P.3d 747 (2006).

Marek opens up a can of worms for any database project because of the "New York" rule with respect to arbitration. Historically, under New York law, any attempt to add a standard clause providing for arbitration in a late arriving document was doomed to fail because New York courts wanted to see a specific agreement to arbitrate. This is a complicated subject beyond the scope of this letter. I am not sure the RLCC at p. 13, line 23-26 is sufficient to handle the complexity presented by arbitration. The point is simply this: there are numerous cases relating specifically to

arbitration clauses which, regardless of whether consumer or business, deny enforcement to late arriving arbitration clauses because they either are mere proposals for addition or, in a case between merchants, they materially alter the contract within the meaning of UCC s. 2-207(2). I have not piled on these negative cases simply to "run up the score" against *ProCD* because, in fairness, it merits a detailed discussion. For this reason, I have not yet included *Marek* and similar cases in EXHIBIT A. But it should not be lost on the ALI that further research and analysis might bury the *ProCD* logic with significant contrary case law. I have declined to do that here, both for reasons of time and my firm belief that we are not, or should not be, primarily engaged in a mere bean counting exercise.

Wachter is not a consumer case. It denies enforcement of later supplied terms. Its reasoning would extend to a consumer case in which some bargaining took place in advance of agreement on dickered terms. In a case where no bargaining took place (and there simply was agreement on price), the *Wachter* court might employ *ProCD* reasoning. The *Howard* case suggests *Wachter* should apply in a consumer transaction. For this reason, I have included it in my data presentation. In full disclosure, there was a dissent in *Wachter* which sides with the *ProCD* logic. *1-A Equipment Co.* was not a consumer case. *Lively* was analyzed as both a consumer case and a business case—with the same result. Accordingly, including *Wachter* seems proper.

Looking ahead to a potential broader evaluation of case law, the methodology employed by the reporters relies on an analysis of *dicta*, as well as holdings, primarily in consumer cases, RLCC p. 6, line 18. A non-consumer case may also, in *dicta*, support the approach taken in either *ProCD* or its leading competitor, *Klocek*. The state case law database already includes a few of these cases. I think there are potentially many more of them. An example of this type of support appears in *Quality Wood Designs, Inc. v. Ex-Factory, Inc.*, 40 F.Supp.3d 1137 (D.S.D. 2014). If the principles in this restatement are extended beyond the consumer area, it might be useful to understand the relative support for the different approaches to the problem of boilerplate or standard terms in non-consumer case law and to seek out more of these non-consumer cases.

RLCC p. 51, lines 29-30

RLCC states that from 1998 to 2016 only one case denied enforcement to a PNTL contract. This is wrong based on independent research. See *Licitra v. Gateway; Terrell v. R & A Mfg. Partners, Ltd.; Lively v. IJAM, Inc.; Razor v. Hyundai Motor Am.*; and, *McCaulley*. Probably *Wachter* could be added to this list.

RLCC p. 51, lines 30-31

RLCC states that: "The post-*ProCD* decisions of the state-supreme and appellate courts point to a convergence and to the emerging dominance of the *ProCD* approach."

Both the prior discussion and EXHIBIT A suggest this statement is an overstatement, if not simply wrong.

Given issues about coding and categorization, I think the best overview of state law is provided by looking at the cases in EXHIBIT A after 1996. This results in ten (10) cases favoring the *ProCD* logic and six (6) cases against the *ProCD* logic. That does not seem to me an overwhelming case. Importantly, state supreme courts divide evenly at three (3) to three (3). In appellate cases in which a clause was actually enforced, the anti-*ProCD* logic dominates, 4 to 1 in useable precedent (4 to 2 overall).

Thus, I do not see either convergence or emerging dominance. I see a mess. This is particularly true when one considers there is conflicting case law within three different states. Look at the data and decide for yourself. I tend to agree with Judge Gorsuch's assessment in *Howard* in 2014. That is the only fair reading of state case law materials.

RLCC p. 51, lines 32-33

RLCC states: "Even clearer trends emerge from a comprehensive empirical study of all published and unpublished PNTL cases involving consumer contracts in federal and state courts."

The above statement reveals the need for a better and more systematic presentation of empirical data. There should be four separate sets of data presented: first, a set of state case law; second, a set of federal case law; third, a table showing combined state and federal data; and, fourth, a master set showing the incorporation of unpublished opinions into the first three sets. As the presentation stands, a reader cannot disentangle the data.

RLCC p. 52, lines 5-6

RLCC states: "This analysis reveals that the landmark case denying enforcement of PNTL contracts, *Klocek*, decided in 2000, has not generated nearly as much of a following as *ProCD*."

The addition of *Wachter*, *McCaulley* and *Howard* would count as three more cases in the *Klocek* column. There may well be more.

The data does suggest *ProCD* has a large following (almost certainly the largest absolute number of citations). But why is this? The reasoning employed in a case is important, as well as the reason for the citation. A court may follow the reasoning of a case without citation, particularly if the court is interpreting a statute with language it deems clear. It is particularly necessary to cite a case when one is doing violence to statutory language in order to justify the abuse. Frankly, that is likely what is going on with *ProCD*.

RLCC p. 52, lines 4-5

RLCC states: In fact, the last time a PNTL contract was not enforced in this sample, simply because of the PNTL formation procedure, was 2005.

This seems incorrect based on my research—at least after the sample is corrected. As recently as 2013, the court in *McCaulley* denied enforcement of later supplied terms because of the PNTL formulation. *McCaulley* should be added to the database and the reference changed to 2013. This weakens the case for adoption of RLCC.

Concluding remarks

Though my above remarks are critical, I should note RLCC p.53, lines 5-7, which state: "Cases in which courts refused to enforce the allegedly adopted standard contract terms are ones in which the conditions stipulated in this Section were not met." [Referring to RLCC Section 2.]

A fair review of the identified cases shows that the reporters have, in the text of RLCC, captured the essence of factors used by courts to enforce boilerplate

and standard terms (when a court is inclined to do so). This is no small task. Regardless of your position on consumer policy or the interpretation of the UCC, this is a valuable contribution. I also note the conservative approach taken by the reporters to include a stringent test for adoption of later supplied terms in RLCC Section 2(b). If the text of RLCC is adopted, I would predict compliance with this section will be the battleground over which the bulk of consumer cases is fought (rather than expanded notions of unconscionability).

I am hopeful that clarification on coding standards will give a clearer picture of the empirical basis for RLCC. On the merits, I am not convinced that the RLCC treatment of PNTL agreements deserves an exclusive endorsement. I might see a report describing a majority and a minority position. In any event, such an examination and clarification of coding may lead to reclassification of many cases—either for or against the *ProCD* logic. Hopefully such an exercise either will confirm the direction of RLCC in the tentative draft or lead the ALI to take a different path, but in either case, with increased confidence in the decision.

I sometimes undertake empirical projects. They are difficult. Everyone makes mistakes and omissions. I am sure some of my analysis of the tentative draft will need amendment, correction and clarification. We should all be thankful for researchers who take the first step and put both themselves and their data “out there” for further research and review. I hope my remarks are used constructively to improve the project.

Very truly yours,

A handwritten signature in blue ink that reads "William H. Widen". The signature is written in a cursive, flowing style.

William H. Widen

EXHIBIT A

DATA ANALYSIS: State cases embracing ProCD logic

Definition key:

A case is coded as “embracing the ProCD logic” if it indicates, by dicta or by holding, that it would enforce later arriving terms IF the party receiving those terms either had advance notice that later terms would be forthcoming, had an opportunity to unwind the transaction after reviewing the later arriving terms, or both. This coding is an attempt to capture the test in RLCC Section 2(b) for enforcement of a later arriving term.

Table: summary of findings

State cases embracing ProCD logic									
Supreme Courts		Other appellate courts		All appellate courts		Trial Courts		All courts grand total	
YES	NO	YES	NO	YES	NO	YES	NO	YES	NO
1995 and prior									
3 (2)	1	1	1	4	2	0	0	4 (3)	2
AR, AL, AL	MT	IN	IN						
1996 and forward									
3	3	5	3	8	6 (5)	2	1	10	7 (6)
WA, ME, RI	OK, KS, IL	NY, TX, MA, LA, MO	AL, OK, NB			DE, VA	NY		
All years									
								14 (13)	9 (8)

Qualitative analysis

The numbers reported in parentheses (e.g. for supreme courts 1995 and prior) reflect the elimination of multiple consistent results within a single state. This elimination may provide a better indication of state by state trends. For supreme courts 1995 and prior, Alabama had two consistent results. For 1996 and forward, Oklahoma had two consistent results, one at the supreme court and one at an appellate court.

Court cases in three states reflect inconsistent results: Alabama, Indiana and New York. Consideration might be given to eliminating the results from these states. However, the circumstances of each differ. Alabama cases embracing the ProCD logic are both at the supreme court, pre-1996, and are dicta. The Alabama case rejecting the ProCD logic is at an appellate court, post-1996 and is a holding. The Indiana cases are both pre-1996. The Indiana case embracing the ProCD logic is at the supreme court and is dicta. The Indiana case rejecting the ProCD logic is at an appellate court and is a holding. The New York cases are both post-1996, and both are holdings. The New York case embracing the ProCD logic is an appellate court. The New York case rejecting the ProCD logic is at a trial court. As a matter of presentation, the decision was made to include all of these cases, but to note the inconsistencies and the character of each case involved.

EXHIBIT A

Importantly, for the period from 1996 forward, research shows that state supreme courts are evenly divided, three (3) to three (3) on whether or not to embrace the ProCD logic. It is hard to see how, with an even split in the only courts who may create binding precedent on the issue, a restatement can pick a side and declare a “winner.”

More work needs to be done on what counts as dicta support for the ProCD logic. For example, *Massey-Ferguson, Inc. v. Laird*, 432 So.2d 1259 (Ala. 1983) may not, in fact, support the approach taken in RLCC Section 2(b) because of the particular knowledge the court seemed to require about the nature of warranty that would be forthcoming.

My color coded research notes follow this page.

From ALL preliminary shrinkwrap database 11/15/2017: "State" cases only RED/No=ProCD logic rejected; GREEN/Yes=ProCD logic accepted							EXHIBIT A
Marion Power Shovel Co. v. Huntsman (dicta?)	437 S.W.2d 784 (1969)	1969	State	AR*	State Supreme	Yes	No*
Tiger Motor Co. v. McMurtry (dicta?)	284 Ala. 283, 224 So.2d 638 (1969)	1969	State	AL*	State Supreme	Yes	
Whitaker v. Farmhand, Inc. (solid precedent)	567 P.2d 916 (Mont. 1977)	1977	State	MT	State Supreme	No	
Hahn v. Ford Motor Co., Inc. (dicta?)	434 N.E.2d 943 (Ind.Ct.App.1982)	1982	State	IN	State App.	Yes	
Massey-Ferguson, Inc. v. Laird (no support for s. 2(b))	432 So.2d 1259 (Ala.1983)	1983	State	AL	State Supreme	Yes	
A.B.C. Home & Real Estate Inspection, Inc. v. Plummer	500 N.E.2d 1257 (Ind.Ct.App.1986) (solid)	1986	State	IN	State App.	No	
Brower v. Gateway 2000, Inc. (solid precedent)	246 A.D.2d 246 (N.Y. App. Div. 1998)	1998	State	NY	State App.	Yes	
Rinaldi v. Iomega Corp. (solid precedent)	1999 WL 1442014 (Del. Super. Ct. 1999)	1999	State	DE	State Trial	Yes	
M.A. Mortensen Co., Inc. v. Timberline Software Corp.	998 P.2d 305 (Wash. 2000) (en banc) (solid)	2000	State	WA	State Supreme	Yes	
Licitra v. Gateway, Inc. (solid) small claims exception	734 N.Y.S.2d 389 (N.Y.Civ.Ct.2001)	2001	State	NY	State Trial	No	
Smith v. Gateway, Inc. (solid but not citable)	2002 WL 1728615 (Tx. Ct. App. 2002)	2002	State	TX	State App.	Yes	
Terrell v. R & A Mfg. Partners. Ltd. (solid)	835 So.2d 216 (Ala.Civ.App.2002)	2002	State	AL	State App.	No	
1-A Equipment Co., Inc. v. ICode, Inc. (solid, not consm)	2003 Mass.App.Div. 30 (2003)	2003	State	MA	State App.	Yes	
Lively v. IJAM, Inc. (solid, same result consum or bus)	114 P.3d 487 (Civ. App. Okla. 2005)	2005	State	OK	State App.	No	
Rico v. Cappaert Manufactured Hous., Inc. (dicta)	903 So.2d 1284 (La.App. 3rd Cir.)	2005	State	LA	State App.	Yes	
Rogers v. Dell Computer Corp. (dicta)	138 P.3d 826 (Okla. 2005)	2005	State	OK	State Supreme	No	
Stenzel v. Dell, Inc. (solid)	870 A.2d 133 (Me.2005)	2005	State	ME	State Supreme	Yes	
DeFontes v. Dell, Inc. (solid)	984 A.2d 1061 (R.I. 2009)	2009	State	RI	State Supreme	Yes	
From RLCC narrative p. 51							
Goode v. Franklin Welding & Equip. Co., Inc. (solid)	50 Va. Cir. 441 (Cir. Ct. 1999)	1999	State	VA	State Trial	Yes	
Hobbs v. Tamko Bldg. Prods. (dicta)	479 S.W.3d 147 (Mo. Ct. App. 2015)	2015	State	MO	State App.	Yes	
From Independent research							
Wachter Management Co. v. Dexter & Chaney, Inc. (solid)	282 Kan. 365 (2006)	2006	State	KS	State Supreme	No	
McCaulley v. Nebraska Furniture Mart, Inc. (solid)	21 Neb. App. 125 (2013)	2013	State	NB	State App.	No	
Razor v. Hyundai Motor Am. (solid)	222 Ill.2d 75 (2006)	2006	State	IL	State Supreme	No	
Changes and additions from ALL Preliminary database: Marion Power Shovel Co. v. Huntsman was re-coded from AL to AR; support for ProCD might change from "Yes" to "No" depending on coding standard applied. As a "Yes" it is dicta. Tiger Motor Co. v. McMurtry was re-coded from AR to AL; U.S. Surgical Corp. v. Orris, Inc. was incorrectly coded as a "State" case and was deleted. Rinaldi is a trial court case, not a supreme court case. Mortensen is not consumer. Wachter is not consumer. 1-A equip not consumer. Smith v. Gateway may not be cited as precedent. Rico would have applied ProCD if those facts were presented.							