INFLECTION POINTS IN THE DRAFTING OF THE RESTATEMENT OF CONSUMER CONTRACTS: SALIENCE AND ITS ARC

PATRICIA A. MCCOY*

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* Liberty Mutual Insurance Professor, Boston College Law School. Professor McCoy was an Adviser to the Restatement of the Law, Consumer Contracts.

Introduction

All Reporters come to Restatement projects with priors, and that was no less true for the Restatement of the Law, Consumer Contracts ("RCK" or "Restatement"). One of the RCK's Reporters, Omri Ben-Shahar, had coauthored an acclaimed book detailing disclosure's failure to afford consumer protection.[1] Another Reporter, Florencia Marotta-Wurgler, had conducted definitive research demonstrating that almost no consumers read the terms and conditions in online contracts.[2] The Reporters were concerned about consumer harm, yet skeptical of disclosure as the appropriate regulatory tool.

When it came to the RCK, these priors put the Reporters in a bind. Courts generally infer blanket assent to boilerplate, contingent on proper notice. But the Reporters viewed notice as meaningless because virtually no consumers read boilerplate. So how would they resolve this tension while upholding the function of Restatements to restate the law? Their solution was two-fold: to organize the RCK around the concept of *salience*, instead of notice, and to rely primarily on contract defenses such as unconscionability and deception to protect consumers.

In early versions of the RCK, unconscionability thus would have been available as a defense—irrespective of notice—for non-salient terms (ones that did not affect the contracting decisions of a substantial number of consumers). Meanwhile, those same early drafts maintained that salient terms could never be substantively unconscionable because market forces policed those terms adequately.

With salience as the springboard, the Restatement project unfolded in three acts, each with its own inflection point. In Act One, the Reporters rolled out salience in an attempt to neuter the role of notice. In Act Two, salience sparked heavy pushback. In Act Three, the American Law Institute (ALI) bartered a conclusion that left no one happy, neither industry nor consumer groups nor the Reporters themselves.

If Act One was thesis and Act Two was antithesis, Act Three was not so much synthesis but a final text riddled with internal tensions. Pro-consumer forces grafted some meaningful reforms onto that text and managed to extend the unconscionability defense to all contractual terms. But those reforms did not excise the traditional common-law notice requirements that the Reporters had retained in the RCK from the start. Once salience disappeared from the black letter of the RCK due to opposition from within the ALI's ranks, those notice requirements regained their former prominence. As a result, the final Restatement generally allows fine-print terms to bind unsuspecting consumers

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[1] Omri Ben-Shahar & Carl E. Schneider, More Than You Wanted to Know: The Failure of Mandated Disclosure (2014).

[2] Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. Legal Stud. 1 (2014).

if there is proper notice, subject to defenses that are often difficult to prove. This result leaves it doubtful that the Restatement will result in meaningful relief for injured consumers.

I. The Bind

When the Reporters undertook the RCK, they were already known for their critiques of disclosure. Their early drafts stressed that form contracts saddle consumers with boilerplate that they do not read or comprehend. That, according to the Reporters, created "room for abuse."[3]

Despite these concerns, courts commonly allow adoption of boilerplate where the consumer manifests assent, so long as the business provides the consumer with reasonable notice of the term, reasonable notice of the intent to include the term in the contract, and a reasonable opportunity to review the term.[4] The problem is, those disclosures do not work, as the Reporters rightly observe.[5] Worse, by valorizing notice, the common law incentivizes firms to try to insulate themselves from unconscionability defenses by using disclosures with conspicuous fonts.[6]

To be sure, contract law permits courts to deny enforcement of overreaching terms on grounds including unconscionability or deception.[7] In practice, courts have been reluctant to strike down contract terms as unconscionable.[8] The judiciary has been more receptive to claims based on deception, but that depends on consumers actually litigating. As Adam Levitin carefully shows,[9] most consumers cannot afford to sue and rarely defend themselves if sued. Meanwhile, mandatory arbitration clauses have mushroomed and deny aggrieved consumers their day in court. Although the class action vehicle remains the most effective route to consumer redress, class action waivers in mandatory arbitration clauses have proliferated and the U.S. Supreme Court upheld them in *AT&T Mobility v. Concepcion*.[10] *Concepcion*'s new hurdle to

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[3] Restatement of the Law, Consumer Contracts intro. note (Am. L. Inst., Council Draft No. 1, 2015).

[4] *See* Restatement of the Law, Consumer Contracts § 2 Reporters' Notes cmt. a, at 45 (Am. L. Inst. 2024).

[5] *See* Restatement of the Law, Consumer Contracts intro. note (Am. L. Inst., Council Draft No. 1, 2015).

[6] *See* Restatement of the Law, Consumer Contracts § 5 Reporters' Notes, at 49 (Am. L. Inst., Preliminary Draft No. 1, 2014).

[7] *See* Restatement of the Law, Consumer Contracts §§ 6–7 Reporters' Notes, at 118-19, 137 (Am. L. Inst. 2024).

[8] *See, e.g.*, Letter from Barbara D. Underwood, N.Y. Att'y Gen., et al., to Richard L. Revesz, Dir., Am. L. Inst., and Stephanie A. Middleton, Deputy Dir., Am. L. Inst. 2–3 (Oct. 15, 2018) [hereinafter 11 State AG Letter], https://www.creditslips.org/files/multi_state_attys_general_-_consumer_contracts_-_cd_5_-_101518.pdf [https://perma.cc/F2GS-XTG3].

[9] Adam J. Levitin, *The Death of Consumer Contract*, 68 Ariz. L. Rev. ___ (forthcoming 2026).

[10] AT&T Mobility v. Concepcion, 563 U.S. 333, 352 (2011).

consumer class actions dealt a severe blow to consumer relief, with a federal study finding that arbitral awards produce scarcely any recovery for consumers.[11]

For these reasons, when the Reporters took up the Restatement project, they found themselves in a bind. Their challenge, then, was to draft a Restatement that provided meaningful protections to injured consumers within the confines of current case law.

II. Act One: How the Reporters Proposed to Resolve the Bind

In late 2013, the Reporters unveiled their solution to the bind, which was a new theoretical approach to the RCK based on "salience."[12] Under that concept, consumer contracts contain salient and non-salient terms.[13] A salient term "affects the contracting decisions of a substantial group of consumers."[14] An all-in price is a common example of a salient term.[15] Boilerplate, in contrast, normally consists of non-salient terms.

The distinction between salient and non-salient terms turns on differences in competitive conditions. According to the Reporters, "[w]hen terms are salient, their content is shaped by market forces and their quality is priced accordingly."[16] In contrast, "competition is ineffective in policing terms that are non-salient to consumers."[17]

Salience's roots in theories of competition had strong *laissez-faire* implications. Because "competition could be counted on to police salient terms," the Reporters maintained that "the basis for intervention" was "diminished"

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[11] Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a), at 11–17 (2015).

[12] Memorandum from Reporters Oren Bar-Gill and Omri Ben-Shahar to Advisors and Members Consultative Grp. on Restatement Third, The Law of Consumer Contracts, Am. L. Inst. 2, 13 (Nov. 1, 2013) (on file with author).

[13] *Id.*

[14] *Id.* at 12. Later, this formulation was changed to "a substantial *number* of consumers." Restatement of the Law, Consumer Contracts § 5 cmt. 6, at 63 (Am. L. Inst., Discussion Draft 2017) (emphasis added).

[15] *See, e.g.*, Restatement of the Law, Consumer Contracts § 5 Reporters' Notes, at 68 (Am. L. Inst., Preliminary Draft No. 3, 2017).

[16] Memorandum from Reporters Oren Bar-Gill and Omri Ben-Shahar to Advisors and Members Consultative Grp. on Restatement Third, The Law of Consumer Contracts, Am. L. Inst., *supra* note 12, at 2. This analysis channels Alan Schwartz and Louis Wilde, who argued that markets will produce competitive results when an informed minority shops based on the quality of standard terms. Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. Pa. L. Rev. 630, 638 (1979).

[17] Memorandum from Reporters Oren Bar-Gill and Omri Ben-Shahar to Advisors and Members Consultative Grp. on Restatement Third, The Law of Consumer Contracts, Am. L. Inst., *supra* note 12, at 14.

for those terms "*[a]s a normative matter.*"[18] Indeed, in their original formulation, salient terms could never be unconscionable.[19]

In contrast, the Reporters considered judicial intervention appropriate for non-salient terms.[20] This was explicit in the RCK's original black letter test for unconscionability, which substituted lack of salience for the traditional procedural unconscionability prong.[21] Although salience vanished from the black letter rule on unconscionability by fall 2014,[22] it continued to inform the drafters' later analyses in other ways.

The Reporters articulated two rationales for the salience test, one militating in favor of stronger consumer protections and one militating against. First, they sought to resolve the bind by treating non-salient terms as procedurally unconscionable *per se,* even if those provisions met "standard criteria of disclosure, or even if affirmed by signatures . . . ."[23] Second, they sought to avoid "a reduction in consumer choice" by exempting salient terms from judicial oversight.[24]

The Reporters' preference for leaving market outcomes untouched extended to non-salient terms as well. Recall that the Reporters described salient terms as "shaped by market forces and their quality . . . priced accordingly."[25] Early on, they made similar assertions about the pricing accuracy of boilerplate. As far back as 2012, for instance, the Reporters maintained (without evidence) that "by inserting one-sided, pro-seller boilerplate terms, the seller is able to offer other more pro-consumer terms of the deal, specifically a lower price."[26]

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[18] *Id.* at 2, 14 (emphasis added).

[19] *See id.* at 2.

[20] Memorandum from Reporters Oren Bar-Gill and Omri Ben-Shahar on Pre-Draft of Provisions for Restatement Third, The Law of Consumer Contracts to the Council of Am. L. Inst. 13–14 (Jan. 17, 2014) (on file with author).

[21] *Compare* Memorandum from Reporters Oren Bar-Gill and Omri Ben-Shahar to Advisors and Members Consultative Grp. on Restatement Third, The Law of Consumer Contracts, Am. L. Inst., *supra* note 12, at 10 (proposing black letter rule that a "contract term is unconscionable if it is (1) substantively unconscionable, and (2) non-salient"), *with* Memorandum from Reporters Oren Bar-Gill and Omri Ben-Shahar on Pre-Draft of Provisions for Restatement Third, The Law of Consumer Contracts to the Council of Am. L. Inst., *supra* note 20, at 11 (proposing black letter rule that a "contract or a term is unconscionable if it is (1) Substantively unconscionable, and (2) Procedurally unconscionable, meaning that the provision describes a non-salient element of the contract.").

[22] *See* Restatement of the Law, Consumer Contracts § 5, § 5 cmt. 6, § 5 Reporters' Notes, at 48–50 (Am. L. Inst., Preliminary Draft No. 1, 2014).

[23] Memorandum from Reporters Oren Bar-Gill and Omri Ben-Shahar to Advisors and Members Consultative Grp. on Restatement Third, The Law of Consumer Contracts, Am. L. Inst., *supra* note 12, at 13.

[24] Restatement of the Law, Consumer Contracts § 5 cmt. 6 (Am. L. Inst., Preliminary Draft No. 1, 2014).

[25] Memorandum from Reporters Oren Bar-Gill and Omri Ben-Shahar to Advisors and Members Consultative Grp. on Restatement Third, The Law of Consumer Contracts, Am. L. Inst., *supra* note 12, at 2.

[26] Outline by Reporters Oren Bar-Gill and Omri Ben-Shahar on Restatement of the Law Third, Consumer Contracts, Am. L. Inst., 2 (September 2012) (on file with author). *See also*

As this suggests, the RCK project was plagued throughout by a tension between the assumption that consumers pay lower prices in exchange for boilerplate and concerns about anticompetitive pricing. In the same 2012 discussion, the Reporters noted, for instance, that firms could divide their prices into multiple components and highlight the attractive cost features while relegating prohibitive cost components to the boilerplate, which most consumers would not read.[27] Still, the Reporters never resolved the question of *when and if* boilerplate could be competitively priced.

The importance placed on consumer choice also informed the decision of how to shield consumers against exploitative boilerplate. On top of relying on defenses such as unconscionability and deception to protect consumers, the Reporters could have made it harder to adopt boilerplate *ab initio* by requiring stricter safeguards than notice. As they acknowledged: "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."[28]

Such heightened assent requirements could have included more active manifestations of assent or "presumptions that certain provisions are unfair and unenforceable."[29] This latter approach is "widely followed in foreign jurisdictions" and also appears in Uniform Commercial Code § 2-719(3).[30]

Instead, the Reporters took a hands-off approach, in Section 2, to the adoption of standard contract terms.[31] From its earliest iterations through the final Restatement, Section 2 allowed the adoption of boilerplate upon reasonable notice and an opportunity to read, regardless of whether consumers actually read those terms.[32] The Reporters chose these "highly permissive adoption rules"[33] to maximize consumer choice. Consequently, so long as merchants jump through the right procedural hoops, it is just as easy to adopt boilerplate as salient terms. That outcome—and the idea of salience—ignited controversy among the ALI's membership and precipitated Act Two.

Restatement of the Law, Consumer Contracts § 2 Reporters' Notes (Am. L. Inst., Council Draft No. 1, 2015).

[27] Outline by Reporters Oren Bar-Gill and Omri Ben-Shahar on Restatement of the Law Third, Consumer Contracts, Am. L. Inst., *supra* note 26, at 2–3.

[28] Restatement of the Law, Consumer Contracts intro. note (Am. L. Inst., Council Draft No. 1, 2015).

[29] Restatement of the Law, Consumer Contracts intro. note, 2–3 (Am. L. Inst., Tentative Draft No. 2, 2022).

[30] *Id.*

[31] "Standard contract terms" is the RCK's technical phrase for boilerplate provisions. *See* Restatement of the Law, Consumer Contracts § 1(a)(5) (Am. L. Inst. 2024).

[32] *Compare* Memorandum from Reporters Oren Bar-Gill and Omri Ben-Shahar to Advisors and Members Consultative Grp. on Restatement Third, The Law of Consumer Contracts, Am. L. Inst., *supra* note 12, at 6 *with* Restatement of the Law, Consumer Contracts § 2(a) (Am. L. Inst. 2024).

[33] Restatement of the Law, Consumer Contracts intro. note (Am. L. Inst., Council Draft No. 1, 2015).

III. Act Two: The RCK Hit Headwinds

After the Reporters introduced salience in late 2013, they encountered growing opposition from some ALI members and other interested observers. While the Reporters' economic approach to intervention received pushback, much of the opposition was to salience itself.

A. The Reporters' Economic Approach Garnered Protest

Among ALI projects, the RCK project stood out for its theoretical economic framework. This was apparent from the start, when the Reporters announced that market forces would guide the Restatement: "[T]he legal terms of consumer contracts 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."[34]

This market-based approach to the RCK got flak. State attorneys general argued, for instance, that if contract law allowed merchants to pack boilerplate with increasingly exploitative terms, that is what merchants would do.[35] Most of the criticisms of the market framework zeroed in on salience, however.

To begin with, the concept of salience was not found in judicial decisions.[36] Critics also worried that proving non-salience (*i.e.*, that a term did not affect the buying decisions of a substantial number of consumers) would necessitate the market analysis required in antitrust cases.[37] That would entail costly expert testimony beyond the financial reach of most consumers (many of whom are barred from class relief, in part due to class action waivers).[38]

Dissenters also harbored larger reservations about salience and problems with market power.[39] For instance, the Reporters insisted that a salient term

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[34] Outline by Reporters Oren Bar-Gill and Omri Ben-Shahar on Restatement of the Law Third, Consumer Contracts, Am. L. Inst., *supra* note 26, at 2.

[35] *See, e.g.*, Letter to the Members of the American Law Institute from 24 States, at 4 (May 14, 2019) [24 States Letter], https://ag.ny.gov/sites/default/files/letter_to_ali_members.pdf [https://perma.cc/JV3H-ZV6S]; Ian MacDougall, *Soon You May Not Even Have to Click on a Website Contract to Be Bound by Its Terms*, ProPublica (May 20, 2019), https://www.propublica.org/article/website-contract-bound-by-its-terms-may-not-even-have-to-click [https://perma.cc/YW5B-ZJ3P].

[36] Letter to Council Members from Alliance for Justice et al., at 3 (Jan. 10, 2018) [AFJ Letter], https://www.creditslips.org/files/26_national_and_state_consumer__legal_orgs_letter_re_council_draft_no_4.pdf [https://perma.cc/6VJP-CCGE]; 24 States Letter, *supra* note 35, at 6–7.

[37] For example, in 2016, the Reporters advised that the presumption that standard contract terms do not affect the contracting decisions of a substantial number of consumers "can be rebutted by the business using survey evidence, *as commonly used in litigation involving aspects of unfair competition* . . ." Restatement of the Law, Consumer Contracts § 5 cmt. 5 (Am. L. Inst., Council Draft No. 3, 2016) (emphasis added). *Accord* Restatement of the Law, Consumer Contracts § 6 cmt. 6(d) (Am. L. Inst. 2024).

[38] AFJ Letter, *supra* note 36, at 5; 24 States Letter, *supra* note 35, at 8.

[39] *See, e.g.,* AFJ Letter, *supra* note 36, at 2.

should escape judicial scrutiny, even when "it [was] not negotiable and even if it appear[ed] in the contracts of all businesses in the sector." [40] To assume that competition was effective under those circumstances was questionable. Likewise, the drafts did not discuss market failures such as oligopoly, price-fixing, or conscious parallelism that could impede competitive pricing. Finally, the project did not acknowledge that "even in the best-case scenario," market forces alone "may take years" to correct unfair provisions, "causing significant consumer harm in the process."[41]

Similarly, critics voiced concern that salience predisposed the Reporters against judicial intervention even when merchants exerted market power over consumers through market segmentation[42] or discriminatory targeting.[43] In some cases, the Reporters explicitly opposed intervention into salient terms.[44] Other times, that aversion appeared to work subconsciously, such as when the Reporters pointed to consumers who were *more* sophisticated than the average consumer when considering permissive rules.[45]

Salience also did not account for behavioral anomalies among consumers that companies might exploit.[46] This was apparent from a memorandum dated November 2013, when the Reporters stressed that proof of salience was limited to evidence of market conditions: "The salience inquiry is objective and focuses on the market context in which the term was presented.

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[40] Restatement of the Law, Consumer Contracts § 5 cmt. 6 (Am. L. Inst., Preliminary Draft No. 1, 2014).

[41] 24 States Letter, *supra* note 35, at 7.

[42] The Reporters sought to lay that concern to rest, stating that "[i]f the market is segmented, a term is considered 'salient' if it affects the contracting decisions of a substantial group of consumers in the relevant segment." Restatement of the Law, Consumer Contracts § 5 cmt. 6 (Am. L. Inst., Council Draft No. 1, 2015). Often, however, the impetus for market segmentation is to exploit misunderstanding of contract terms by vulnerable groups of consumers.

[43] *See, e.g.*, AFJ Letter, *supra* note 36, at 2.

[44] *See, e.g.,* Restatement of the Law, Consumer Contracts § 5 cmt. 6 (Am. L. Inst., Preliminary Draft No. 1, 2014); Memorandum from Reporters Oren Bar-Gill and Omri Ben-Shahar to Advisors and Members Consultative Grp. on Restatement Third, The Law of Consumer Contracts, Am. L. Inst., *supra* note 12, at 2 ("To the extent that the contract contains terms that appear abusive and substantively unconscionable, the court may intervene only if such terms are non-salient.").

[45] *See, e.g.,* Restatement of the Law, Consumer Contracts § 2 cmt. 7 (Am. L. Inst., Council Draft No. 2, 2016) ("If it is shown that the consumer had actual knowledge of the terms, the notice requirement is fulfilled without further inquiry into the reasonableness of the notice."); Restatement of the Law, Consumer Contracts § 2 cmt. 8 (Am. L. Inst., Preliminary Draft No. 4, 2021) ("the characteristics of the contracting parties may . . . . be considered when evaluating the reasonableness of the notice (e.g., when a product or service is offered to a small segment of especially sophisticated consumers)"); Restatement of the Law, Consumer Contracts § 2 cmt. 8 (Am. L. Inst. 2024).

[46] The Reporters carved out one exception where an otherwise salient term "affected the purchasing decisions of many consumers, and yet . . . might be reasonably misunderstood by (imperfectly rational) consumers." In that case, depending on the facts, courts could strike down the clause as unconscionable or deceptive. Restatement of the Law, Consumer Contracts § 5 cmt. 6 (Am. L. Inst., Council Draft No. 1, 2015). *See also* Restatement of the Law, Consumer Contracts § 5 Reporters' Notes, at 49 (Am. L. Inst., Preliminary Draft No. 4, 2021).

It is different from an inquiry into the subjective knowledge of the individual consumer."[47]

This remark flowed from the assumption that terms that affect the buying decisions of "a substantial group of consumers"[48] are disciplined by market forces. Probably for that reason, the Reporters resisted taking individual consumers' knowledge into account. Instead, they maintained that the circumstances of individual consumers were "not helpful" in determining the rules of consumer contract law:

> an inquiry into disparities of education, experience, or time spent dissecting the standard terms is not helpful, since such disparities are routinely present in most consumer transactions. This inquiry is only helpful to the extent that it identifies a sufficiently large subgroup of consumers for whom the relevant term is not salient.[49]

The Reporters deleted this discussion of disparities in education or experience from a new memorandum dated January 2014.[50] Nevertheless, they remained averse to intervention when a term affected the contracting decisions of a substantial number of consumers, even if the firm used that term to exploit other customers based on lack of education, experience, or the like.

This stance put salience at odds with traditional contract doctrines such as reasonable expectations. By precluding proof of the context of a transaction, salience would have narrowed the meaning of "reasonableness," cast the reasonable expectations doctrine into doubt, and eliminated a "totality of the circumstances" test for reasonableness. These concerns fueled further dissent that eventually opened the door to consideration of factors involving individual consumers.

B. Growing Dissent and Stand-Off

During the lengthy middle period between salience's rollout in late 2013 and the 2019 ALI Annual Meeting, critics became increasingly vocal about the market-based approach.[51] Growing tensions over that issue spilled over into a floor fight at the 2019 Annual Meeting.

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[47] Memorandum from Reporters Oren Bar-Gill and Omri Ben-Shahar to Advisors and Members Consultative Grp. on Restatement Third, The Law of Consumer Contracts, Am. L. Inst., *supra* note 12, at 12.

[48] *Id.*

[49] *Id.*

[50] Memorandum from Reporters Oren Bar-Gill and Omri Ben-Shahar on Pre-Draft of Provisions for Restatement Third, The Law of Consumer Contracts to the Council of Am. L. Inst., *supra* note 20, at 14.

[51] *See, e.g.,* Memorandum from the Reporters to the ALI Council dated December 21, 2017, regarding Council Draft No. 4.

By January 2018, opposition had spread beyond portions of ALI membership to outside groups, including consumer organizations, state attorneys general, and other state officials. On the consumer side, much of the opposition revolved around the Reporters' proposal to replace meaningful assent to fine-print terms with judicial oversight of contract terms through doctrines such as unconscionability and deception.[52] Section 2 of the proposed Restatement, on the adoption of standard contract terms, provoked special fury.[53] Recall that Section 2(a) sanctioned adoption of boilerplate upon reasonable notice and a reasonable opportunity to review the term, so long as the consumer signified assent to the transaction. Under this approach, critics feared, a consumer's assent to fine print would automatically be presumed, "provided the barest notice and termination requirements [were] met."[54]

Professor Melvin Eisenberg further stressed that the proposed Section 2 was weaker than Section 211(3) of the Restatement (Second), Contracts. Under Section 211(3), when the drafter "has reason to believe that the party manifesting . . . assent [to the writing] would not do so if he knew that the writing contained a particular term, the term is not part of the agreement." He urged the Reporters to correct that oversight and include text comparable to Section 211(3) in the black letter of the RCK.[55]

Professor Eisenberg's spotlight on Section 211(3) dovetailed with other comments by state attorneys general arguing that the RCK should continue to require proof of mutual assent to specific contract terms. In their view, the doctrine of mutual assent required the type of fact-intensive, individual inquiry that the Reporters opposed: "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."[56] Under that approach, the

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[52] *See, e.g.,* Letter to Dean David Levi from Senator Elizabeth Warren, at 1 (Dec. 11, 2017), https://www.creditslips.org/files/warren_-_consumer_contracts_-_dec_11_2017.pdf [https://perma.cc/22D4-QUJU].

[53] *See generally* Adam Levitin, *Podcast on ALI Consumer Contracts Restatement*, Credit Slips (May 16, 2019), https://www.creditslips.org/creditslips/2019/05/podcast-on-ali-consumer-contracts-restatement.html [https://perma.cc/32JV-LK63]; Adam Levitin, *ALI Consumer Contracts Restatement-What's at Stake*, Credit Slips (May 16, 2019), https://www.creditslips.org/creditslips/2019/05/ali-consumer-contracts-restatement-whats-at-stake.html [https://perma.cc/SM48-SYPX]; 24 States Letter, *supra* note 35, at 2–6.

[54] Letter to Richard L. Revesz and Stephanie A. Middleton from 13 State Attorneys General, at 3 (Jan. 12, 2018) [13 State AG Letter] (on file with author).

[55] Melvin Eisenberg, *The Proposed Restatement of Consumer Contracts, if Adopted, Would Drive a Dagger Through Consumers' Rights,* Yale J. Reg., Notice & Comment Blog (Mar. 20, 2019).

[56] 13 State AG Letter, *supra* note 54, at 2. Accord 24 States Letter, *supra* note 35, at 4 (the mutual assent doctrine "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.").

consumer's knowledge would be relevant and so would the factual circumstances surrounding the notice provided to the consumer.

Similar concerns surfaced about the RCK's approach to unconscionability. One consumer group argued that the RCK abandoned "the well-accepted set of factors that courts use to determine procedural unconscionability . . ."[57] These factors included some that the Reporters had declined to consider in their market-based test: "(1) The consumer's lack of financial sophistication (including cognitive biases); (2) the business's exploitation of consumer disadvantages; (3) unequal bargaining power; (4) the use of incomprehensible language; (5) high pressure tactics and misrepresentations; and (6) whether economic, social, or practical duress compelled a party to execute the contract."[58]

In an instance of odd bedfellows, consumer advocates and the business community attacked the RCK's proposed unconscionability provisions on other fronts as well. On the consumer side, objections ranged from an overly narrow approach to substantive unconscionability and the two-prong test to heavy proof requirements and weak remedies.[59] Business commentators objected that the RCK actually strengthened contract defenses and would spawn more litigation.[60] A group of corporate general counsels argued that the ALI should drop the RCK altogether.[61]

Matters came to a head on May 21, 2019, when the ALI convened to vote on the RCK at the ALI's 2019 Annual Meeting. The session erupted into a floor fight, with raucous opposition. Sections 2 (on adoption of standard terms) and 5 (on unconscionability) came under particularly intense attack. By the time the session ran out of time, the membership had only approved Section 1, on definitions, and had sent the RCK back to the drawing board.

IV. Act Three: The Final Denouement

By the conclusion of the 2019 Annual Meeting, it was apparent that the RCK would not win approval without a compromise. Due to the COVID-19 crisis, the next draft did not emerge until October 2021, with Preliminary Draft No. 4. From then until 2024, when the final Restatement appeared in print, the Restatement went through several more drafts resulting from

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[57] AFJ Letter, *supra* note 36, at 2.

[58] *Id.*

[59] *See, e.g., id.* at 3–5; 11 State AG Letter, *supra* note 8, at 2–3; Eisenberg, *supra* note 55; 24 States Letter, *supra* note 35, at 3.

[60] *See, e.g.,* Tiger Joyce, *Tort Lawyers Take Over the American Law Institute*, Wall St. J. (June 30, 2017); MacDougall, *supra* note 35.

[61] Nicholas Malfitano, *ALI members question foundations of recently passed Restatement of Consumer Contracts*, The Pennsylvania Rec. (May 23, 2022) (available on Westlaw).

discussions among ALI members, the Reporters, and ALI Council Member Steven Weise.[62]

A. The Revisions Leading Up to the 2022 Annual Meeting

Preliminary Draft No. 4 took the first significant steps toward compromise with its revised provisions on unconscionability. Specifically, that draft amended the black letter of Section 5 to take the sophistication of a typical consumer, the complexity of the term, and unscrupulous market conduct into account when determining procedural unconscionability:

> (d) Without limiting the scope of subsection (b)(2), a standard contract term is procedurally unconscionable if a reasonable consumer in the circumstances is not aware of the term or does not understand or appreciate the implications of the term, and as result does not meaningfully account for the term in making the contracting decision. Factors relevant to making such a determination include:
>
> (1) the legal and financial sophistication of a typical consumer who enters into such transactions;
>
> (2) the complexity of the term or of the agreement as a whole;
>
> (3) pressure tactics and manipulation employed by the business in soliciting the consumer's assent.[63]

This language, with its references to consumer sophistication, was a departure from older versions that had downplayed that factor. Still, the text limited procedural unconscionability, for the most part, to the awareness and sophistication of a "reasonable" or "typical" consumer.[64]

In December 2021, the Reporters submitted another draft with further revisions to the ALI Council.[65] Following the Council's review, the Reporters issued new revisions in Tentative Draft No. 2 in April 2022, in response to criticisms by pro-consumer members.

Importantly, the April 2022 draft expanded the black letter of Section 1 to state that the entire Restatement of the Law (Second), Contracts, applied to

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[62] At the ALI Council's request, Mr. Weise acted as an intermediary in the discussions about future revisions to the RCK among the Advisers, the Members Consultative Group, and the Reporters.

[63] Restatement of the Law, Consumer Contracts § 5(d) (Am. L. Inst., Preliminary Draft No. 4, 2021).

[64] *Id.* However, subsection (d)(3) did refer to the tactics of the business "in soliciting *the* consumer's assent" (emphasis added), meaning the exact consumer in question. Elsewhere, that subsection further referred to "a reasonable consumer *in the circumstances*" (emphasis added), signaling a more case-specific approach.

[65] Restatement of the Law, Consumer Contracts (Am. L. Inst., Council Draft No. 6, 2021).

consumer contracts.[66] Of particular significance, this new text singled out specific provisions of the Restatement (Second), Contracts, that afford important protections to consumers. These included Section 206, which interprets contract terms against the drafter. In addition, new Section 1 adopted the reasonable expectations provision in Section 211(3) of the Restatement (Second), Contracts, as Melvin Eisenberg had urged.

To the frustration of consumer advocates, Tentative Draft No. 2 did not alter the black letter of Section 2, on the adoption of terms, except to expressly place the burden of proving assent, reasonable notice, and a reasonable chance to review on the business.[67] However, the draft did extend procedural unconscionability in Section 5 to reach all contract terms, not just "standard contract terms" (*i.e.*, boilerplate).[68] With that change, salient terms could now be challenged as procedurally unconscionable under the right conditions.

In May 2022, the Reporters presented Tentative Draft No. 2 to the ALI's membership at the 2022 Annual Meeting. At that session, the Reporters agreed to make or consider certain additional changes in response to the floor debate. With those commitments, the members voted to approve the RCK.[69]

B. Final Changes

The 2022 Annual Meeting was the last time the ALI membership met to debate the RCK and vote on it as a whole. Under the Boskey motion procedures, however, the Reporters made additional subsequent changes in response to consumer concerns.

1. Interpretive Principles for Consumer Contracts

The first important change was the addition of a new Section 4, adopting interpretive principles for consumer contracts.[70] This revision implemented a floor motion passed by the members at the 2022 Annual Meeting and read:

> § 4. Interpretation and Construction of Consumer Contracts
>
> (a) A consumer contract imposes upon each party a non-disclaimable duty of good faith and fair dealing in its performance and its enforcement.

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[66] Restatement of the Law, Consumer Contracts § 1 (Am. L. Inst., Tentative Draft No. 2, 2022).

[67] *Id.* § 2.

[68] *Id.* § 5(d).

[69] *See* Restatement of the Law, Consumer Contracts xiii-xv (Am. L. Inst., Revised Tentative Draft No. 2, 2022).

[70] *See id.* at xiv.

> (b) In choosing among the reasonable meanings of a standard contract term, the meaning which operates against the business supplying the term is preferred.
>
> (c) Ambiguities in the notices that are part of the process by which standard contract terms are adopted are resolved against the business using the process.
>
> (d) Standard contract terms are interpreted in a manner that effectuates the reasonable expectations of the consumer.[71]

This new section remains in the final Restatement with only one minor substantive change.[72] Significantly, new Section 4 built on the references to the Restatement (Second), Contracts in Section 1 by placing interpretive principles in their own black letter section and expanding them. New, broader language in Section 4 cemented the principle of *contra proferendum* in every consumer contract. Similarly, the reasonable expectations doctrine was no longer limited to the somewhat narrow language in Section 211(3) of the Restatement (Second), Contracts, but was now amenable to broader definitions in decided cases.

The decision to elevate the reasonable expectations doctrine to the black letter in Section 4 had important implications for assent in Section 2. While Section 2 still authorizes the blanket adoption of boilerplate terms following notice, the reasonable expectations language opens the door to argue that a term was never adopted because the consumer did not reasonably expect that term. Furthermore, when the meaning of a term is in dispute, courts are to enforce "the meaning that is consistent with the reasonable expectations of the consumers" and "consumers are not bound by any meaning that conflicts with such expectations."[73] And courts can decline to enforce a term altogether—"[e]ven when the meaning of a term is not uncertain or has otherwise been ascertained"—when it conflicts with the reasonable expectations of consumers.[74] That can happen when "consumers' reasonable expectations were cultivated by the business's precontractual promises or affirmations of fact."[75] As one member of the bar pointed out, the reasonable expectations clause thus makes it easier for consumers to argue that when "they were not aware

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[71] *Id.* § 4. At the same time, this draft removed a part of Section 1(c) discussing interpretation. *See id.* at xiv.

[72] Restatement of the Law, Consumer Contracts § 4 (Am. L. Inst. 2024). In the final version, the first two words of Section 4(c) ("Ambiguities in") were replaced with the words "Uncertainty in the meaning of . . .".

[73] Restatement of the Law, Consumer Contracts § 4 cmt. 5 (Am. L. Inst. 2024).

[74] *Id.*

[75] *Id. Accord* Restatement of the Law, Consumer Contracts § 4 cmt. 5 (Am. L. Inst., Revised Tentative Draft No. 2, 2022).

of certain terms and conditions in a contract, . . . the contract itself should be null and void."[76]

2. The Reasonableness Standard

During the May 2022 floor debate, some members had also pushed for a black letter definition of the term "reasonable" that was broad enough to allow proof of the actual circumstances of the consumer and transaction in question. Subsequently, negotiations continued over the meaning of "reasonable" and culminated in a new Section 1(b), which reads:

> (b) *The Reasonableness Standard*
>
> When a rule in this Restatement depends on whether an action or other feature of the parties' conduct or communications is "reasonable," reasonableness is determined on the basis of the totality of the circumstances, including consideration of the ordinary behavior, perspective, and expectations of consumers engaged in the type of transaction at issue and the consumer's interaction with the business.[77]

This final version of the reasonableness standard represents a significant departure from the RCK's old approach, which had refused to take "the subjective knowledge of the individual consumer" into account.[78] Instead, in determining reasonableness, the final Restatement considers the totality of the circumstances, including three factors involving consumers engaged in the type of transaction at issue: their "ordinary behavior," their "perspective," and, importantly, their "expectations." This latter phrase bolsters the "reasonable expectations" language in Section 4. The final definition of "reasonableness" further requires consideration of "*the* consumer's interaction with the business." Thus, the totality of the circumstances test looks at the interaction of the specific consumer in question, not just consumers generally. Finally, Section 1(b) establishes that the definition of "reasonableness" extends to "communications" and other actions of the business, which means that it applies to the reasonableness of notice and an opportunity to read in Section 2.

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[76] Malfitano, *supra* note 61.

[77] Restatement of the Law, Consumer Contracts § 1(b) (Am. L. Inst. 2024).

[78] Memorandum from Reporters Oren Bar-Gill and Omri Ben-Shahar to Advisors and Members Consultative Grp. on Restatement Third, The Law of Consumer Contracts, Am. L. Inst., *supra* note 12, at 12.

3. Unconscionability

In June 2022, the Reporters made one change to the black letter on unconscionability, which favored consumers. Specifically, in Revised Tentative Draft No. 2, the Reporters added a fourth factor to procedural unconscionability, consisting of "the process by which the term was introduced."[79] This revision remains in the final version.[80]

C. The Final Restatement

When the final Restatement emerged, the most ardent consumer objections had not held sway. Nevertheless, consumer representatives did win changes that opened the door to challenging the adoption of harmful boilerplate on a case-by-case basis.

To consumer advocates' disappointment, the final Restatement still makes consumer contracts easy to enter and hard to break. This is apparent from Section 2, which adopts standard contract terms upon reasonable notice and a reasonable opportunity to read. Section 2 goes on to allow the adoption of terms that are delivered only *after* a consumer manifests assent to the contract, conditional on the same protections plus a reasonable opportunity to terminate the transaction. And Section 3 even permits businesses to modify the terms of their contracts with consumers after consummation, by satisfying the right procedures. Troublingly, this is a one-way street: the Restatement provides no opportunity to consumers to modify their terms with merchants.

Similarly, under the final Restatement, consumer contracts remain hard to escape. The single biggest problem is consumers' lack of meaningful judicial recourse in numerous cases, as Adam Levitin argues. Yet the final Restatement ducks the issue, first by "tak[ing] no position on the proper application of the Federal Arbitration Act,"[81] and, second, by making it too easy to get into oppressive contracts to begin with. In effect, the Restatement attempts to wish the litigation barriers away by pretending that unconscionability and deception are meaningful protections even though the courts are closed to numerous consumers to litigate those doctrines.

Most surprisingly, salience lingers on in the final draft. The comments to Section 6, for example, still maintain that one determinant of procedural unconscionability "is whether a term is likely to affect the contracting decisions of a large enough number of consumers." If so, the comments say, "the reasons

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[79] *Compare* Restatement of the Law, Consumer Contracts § 5(d) (Am. L. Inst., Preliminary Draft No. 4, 2021), *with* Restatement of the Law, Consumer Contracts § 6(d) (Am. L. Inst., Revised Tentative Draft No. 2, 2022).

[80] Restatement of the Law, Consumer Contracts § 6(d) (Am. L. Inst. 2024).

[81] Restatement of the Law, Consumer Contracts, Introduction (Am. L. Inst. 2024).

for intervention in the substance of the deal are diminished."[82] Elsewhere, the Reporters' Notes rehash the well-worn proposition that "salience is a suitable underlying test because competition can normally be counted on to police salient terms, but not non-salient ones."[83] The Reporters' Notes continue to insist that salience is "the heart of the procedural test" for unconscionability,[84] and urge the courts to "focus on the criterion of salience" in deciding whether to police salient terms at all.[85]

Salience's lingering hand is most apparent in the final version's admonition against judicial second-guessing of price terms. The subprime mortgage abuses culminating in the 2008 financial crisis and the more recent campaign against "junk fees" by the Biden Administration drove home the fact that merchants can and do overcharge consumers, despite the vaunted salience of prices. And to be fair, the Restatement does condemn some complex pricing schemes as unconscionable.[86] Other language in the Reporters' Notes warns, however, that judicial scrutiny of prices "should be done with extra care." Normally, the Reporters' Notes advise that courts should not disturb prices, *even when they are "egregiously high*," because price terms are salient:

> When prices are salient—and they often are the most salient element of the transaction—egregiously high prices ought not be held unconscionable by courts, unless they are specifically prohibited by statute, or unless special circumstances of the case justify a finding of procedural unconscionability.[87]

Against this backdrop, the new reasonableness standard and the interpretive principles in Section 4 sit uneasily with the lingering references to salience sprinkled throughout the Reporters' Notes. Nevertheless, the reasonableness standard and the interpretive principles trump the language on salience because both are enshrined in the black letter. In contrast, the remaining references to salience are *not* part of the Restatement because they are confined to the Reporters' Notes.[88]

This is all to say that the final Restatement leaves room to challenge the adoption of boilerplate terms or to contest their enforcement on a case-by-case basis, when the facts involving the consumer or the transaction support

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[82] Restatement of the Law, Consumer Contracts § 6 cmt. 6(c) (Am. L. Inst. 2024).

[83] Restatement of the Law, Consumer Contracts § 6 Reporters' Notes cmt. c, at 127 (Am. L. Inst. 2024).

[84] *Id*. at 126.

[85] *Id.* at 128.

[86] Restatement of the Law, Consumer Contracts § 6 cmt. 8, § 6 Reporters' Notes, at 125 (Am. L. Inst. 2024).

[87] Restatement of the Law, Consumer Contracts § 6 Reporters' Notes, at 125 (Am. L. Inst. 2024).

[88] *See* ALI, Capturing the Voice of The American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work 19, 45–46 (rev. 2015), https://www.ali.org/sites/default/files/2024-09/ali-style-manual.pdf [https://perma.cc/64U2-PAWF].

such a claim. That latitude is only meaningful, of course, if the courts are open to aggrieved consumers.

As a result, the Restatement's legacy is clouded. Will it afford injured consumers greater relief on the margin? Conversely, will it fuel the continued expansion of exploitative boilerplate and its growing risk to consumers? Or will the Restatement be eclipsed by state and federal consumer legislation mandating stronger protections? In years to come, these questions will continue to bedevil the Restatement and its significance.