RESTATEMENT OF THE LAW, CONSUMER CONTRACTS AND THE "TOTALITY OF THE CIRCUMSTANCES"

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TABLE OF CONTENTS

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Introduction

The concept of using the "totality of the circumstances"[1] plays a central role in the *Restatement of the Law, Consumer Contracts* (*Restatement*). The *Restatement* regularly[2] uses this approach to evaluate the matters identified in the following paragraph.

The *Restatement* uses a "totality of the circumstances" test to:

- Determine when a "feature of the parties' conduct or communications" is "reasonable"[3] (when required to be "reasonable" by the *Restatement*), and
- Identify a consumer's reasonable expectations in connection with the interpretation of a consumer contract

The use of the "totality of the circumstances" to determine reasonableness does *not* apply to all uses of the word "reasonable" in the *Restatement.* For example, a "totality of the circumstances" evaluation is not used when a term itself must not be substantively unreasonable, as in an evaluation of unconscionability under section 6 of the *Restatement*.

This presentation:

- Describes the use of totality of the circumstances in the *Restatement*.[4]
- Examines the use of a "totality of the circumstances" evaluation to determine satisfaction of a standard in comparison to the use of a "bright-line" and "safe harbor" approach to determine the satisfaction of a standard.
- Compares the use (or non-use) of "totality of the circumstances" (or similar guidance) in other, similar areas of the law, particularly the Uniform Commercial Code (UCC).
- Evaluates the effectiveness of the "totality of the circumstances" approach in the *Restatement*.

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[1] "Totality of the circumstances" is an evaluative approach widely used in the case law in this area. *See, e.g.*, *Kauders v. Uber Techs., Inc*., 159 N.E.3d 1033 (Mass. 2021) ("Absent actual notice, the totality of the circumstances must be evaluated in determining whether reasonable notice has been given of the terms and conditions.").

[2] The *Restatement* uses the phrase "totality of the circumstances" twenty-two times (black letter, Comments, and Reporters' Notes).

[3] Restatement of the Law, Consumer Contracts § 2(b).

[4] The full text of *Restatement* §§ 1(b), 2, 3, 4 and UCC § 1-201(b)(10), and the Comments related to the portions of those provisions discussed in this paper, are provided in the Appendix to this paper. All emphasis is added, except for captions to black letter and Comments, where the emphasis is in the original.

I. The Restatement is an integrated whole

The *Restatement* recognizes that the protections afforded by the totality of the circumstances evaluation and other assent provisions may not provide adequate protection for consumers (§ 2, Comment 2):

> 2. *Totality-of-the-circumstances approach*. … Recognizing, however, that despite the minimum guaranteed protective procedures required by this Section, consumers often enter into contracts without appreciating the presence or the effect of the standard contract terms, other Sections of this *Restatement* provide additional layers of protection against surprising and unfair outcomes (*see* Comment 14).

Section 2, Comment 14:

> *14. Relation to other Sections*. … Accordingly, it is widely recognized that adoption procedures designed to achieve informed consent would yield relatively little value to, and might even impose burdensome transaction costs upon, the consumer. Courts have thus recognized the importance of safeguards in consumer-contract law. Primary among these are the rules that strike down unconscionable terms and other standard contract terms that undermine consumers' benefit of the bargain (§ 6). Adding to the protection afforded by the unconscionability doctrine are the good-faith duties that govern contract modification and open discretionary terms (§§ 3 and 5) and rules that police deception and enforce precontractual affirmations and promises (§§ 7 and 8).

Further, section 4's rules on interpretation prefer the consumer and impose the standard, non-waivable contract duty of good faith. Taken together with the "totality of the circumstances" method of determining the reasonableness of various instances where a reasonableness standard applies, these rules provide significant protective measures for consumers.

II. "Totality of the circumstances" does not establish a standard

The concept of looking at the "totality of the circumstances" to determine reasonableness does not establish a *standard* to determine whether an action or other feature of the parties' conduct or communications is substantively "reasonable." Rather the "totality of the circumstances" method of evaluating conduct or a communication directs a court how to evaluate whether an action or other feature of a party's conduct or communication satisfies a separate reasonableness *standard* set out in the *Restatement.* That *standard* is one of the reasonableness of conduct or a communication, where applicable.

Nor is the "totality of the circumstances" evaluation presented as a definition of "reasonable." Rather the reasonableness *standard* itself is applied to a particular conduct or communication in the context of the "totality of the circumstances."

III. The uses of "totality of the circumstances" in the *Restatement*

The *Restatement* first directs *when* to apply a reasonableness test to a party's conduct or communication. The *Restatement* then states that the "reasonableness" of the conduct or communication is determined by looking at the "totality of the circumstances." Section 1 "sets the table:"
Section 1:

(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.

Comment 8:

> 8. *The reasonableness standard*. Numerous provisions throughout this *Restatement* depend on whether an action or communication is "reasonable" or "unreasonable" or whether a party has acted "reasonably" or "unreasonably." The *standard* of reasonableness is *evaluated* on the basis of the totality of the circumstances and requires a fact-intensive analysis. For example, the analysis under § 2 of whether a consumer received reasonable notice regarding the terms sought to be adopted as part of the contract includes a review of factors such as the form and nature of the transaction; the clarity, sequence, flow, and simplicity of the communication of the terms; the design, layout, and content of the interface; the difficulty of identifying the notices and finding the location of the terms; the prominence of notices regarding important terms and their nature; and the visibility and clarity of the language alerting consumers that specific steps will result in the adoption of the terms as part of the contract with the business. See § 2, Comment 2. See also § 3, Comment 3. The use of a particular contracting technology, font color, contrast, size, or type;

> capitalization; or graphic design or website design elements is a relevant consideration under the "totality of the circumstances" test, but is not determinative. Compare the definition of "conspicuous" in UCC § 1-201(b)(10), which eliminates the presumed conspicuousness of terms of particular font sizes, colors, and contrasting types.

Section 2, Comment 2:

> 2. *Totality-of-the-circumstances approach*. The reasonableness of any ***process*** of adoption of a standard term is based on the totality of the circumstances and requires a case-by-case, fact intensive analysis in light of the ordinary behavior and perspective of consumers engaged in the type of transaction at issue, and their interaction with the business. The analysis of whether the consumer, who manifested assent to the transaction, has adopted the standard contract terms includes a review of numerous factors, such as the form and nature of the transaction; the clarity, sequence, flow, and simplicity of the communication of the terms; the design, layout, and content of the interface; the nature of the transaction; the totality of the consumer's interactions with the business and the reasonable expectations those interactions created; the difficulty of identifying the notices and finding the location of the terms; the prominence of notices regarding important terms and their nature; and the visibility and clarity of the language alerting consumers that specific steps will result in the adoption of the terms as part of the contract with the business, as well as the manner in which the consumer is asked to manifest assent to the transaction and acknowledge the adoption of the standard contract terms.

IV. Use of the reasonableness standard

The substantive sections of the *Restatement* then use the reasonableness standard, as evaluated by the totality of the circumstances:

§ 2. Adoption of Standard Contract Terms

(a) A standard contract term is adopted as part of a consumer contract if the business demonstrates that the consumer manifested assent to the transaction after receiving:

(1) ***reasonable*** notice of the term and of the intent to include the term in the consumer contract, and

(2) ***reasonable*** opportunity to review the term.

Comment 2. *Totality-of-the-circumstances approach*. The reasonableness of any process of adoption of a standard term is based on the totality of the circumstances and requires a case-by-case, fact intensive analysis in light of the ordinary behavior and perspective of consumers engaged in the type of transaction at issue, and their interaction with the business. …

§ 3. Adoption of a Modification of Standard Contract Terms

(a) A business's proposed modification of a standard contract term in a consumer contract governing an ongoing relationship is adopted if the business demonstrates that:

(1) the consumer received ***reasonable*** notice of the proposed modified term and a reasonable opportunity to review it;

(2) the consumer received a ***reasonable*** opportunity, including reasonable notice of the opportunity, to reject the proposed modified term and continue the contractual relationship under the existing term;

(3) the consumer received ***reasonable*** notice that continuing the contractual relationship without rejecting the proposed modified term will result in the modification being adopted; and

(4) the consumer either:

(A) manifested assent to the modified term, or

(B) did not reject the proposed modified term and continued to take the benefit of the contractual relationship after the expiration of the rejection period provided in the proposal, or, if such period is not provided, after the expiration of ***reasonable*** time to review and reject.

§ 4. Interpretation and Construction of Consumer Contracts

…

(d) Standard contract terms are interpreted in a manner that effectuates the ***reasonable*** expectations of the consumer.

Comment 5:

5. *Reasonable expectations*. Protection of consumers' ***reasonable*** expectations has a central role in consumer-contract law, both in the interpretation and construction of the terms of the contract (this Section) and, once the meaning is ascertained, in determining their effect and enforceability ((§§ 6 to 9).

> When the meaning of a standard contract term has to be ascertained, the meaning that is consistent with the ***reasonable*** expectations of the consumers should be preferred, and consumers are not bound by any meaning that conflicts with such expectations. Consumers' ***reasonable*** expectations are determined in context, based on the ***totality of the circumstances***, and in consideration of the ordinary behavior and perspective of consumers engaged in the type of transaction at issue and their interaction with the business, including the representations made to them, the typical purpose of such transactions, and the preservation of value of the nonstandard or core terms of the deal.
>
> The protection of consumers' ***reasonable*** expectations is also central to the determination of the legal effect of standard contract terms, even when the meaning of those standard contract terms is not uncertain or has otherwise been ascertained. It has particularly strong justification when consumers' ***reasonable*** expectations were cultivated by the business's precontractual promises or affirmations of fact, and, in such circumstances, a construction or interpretation of the contract in a manner that gives effect to consumers' ***reasonable*** expectations is preferred. See § 6, Comment 6(b); § 7(b)(1); § 8, Comment 2; § 9. This rule protects consumers' expectations that the business has reason to anticipate would arise from the circumstances surrounding the business's interaction with consumers, and that are central to consumers' decision to enter the transaction. See generally *Restatement* of the Law Second, Contracts § 211(3) and Comment f (providing that standard contract terms that "eviscerate[]" the terms explicitly represented to consumers, or that "eliminate[] the dominant purpose of the transaction," are not enforceable).

§ 6. Unconscionability

(d) Without limiting the scope of subsection (b)(2), a 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 a 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 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; and

(4) the process by which the term was introduced.

This invokes an evaluation similar to that of totality of the circumstances (§ 2, Comment 8):

> 8. *The reasonableness standard*. Numerous provisions throughout this *Restatement* depend on whether an action or communication is "reasonable" or "unreasonable" or whether a party has acted "reasonably" or "unreasonably." The standard of reasonableness is evaluated on the basis of the ***totality of the circumstances*** and requires a fact-intensive analysis.
>
> …
>
> Likewise, the analysis under § 6(d) whether a reasonable consumer is unfairly surprised by a term includes a review of the bargain as presented to consumers, the manner in which the presence or the effect of the term was hidden or otherwise suppressed, the sophistication of the ordinary consumer engaging in the type of transaction at issue, and the language used by the business. See § 6, Comment 6.

V. "Totality of the circumstances" is not based on putting agreements into a category

There are some decisions that might be read first to attempt to place a particular online process into a category and then, depending on the applicable category, to determine, *based on the applicable category*, whether the communication or process is enforceable. [5] The *Restatement* does not follow that approach:

> § 2, Comment 2:
>
> Thus, the ***form*** of the presentation of terms or of the invited manifestation of assent (sometimes referred to as "clickwrap" or "browsewrap," online or in a brick-and-mortar setting) ***does not in itself determine whether the standard terms have become part of the contract.*** Rather, the form embodies a bundle of factors for the court to consider when applying the general test. It may, in some circumstances, be ***more difficult to demonstrate satisfaction*** of the requirements of adoption in a "***browsewrap***" presentation, where the alerts provided to consumers about the proposed terms are often less visible, and where the connection between the action taken and the adoption of the terms is sometimes less clear.

[5] *See, e.g.*, *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359 (E.D.N.Y. 2015).

A focus on categories is ineffective and would often result in insufficient attention to the reasonableness of the process itself:

- The policies behind the definition and structure of the categories may not reflect the policies inherent in the "reasonableness" standard (as determined using the totality of the circumstances).
- The attempt to place a particular process into a particular category is hopeless as the range of processes used in online transactions varies widely, and a particular process often cannot be fitted into a particular category.
- A focus on categories gives insufficient weight to the particular facts that would otherwise be evaluated using a totality of the circumstances approach.
- A totality of the circumstances evaluation allows for a more nuanced approach, which enables a court to look to the particular circumstances and whether the policy goals of the standard have been met in the circumstances.
- A totality of the circumstances evaluation deters use of categories to seek to avoid the substantive goals of a provision.

Having a single standard and then using the totality of the circumstances to determine whether the standard has been met allows the court to use the set of goals of the standard widely adopted by other courts and *then* to apply that standard and its goals in a nuanced, particularized manner.

VI. The totality of the circumstances evaluation applies element by element of the standard

Totality of the circumstances is not an evaluation that applies to a section as a whole. Rather it applies to each element of the relevant rule that has a "reasonableness" test.

For example, section 2 provides:

> § 2. Adoption of Standard Contract Terms
>
> (a) A standard contract term is adopted as part of a consumer contract if the business demonstrates that the consumer manifested assent to the transaction after receiving:
>
> (1) *reasonable* notice of the term and of the intent to include the term in the consumer contract, and
>
> (2) *reasonable* opportunity to *review* the term.

Under this approach, a business must "demonstrate," as evaluated under the totality of the circumstances, that *each* of the following has been satisfied:

- "***reasonable*** notice of the *term"*
- **"*reasonable*** notice of the … of the *intent* to include the term in the consumer contract"
- "***reasonable*** opportunity to *review* the term"

Because the existence of "manifestation of assent" depends on the satisfaction of *each* of the reasonableness standards, in practice the manifestation of assent itself depends on whether the totality of the circumstances supports the satisfaction of the reasonableness standard for *each* element. The same approach applies to other uses of the totality of the circumstances evaluation in the *Restatement*.

VII. "Totality of the circumstances" in the UCC

As part of the significant revisions to the UCC (completed in 2022) to adapt the UCC to significant modern forms of digital assets, the Drafting Committee[6] updated the meaning of "conspicuous" for electronic transactions and adopted the "totality of the circumstances" test for the meaning of "conspicuous" in the UCC.[7] As stated in UCC § 1-201, Comment 10:

> Historically, contract terms were presented in writing, making the use of standards that relate to the size and appearance of type relevant to the determination of conspicuousness. Today terms in a record are frequently communicated electronically. New technologies have created opportunities for terms to be displayed or presented in novel ways, such as by the use of pop-up windows, text balloons, dynamically expanding or dynamically magnifying text, and non-visual elements such as vibrations, to name a few.
>
> …
>
> As noted above, the evolution of technology has led to an evolution in the ways in which terms in an electronic record are displayed or presented. A term displayed or presented in a novel way utilizing emerging technologies is, of course, conspicuous if the effect of the

[6] I was a member of the Drafting Committee.

[7] The *Restatement* does not use the term "conspicuous" in its substantive rules, as opposed to "reasonable" as evaluated under the 'totality of the circumstances" process, because the UCC uses "conspicuous" in the narrower context of the conspicuousness of a notice. The *Restatement* uses the reasonableness of a notice as a component of a broader evaluation of the reasonableness of a process or communication.

> display or presentation is that a reasonable person against which the term is to operate ought to have noticed it.

The Drafting Committee adopted a "totality of the circumstances" test for the meaning of "conspicuous" in the UCC. As seen below, the definition of "conspicuous" and its Comments are highly analogous to the totality of the circumstances approach used to determine whether the "reasonableness" standard in the *Restatement* has been satisfied.[8] In addition to the many benefits of using an approach based on the totality of the circumstances, using totality of the circumstances in the UCC makes contract drafting and judicial analysis more efficient as persons preparing and reviewing agreements subject to the *Restatement* and the UCC do not have to figure out whether more than one test applies to particular provisions of an agreement.

"Conspicuous"

§ 1-201(b)(10):

> (10) "Conspicuous", with reference to a term, means so written, displayed, or presented that, based on the *totality of the circumstances*, a reasonable person against which it is to operate ought to have noticed it.

Comment 10:

> "Conspicuous." Derived from former Section 1-201(10). This definition states the general standard that to be conspicuous a term ought to be noticed by a reasonable person against which the term is to operate. Whether a term is conspicuous is an issue for the court. Whether the appearance and presentation of a particular term satisfy this standard is determined by reference to the *totality of the circumstances* and requires a case-by-case analysis.
>
> Historically, contract terms were presented in writing, making the use of standards that relate to the size and appearance of type relevant to the determination of conspicuousness. Today terms in a record are frequently communicated electronically. New technologies have created opportunities for terms to be displayed or presented in novel ways, such as by the use of pop-up windows, text balloons, dynamically expanding or dynamically magnifying text, and non-visual elements such as vibrations, to name a few.
>
> …

[8] This was not serendipitous.

> Terms presented in an online record raise issues that differ in some respects from the issues associated with presenting the same terms in a writing. For example, how a term appears depends to some extent on the equipment and settings used by the person presented with the term.
>
> The test of whether a term is conspicuous remains constant notwithstanding the different contexts referenced above. A term is conspicuous if its appearance and presentation are such that it ought to be noticed by a reasonable person against which the term is to operate. If the term is in a standard form intended for use in many agreements, the determination of whether the term is conspicuous may be made with reference to typical likely parties to the agreements, taking into account all aspects of the transaction, the range of likely equipment and settings used by such parties, and the education, sophistication, disabilities, and other attributes of such parties. If the term is not in a standard form, the determination of whether it is conspicuous should be made with reference to a reasonable person in the position of the actual person against which it is to operate. …

As with the "totality of the circumstances" test in the *Restatement*, the standard (whether "a reasonable person against which [the term] is to operate ought to have noticed it") is fixed and does not vary based on the category of the transaction (such as a "clickwrap" transaction).

Rather the "totality of the circumstances" governs how to evaluate whether the standard has been satisfied in the circumstances:

> The test of whether a term is conspicuous remains constant notwithstanding the different contexts referenced above. A term is conspicuous if its appearance and presentation are such that it ought to be noticed by a reasonable person against which the term is to operate. If the term is in a standard form intended for use in many agreements, the determination of whether the term is conspicuous may be made with reference to typical likely parties to the agreements, taking into account all aspects of the transaction, the range of likely equipment and settings used by such parties, and the education, sophistication, disabilities, and other attributes of such parties. If the term is not in a standard form, the determination of whether it is conspicuous should be made with reference to a reasonable person in the position of the actual person against which it is to operate.

UCC § 1-201, Comment 10.

VIII. Why not use a "bright-line" or "safe harbor" standard?

The *Restatement* might have adopted a "bright-line" or "safe harbor" test in place of a totality of the circumstances test for where "reasonable" is used as the standard:

- A "totality of the circumstances" evaluation directs a court to examine and evaluate the particular facts and policies before it.
- At the other end of the spectrum, a "bright-line" test specifies that the standard is satisfied *only* if stated conditions are met;
- A "safe harbor" test retains a "totality of the circumstances" evaluation, but combines it with a "bright-line" test by providing that the standard can be met *either* by satisfying the "totality of the circumstances" *or* specified bright-line conditions.

These approaches can have differing effects on the support of the policy goals of the particular standard and the efficiency of the contract process:

- A "totality of the circumstances" test does a more nuanced job of allowing a court to examine the facts and evaluate them based on the policy goals of the particular standard; however, it can be less efficient in terms of judicial time and the ability to have predictable results from a contract.
- A bright-line test would support one of the principal goals of contract law—certainty and predictability of results. The quest for certainty can also reduce the cost of the contract transaction as a whole. But in some circumstances the adoption of a bright-line test would provide for certainty at the cost of other policy goals, including some level of fairness in the terms of the agreement. Bright-line tests, if truly *bright*-line, inevitably will validate or invalidate an action or other feature of a party's conduct that should be invalidated or validated as a matter of policy.
- A safe harbor test goes somewhere down the middle and tries to have the "best of both worlds"; but satisfying one world or the other is not always the best policy result.

Several additional factors affect the decision on whether to use a bright-line or safe harbor test in place of a "totality of the circumstances" test:

- Is the transactional cost of satisfying the bright-line relatively low?
- Are there so many fact patterns that a bright-line or safe harbor test cannot adequately address the policy factors in all circumstances?
- Can a single standard be articulated (whether as a bright-line or safe harbor) that would adequately cover the many fact patterns on a policy basis?
- Can a single standard be articulated (whether as a bright-line or safe harbor) that would provide sufficient, precise guidance to be useful?
- Is it probable that the particular fact patterns likely to be addressed will change over time due to technology or other developments?
- Is a bright-line or safe harbor test able to adapt to changing circumstances?
- Can a bright-line or strict foreclosure test be manipulated to defeat the desired policy goals?

In the case of the *Restatement*, these overall factors strongly support the use of a "totality of the circumstances" test:

- The policy goals of the *Restatement*—to provide protective processes to give the consumer reasonable notice of the standard terms of the agreement— are better analyzed on a case-by-case basis.
- There are a vast number of approaches (often changing with technology) to presenting the information that must be reasonable under the *Restatement*.

As stated in UCC § 1-201, Comment 10:

> This approach [totality of the circumstances] is intended to be both more protective of consumers and more useful to drafters by providing more clarity and flexibility in the methods that may be used to call attention to a term.

The "totality of the circumstances" method of determination of whether the standard has been met provides for a closer scrutiny of provisions:

§ 4, Comment 1:

> 1. *General*. Interpretation of consumer contracts is the determination of the meaning the parties gave to the language of the contract. Interpretation is not a determination of the legal enforceability of the terms. See *Restatement* of the Law Second, Contracts § 200, Comment c. This Section restates several rules of interpretation and construction that have *heightened* relevance to consumer contracts. The Section does not purport to cover all aspects of contract interpretation and construction. The *Restatement* of the Law Second, Contracts, continues to provide guidance on the interpretation and construction of consumer contracts, and its rules are not displaced by this Section. See § 1, Comment 9.

The UCC provides some examples of the use of and changes in the use of "totality of the circumstances," bright-lines, and safe harbors. Sometimes revisions to the UCC move a standard from a "totality of the circumstances"-type rule to a bright-line rule. Other times the revisions move the standard from a safe harbor approach to a pure "totality of the circumstances"-type approach.

Debtor's name. In many circumstances, a secured party under UCC Article 9 will file a financing statement to perfect its security interest in collateral. One of the critical items of information in the financing statement is the name of the debtor (the person granting the security interest). Originally Article 9 had a standard that was similar to the "totality of the circumstances." That proved highly inefficient for persons searching for financing statements filed against the debtor. The 1999 amendments moved the standard to a bright-line test, which is efficient and inexpensive to comply with.

Before 1999 [former § 9-402(8)]	**1999** [§ 9-503(a)]
A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.	A financing statement sufficiently provides the name of the debtor: … (1) if the debtor is a registered organization… only if the financing statement provides the name that is stated to be the registered organization's name on the public organic record of most recently filed with or issued or enacted by the registered organization's jurisdiction of organization which purports to state, amend, or restate the registered organization's name;

Conspicuous. The UCC's 2022 Amendments adoption of a "totality of the circumstances" test for determining when a term is "conspicuous" replaces a test that had several safe harbors. The move to "totality of the circumstances" recognizes that the former safe harbors do not work well in electronic contracting.

Before 2001 (safe harbor) [former § 1-201(10)]	**Before 2022** (safe harbor) [former § 1-201(10)]	**2022** ("totality of the circumstances") [§ 1-201(10)]
"Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. ***A printed heading in capitals (as: Non-Negotiable Bill of Lading) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous".***	"Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. … ***Conspicuous terms include the following: (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.***	"Conspicuous," with reference to a term, means so written, displayed, or presented that, based on the ***totality of the circumstances***, a reasonable person against which it is to operate ought to have noticed it.

Commercial reasonableness. The UCC uses a "commercial reasonableness" test in many places. That phrase is not defined and is similar to a "totality of the circumstances" test. Article 9 does provide a safe harbor for the requirement that "every aspect" of a foreclosure disposition must be commercially reasonable[9]:

> (b) [Dispositions that are commercially reasonable.] A disposition of collateral ***is made in a commercially reasonable manner*** if the disposition is made:
>
> (1) in the ***usual manner on*** any ***recognized market***;
>
> (2) at the price ***current*** in any ***recognized market*** at the time of the disposition; or
>
> (3) otherwise in conformity with ***reasonable commercial practices*** among dealers in the type of property that was the subject of the disposition.

These safe harbors provide only a dim (not bright) line and provide little comfort to a secured party.

> 14. *Relation to other Sections*. The adoption rules in this Section reflect the reality in which the consumer's consent to the standard

[9] UCC § 9-610(b).

> contract terms is rarely informed. In classic contract law, the requirement of assent was regarded as a meaningful mechanism that protected the contracting party, under the premise that that party, with full knowledge of the terms and with sufficient understanding of their impact, would manifest assent only to a contract that promoted that party's interests. The length and complexity of standard-form contracts, and the large number of such contracts consumers enter into, have diluted the effectiveness and plausibility of such front-end self-protection. Accordingly, it is widely recognized that adoption procedures designed to achieve informed consent would yield relatively little value to, and might even impose burdensome transaction costs upon, the consumer. Courts have thus recognized the importance of safeguards in consumer-contract law. Primary among these are the rules that strike down unconscionable terms and other standard contract terms that undermine consumers' benefit of the bargain (§ 6). Adding to the protection afforded by the unconscionability doctrine are the good-faith duties that govern contract modification and open discretionary terms (§§ 3 and 5) and rules that police deception and enforce precontractual affirmations and promises (§§ 7 and 8). See also § 1(f) (outlining the provisions of this *Restatement*). If, despite reasonably communicated disclosures, consumers are not expected to scrutinize the legal terms up front, courts should scrutinize them ex post. The ex post scrutiny is intended to uproot terms that are so one-sided that they would be unlikely to survive in an environment of meaningful assent or that peel off the value that consumers bargained for.

Conclusion

The *Restatement*'s use of the "totality of the circumstances" to determine whether a particular reasonableness standard has been satisfied is an appropriate and effective method of serving the policy goals in the transactions covered by the *Restatement*.

Appendix

Restatement § 1

…

(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.

Comment 8

8. The reasonableness standard. Numerous provisions throughout this *Restatement* depend on whether an action or communication is "reasonable" or "unreasonable" or whether a party has acted "reasonably" or "unreasonably." The standard of reasonableness is evaluated on the basis of the totality of the circumstances and requires a fact-intensive analysis. For example, the analysis under § 2 of whether a consumer received reasonable notice regarding the terms sought to be adopted as part of the contract includes a review of factors such as the form and nature of the transaction; the clarity, sequence, flow, and simplicity of the communication of the terms; the design, layout, and content of the interface; the difficulty of identifying the notices and finding the location of the terms; the prominence of notices regarding important terms and their nature; and the visibility and clarity of the language alerting consumers that specific steps will result in the adoption of the terms as part of the contract with the business. See § 2, Comment 2. See also § 3, Comment 3. The use of a particular contracting technology, font color, contrast, size, or type; capitalization; or graphic design or website design elements is a relevant consideration under the "totality of the circumstances" test, but is not determinative. Compare the definition of "conspicuous" in UCC § 1-201(b)(10), which eliminates the presumed conspicuousness of terms of particular font sizes, colors, and contrasting types.

Likewise, the analysis under § 6(d) whether a reasonable consumer is unfairly surprised by a term includes a review of the bargain as presented to consumers, the manner in which the presence or the effect of the term was hidden or otherwise suppressed, the sophistication of the ordinary consumer engaging in the type of transaction at issue, and the language used by the business. See § 6, Comment 6.

Reasonableness of the contracting process is determined in light of the ordinary behavior and perspective of consumers engaged in the type of transaction at issue rather than evaluated against an abstract, aspirational standard of consumer behavior. An evaluation of reasonableness includes consideration of the entirety of a consumer's interactions with a business, including both prior transactions and the course of the instant transaction.

The evaluation whether, under the circumstances, the reasonableness standard has been met involves questions of fact and of law. If there is a dispute about the relevant facts—for example, whether under § 2 an agent of the business alerted a consumer to the presence of the standard contract terms at the time that the consumer manifested assent—the factual dispute will be decided by the trier of fact. Once the facts are established, or in circumstances in which they are not under dispute, a determination of whether the adoption process meets the reasonable-notice requirements in § 2 is generally made by the court. Such determinations are made based on the ordinary behavior and perspective of consumers engaged in the type of transaction at issue and those consumers' interactions with the business.

Restatement § 2. Adoption of Standard Contract Terms

(a) A standard contract term is adopted as part of a consumer contract if the business demonstrates that the consumer manifested assent to the transaction after receiving:

(1) reasonable notice of the term and of the intent to include the term in the consumer contracts, and

(2) reasonable opportunity to review the term.

(b) When a standard contract term is available for review only after the consumer manifests assent to the transaction, the standard contract term is adopted as part of the consumer contract if the business demonstrates that:

(1) before manifesting assent to the transaction, the consumer received reasonable notice regarding the existence of the standard contract term intended to be provided later and to be part of the consumer contract, informing the consumer about the opportunity to review and terminate the contract, and explaining that the failure to terminate would result in the adoption of the standard contract term;

(2) after manifesting assent to the transaction, the consumer received reasonable opportunity to review the standard contract term; and

(3) after the standard contract term was made available for review, the consumer received reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden, and did not exercise that power.

(c) If the consumer manifests assent to the transaction, a contract is not rendered unenforceable if some of the standard contract terms are not adopted under subsections (a) and (b). In such a case, the terms of the contract are those adopted under subsections (a) and (b), and, if the consumer elects, any of the unadopted standard terms, along with terms, whether standard or not, to which both parties agreed, and terms supplied or incorporated by law.

Comment 2

2. *Totality-of-the-circumstances approach*. The reasonableness of any process of adoption of a standard term is based on the totality of the circumstances and requires a case-by-case, fact intensive analysis in light of the ordinary behavior and perspective of consumers engaged in the type of transaction at issue, and their interaction with the business. The analysis of whether the consumer, who manifested assent to the transaction, has adopted the standard contract terms includes a review of numerous factors, such as the form and nature of the transaction; the clarity, sequence, flow, and simplicity of the communication of the terms; the design, layout, and content of the interface; the nature of the transaction; the totality of the consumer's interactions with the business and the reasonable expectations those interactions created; the difficulty of identifying the notices and finding the location of the terms; the prominence of notices regarding important terms and their nature; and the visibility and clarity of the language alerting consumers that specific steps will result in the adoption of the terms as part of the contract with the business, as well as the manner in which the consumer is asked to manifest assent to the transaction and acknowledge the adoption of the standard contract terms. Thus, the form of the presentation of terms or of the invited manifestation of assent (sometimes referred to as "clickwrap" or "browsewrap," online or in a brick-and-mortar setting) does not in itself determine whether the standard terms have become part of the contract. Rather, the form embodies a bundle of

factors for the court to consider when applying the general test. It may, in some circumstances, be more difficult to demonstrate satisfaction of the requirements of adoption in a "browsewrap" presentation, where the alerts provided to consumers about the proposed terms are often less visible, and where the connection between the action taken and the adoption of the terms is sometimes less clear. Similarly, where the form of the presentation itself does not communicate its contractual nature, for example, a checkout receipt at a retail store, the business may have to take additional steps to give the consumer reasonable notice that a contract is being formed. Recognizing, however, that despite the minimum guaranteed protective procedures required by this Section, consumers often enter into contracts without appreciating the presence or the effect of the standard contract terms, other Sections of this *Restatement* provide additional layers of protection against surprising and unfair outcomes (see Comment 14).

Restatement § 3. Adoption of a Modification of Standard Contract Terms

(a) A business's proposed modification of a standard contract term in a consumer contract governing an ongoing relationship is adopted if the business demonstrates that:

(1) the consumer received reasonable notice of the proposed modified term and a reasonable opportunity to review it;

(2) the consumer received a reasonable opportunity, including reasonable notice of the opportunity, to reject the proposed modified term and continue the contractual relationship under the existing term;

(3) the consumer received reasonable notice that continuing the contractual relationship without rejecting the proposed modified term will result in the modification being adopted; and

(4) the consumer either:

(A) manifested assent to the modified term, or

(B) did not reject the proposed modified term and continued to take the benefit of the contractual relationship after the expiration of the rejection period provided in the proposal, or, if such period is not provided, after the expiration of reasonable time to review and reject.

(b) A consumer contract governing an ongoing relationship may provide for a reasonable procedure for adoption of modified terms under which the business may propose a modification of the standard contract terms but may not, to the detriment of the

consumer, exclude the application of subsection (a), except that the established procedure may replace the reasonable opportunity to reject the proposed modified term with a reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden.

(c) A modification by the business of a standard contract term in a consumer contract is adopted only if the modification is proposed in good faith, if it is fair and equitable in view of circumstances not anticipated by the parties when the contract was made, and if it does not have the effect of undermining an affirmation or promise made by the business that was made part of the basis of the original bargain between the business and the consumer.

(d) Standard contract terms may not be modified in a consumer contract that has been substantially performed by at least one party.

Comment 3:

3. *Reasonable notice and opportunity to review.* As with the adoption of original terms under § 2, modified standard contract terms may be adopted only if the consumer receives reasonable notice of the new terms and a reasonable opportunity to review them. A general notice of the possibility of future modifications is not sufficient. In addition, the consumer must receive reasonable notice of the opportunity to reject the modified terms (which is discussed in Comment 4), along with reasonable notice that continuing the contractual relationship without rejecting the modified terms will result in the modifications becoming legally binding. The factors listed in § 2, Comment 2, including appearance, placement, layout, and timing of the notice; the clarity, sequence, and simplicity of the communication of the terms; the difficulty of identifying and finding the location of the terms; the prominence of notice regarding important terms and their nature; the visibility and clarity of the language alerting consumers that specific steps will result in a modification of the terms; and the nature of the proposed modified standard contract terms determine whether, considering the totality of the circumstances, the notice and opportunity to review and reject are reasonable. The evaluation whether, under the circumstances, reasonable notice, opportunity to review, and opportunity to reject were provided involves questions of fact and of law. If there is a dispute about the relevant facts, for example, how or when the proposed change of terms was presented to the consumer, it will be decided by the trier of fact. If there is no dispute concerning the relevant facts, for example, if the digital interface seen by the consumer during the proposed modification is recorded and undisputed, a determination whether the proven adoption process meets the legal

requirements in § 3 is generally made by the court. See generally § 1(b) (reasonableness standard) and Comment 8.

Restatement § 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.

(b) In choosing among the reasonable meanings of a standard contract term, the meaning that operates against the business supplying the term is preferred.

(c) Uncertainty in the meaning of the notices that are part of the process by which standard contract terms are adopted is resolved against the business using the process.

(d) Standard contract terms are interpreted in a manner that effectuates the reasonable expectations of the consumer.

Comment 5

5. *Reasonable expectations*. Protection of consumers' reasonable expectations has a central role in consumer-contract law, both in the interpretation and construction of the terms of the contract (this Section) and, once the meaning is ascertained, in determining their effect and enforceability ((§§ 6 to 9).

When the meaning of a standard contract term has to be ascertained, the meaning that is consistent with the reasonable expectations of the consumers should be preferred, and consumers are not bound by any meaning that conflicts with such expectations. Consumers' reasonable expectations are determined in context, based on the totality of the circumstances, and in consideration of the ordinary behavior and perspective of consumers engaged in the type of transaction at issue and their interaction with the business, including the representations made to them, the typical purpose of such transactions, and the preservation of value of the nonstandard or core terms of the deal.

The protection of consumers' reasonable expectations is also central to the determination of the legal effect of standard contract terms, even when the meaning of those standard contract terms is not uncertain or has otherwise been ascertained. It has particularly strong justification when consumers' reasonable expectations were cultivated by the business's precontractual promises or affirmations of fact, and, in such circumstances, a construction or interpretation

> of the contract in a manner that gives effect to consumers' reasonable expectations is preferred. See § 6, Comment 6(b); § 7(b)(1); § 8, Comment 2; § 9. This rule protects consumers' expectations that the business has reason to anticipate would arise from the circumstances surrounding the business's interaction with consumers, and that are central to consumers' decision to enter the transaction. See generally *Restatement* of the Law Second, Contracts § 211(3) and Comment f (providing that standard contract terms that "eviscerate[]" the terms explicitly represented to consumers, or that "eliminate[] the dominant purpose of the transaction," are not enforceable).

Uniform Commercial Code § 1-201(b)(10):

> (10) "Conspicuous", with reference to a term, means so written, displayed, or presented that, based on the totality of the circumstances, a reasonable person against which it is to operate ought to have noticed it.

Comment 10:

> "*Conspicuous*." Derived from former Section 1-201(10). This definition states the general standard that to be conspicuous a term ought to be noticed by a reasonable person against which the term is to operate.
>
> Historically, contract terms were presented in writing, making the use of standards that relate to the size and appearance of type relevant to the determination of conspicuousness. Today terms in a record are frequently communicated electronically. New technologies have created opportunities for terms to be displayed or presented in novel ways, such as by the use of pop-up windows, text balloons, dynamically expanding or dynamically magnifying text, and non-visual elements such as vibrations, to name a few.
>
> The definition has been revised in the Uniform Commercial Code Amendments (2022) (2022 Amendments) by deleting the statutory examples relating to the appearance of type and instead indicating in these comments a broader universe of factors that are applicable to both written and electronic presentations. This approach is intended to be both more protective of consumers and more useful to drafters by providing more clarity and flexibility in the methods that may be used to call attention to a term.
>
> The attributes of a reasonable person against which a term is to operate can vary depending upon the nature of the transaction and

the market in which the transaction occurs. For example, assume that a merchant of goods wishes to enter into a transaction for the sale or lease of goods which does not include an implied warranty of merchantability or fitness for particular purpose. Depending on the particular transaction, the person against which the term excluding implied warranties is to operate may be a large business buyer or lessee, a small business, or a consumer. Similarly, the determination of whether a term is conspicuous may, depending on the context, yield a different conclusion when the term is used in a standard form agreement than when terms of the agreement are the subject of negotiation or discussion.

Terms presented in an online record raise issues that differ in some respects from the issues associated with presenting the same terms in a writing. For example, how a term appears depends to some extent on the equipment and settings used by the person presented with the term.

The test of whether a term is conspicuous remains constant notwithstanding the different contexts referenced above. A term is conspicuous if its appearance and presentation are such that it ought to be noticed by a reasonable person against which the term is to operate. If the term is in a standard form intended for use in many agreements, the determination of whether the term is conspicuous may be made with reference to typical likely parties to the agreements, taking into account all aspects of the transaction, the range of likely equipment and settings used by such parties, and the education, sophistication, disabilities, and other attributes of such parties. If the term is not in a standard form, the determination of whether it is conspicuous should be made with reference to a reasonable person in the position of the actual person against which it is to operate.

Factors relevant to whether a term is conspicuous include, but are not limited to, the following:

(i) The use of headings and text that contrast with the surrounding text. For example, a term is likely to be conspicuous if it is introduced by a heading in uppercase letters equal to or greater in size than the surrounding text. Similarly, a term is likely to be conspicuous if set out in language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to

the language. However, even with those characteristics, for a term to be conspicuous the overall statutory test must always be met. For example, even if in bold, uppercase letters, a term might not be conspicuous if placed among other terms also in bold, uppercase letters so there is no contrast with the surrounding text or if the application of other factors causes the term not to be provided such that a reasonable person against which it is to operate ought to have noticed it.

(ii) The placement of the term in the record. A term appearing at, or hyperlinked from, text at the beginning of a record, or near the place where the person against which the term is to operate must signify assent, is more likely to be conspicuous than a term in the middle of a lengthy record absent the use of a method reasonably designed to draw the person's attention to the term in middle of the record (for example, by providing separate reasonable notice of the term before presenting the record containing the term to the person for assent or forcing the person to stop on a screen highlighting the term during the presentation of the record for assent).

(iii) If terms are available only through the use of a hyperlink, in addition to the placement of the hyperlink as described above, factors to be considered include whether there is language drawing attention to the hyperlink and describing its function, and the size and color of the text used for the hyperlink and any related language.

(iv) The effort needed to access the term. The process and flow of the display and presentation is also relevant. For example, a term accessible only by triggering multiple hyperlinks is less likely to be conspicuous than a term accessible from a single hyperlink.

(v) Whether the person against which the term is to operate must separately assent to or acknowledge the term. Obtaining separate assent or acknowledgment of a term is generally sufficient to make the term conspicuous.

(vi) The language of the heading, if any. A misleading heading – such as the heading "Warranty" for a paragraph that contains a disclaimer of warranties – might cause a reasonable person to fail to notice the language that would disclaim warranties, so that the term would not be conspicuous.

As noted above, the evolution of technology has led to an evolution in the ways in which terms in an electronic record are displayed or presented. A term displayed or presented in a novel way utilizing emerging technologies is, of course, conspicuous if the effect of the display or presentation is that a reasonable person against which the term is to operate ought to have noticed it.

This definition deals only with requirements that a term be conspicuous (or noted conspicuously) that are stated in particular provisions of the Uniform Commercial Code. Other protective doctrines designed to assure that assent is meaningful that are found in law outside the UCC may also apply. See Section 1-103(b).

Former Uniform Commercial Code § 1-201(10) [2001]

(10) "Conspicuous", with reference to a term, means so written, displayed, or presented that, based on the totality of the circumstances, a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following:

(A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

Comment 10:

10. "*Conspicuous*." Derived from former Section 1-201(10). This definition states the general standard that to be conspicuous a term ought to be noticed by a reasonable person. Whether a term is conspicuous is an issue for the court. Subparagraphs (A) and (B) set out several methods for making a term conspicuous. Requiring that a term be conspicuous blends a notice function (the term ought to be noticed) and a planning function (giving guidance to the party relying on the term regarding how that result can be achieved). Although these paragraphs indicate some of the methods for making a term attention calling, the test is whether attention can reasonably be expected to be called to it. The statutory language should not be construed to permit a result that is inconsistent with that test.

Former Uniform Commercial Code § 1-201(10) [before 2001]:

> (10) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: Non-Negotiable Bill of Lading) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

Comment 10:

> 10. "*Conspicuous*". This is intended to indicate some of the methods of making a term attention-calling. But the test is whether attention can reasonably be expected to be called to it.