

Restatement of the Law, Consumer Contracts (Tentative Draft No. 2, April 2022) – Significant Black Letter Changes Since 2019 Annual Meeting (Tentative Draft No. 1, April 18, 2019) (“TD No. 1”)

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The members of The American Law Institute will consider Tentative Draft No. 2 of the Restatement of the Law, Consumer Contracts at the 2022 Annual Meeting. The Restatement, Tentative Draft No. 1, was considered at the 2019 Annual Meeting. As the Reporters state in their Reporters’ Memorandum for TD No. 2, since the 2019 Annual Meeting, the Reporters have considered the motions and comments made in connection with the 2019 Annual Meeting and subsequent court decisions, comments, articles, blogs, and other sources of input. Tentative Draft No. 2 adopts and implements a wide array of those contributions.

The table below identifies key changes made to the black letter since the 2019 Annual Meeting. There are also a few observations referring to the Comments. The full text of TD No. 2 is posted on the ALI Consumer Contracts project page and is available, along with a copy marked against Tentative Draft No. 1 (considered at the 2019 Annual Meeting).

Emphasis has been added to direct attention to relevant words. The markings do not show changes from earlier drafts.

SECTION OF RESTATEMENT AND TOPIC	RELEVANT <i>BLACK LETTER</i> TEXT FROM TENTATIVE DRAFT NO. 2 (DRAFT TO BE CONSIDERED AT 2022 ANNUAL MEETING)	OBSERVATIONS, COMMENTS, AND NOTES
Introduction		
<p><i>Adds discussion of “core” terms as compared to “standard” terms</i></p>	<p>“Typically, consumer contracts consist of <i>core deal terms</i>, which consumers readily identify as characterizing the transaction (such as price and payment methods, a shorthand description of the product, and a few others), and <i>non-core standard contract terms</i>, which cover a variety of provisions that the business seeks to apply to the transaction. Primary among these non-core terms are provisions that disclaim representations and warranties, limit consumer remedies, qualify the rights of consumers to bring legal action, and authorize the business to collect, use, and share consumers’ personal data. Such standardized terms are frequently referred to as the ‘fine print’ or ‘boilerplate.’”</p>	<p>See also § 2, Comment 1 (“This Section describes the procedures for <i>adoption of standard contract terms</i> into consumer contracts. Adoption of standard contract terms is a <i>separate legal consequence</i> than the formation of a binding contract. A contract is formed when the parties manifest assent to a contractual relationship. ... This Section identifies minimum requirements for contracting procedures that result in the adoption of standard contract terms. It operates in a reality in which consumers, when manifesting assent to the transaction, are typically only aware of some ‘core’ aspects of the transaction ...”)</p>

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<i>Adds discussion of adoption rules of §§ 2 and 3 as a component of “protective” (policing) measures (in addition to protective provisions in §§ 4-9)</i>	“In dealing with this fundamental challenge of potential abuse in asymmetric contracting environments, consumer-contract law deploys several <i>protective</i> techniques. The <i>first set of techniques fits within the doctrine of mutual assent</i> —the rules that determine how a contract is formed, which terms are adopted into the agreement, which terms are being modified, and what processes a business must follow to alert consumers to the terms being introduced and to the consequences of their adoption.”	
<i>Adds reference to different approaches in non-U.S. jurisdictions</i>	“One possible approach to the marking of boundaries is a set of presumptions that certain provisions are unfair and unenforceable. This approach, <i>widely followed in foreign jurisdictions</i> , has only limited presence in American law (see, e.g., Uniform Commercial Code § 2-719(3)). Instead, under the common law, traditional doctrines like unconscionability and misrepresentation have been applied to police suspect practices and terms relating to the subject matter of the transaction, the remedies that consumers or the business may seek when the transaction fails, choices of law and forum, the business’s discretion to specify and adjust contractual obligations, and to many other areas of contracting.”	
§ 1. Definitions, Scope, and Outline		
§ 1(a)(6): <i>adds that “statement” can include an “implied” statement</i>	“Affirmation of fact or promise’ – Any express or <i>implied</i> statement or representation about the transaction, ...”	Comment 6 also notes that an “omission” can be a “statement”; <i>see also</i> discussion of § 6 below
§ 1(b): <i>Clarifies that Restatement restates common law of contracts as applied in context of consumer transactions</i>	“This Restatement restates the <i>common law of contracts as courts have applied it in the context of contracts between a business and a consumer</i> . It <i>restates</i> the approach courts have taken to determine which terms are adopted as part of the contract and whether these terms are enforceable.”	
§ 1(c): <i>Clarifies that entire Restatement Second of Contracts applies to consumer contracts</i>	“The <i>entire Restatement of Law Second, Contracts, applies</i> to consumer contracts and provides additional rules and principles, including rules of mutual assent, interpretation, avoidance, and remedies not included in this Restatement.”	

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§ 1(c): <i>Adds express reference to Restatement Second of Contracts § 201 (interpretation takes into account the nature of the reasonable consumer)</i>	“Provisions from the Restatement of Law Second, Contracts that are particularly suited to the interpretation and supplementation of consumer contracts include § 201 on the nature of the reasonable consumer...”	<i>See also</i> Introduction to this <i>Restatement</i> (noting that consumers are “ <i>unlikely to read</i> ” the standard terms), <i>Restatement</i> § 2, Comment 1 (“[This Section] ... operates in a reality in which consumers, when manifesting assent to the transaction, are typically only aware of some ‘core’ aspects of the transaction but are <i>unlikely to read</i> and exercise meaningful informed consent to the non-core standard contract terms.”), and <i>Restatement of Law Second, Contracts</i> § 211, Comment b, noting that a business “ <i>does not ordinarily expect ... customers ... to read the standard terms</i> ”
§ 1(c): <i>Adds express reference to Restatement Second of Contracts § 206 (interpretation against the drafter)</i>	“Provisions from the Restatement of Law Second, Contracts that are particularly suited to the interpretation and supplementation of consumer contracts include ... § 206 on interpretation against the drafter ...”	
§ 1(c): <i>Adds express reference to Restatement Second of Contracts § 211(3) (protecting reasonable expectations of the consumer)</i>	“Provisions from the Restatement of Law Second, Contracts that are particularly suited to the interpretation and supplementation of consumer contracts include ... § 211(3) on protecting the reasonable expectations of the consumer.”	
§ 1(d): <i>clarifies deferral to UCC (as voted at 2019 Annual Meeting)</i>	“In particular, this Restatement neither interprets nor determines the scope or application of provisions of the Uniform Commercial Code.”	
§ 1(e): <i>Adds “Roadmap” to Restatement</i>	“This Restatement provides specific guidance on the following issues: ... [listing each Section of the Restatement and its title]”	
§ 1(f): <i>Adds statement that adoption of standard terms under §§ 2 and 3 is not a “safe harbor” from application of other Restatement provisions protecting consumers (§§ 4-9) or under other law</i>	“Standard contract terms that <i>satisfy the requirement for adoption</i> under Sections 2 and 3, or are subject to appropriate limits of discretion under Section 4, <i>may be unenforceable</i> under the rules provided in Sections 5-9 or under any other rules of contract law, or other statutory or regulatory provisions.”	

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§ 2. Adoption of Standard Contract Terms		
<p>§ 2(a)(1): <i>black letter requiring that consumer receive “reasonable notice” of the standard term has not changed since Tentative Draft No. 1 and is stated here for convenience – the discussion of this requirement in Comment 2 has been significantly expanded, applying and explaining a “totality of the circumstances” test and a broad array of factors used to implement that test; the discussion reflects the analysis in recent decisions, including the decisions of the Massachusetts Supreme Judicial Court in Kauders v. Uber Technologies, Inc., 486 Mass. 557, 159 N.E.3d 1033 (2021), and the Supreme Judicial Court of Maine in Sarchi v. Uber Technologies, Inc., (2022 ME 8, 268 A.3d 258) (2022) (citing Kauders extensively)</i></p>	<p>“(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) a <i>reasonable notice</i> of the term and of the intent to include the term in the consumer contract, ...”</p>	<p>From Comment 2:</p> <p>“The reasonableness of any process of adoption of a standard term is based on the <i>totality of the circumstances</i> and requires a case-by-case, fact-intensive analysis. 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; 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.”</p>
<p>§ 2(a): <i>Adds statement that the “business” has burden to “demonstrate” that each element of adoption of standard terms has occurred</i></p>	<p>“(a) A standard contract term is adopted as part of a consumer contract <i>if the business demonstrates</i> that the consumer manifested assent to the transaction after receiving: ...”</p>	
<p>§ 2(b): <i>Adds statement that “business” has burden to “demonstrate” that each element of adoption of standard terms by pay now, terms later (“PNTL”) has occurred</i></p>	<p>“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 <i>if the business demonstrates</i> that: ...”</p>	

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§ 3. Adoption of a Modification [by the Business] of Standard Contract Terms		
§ 3(a): <i>Adds express statement that Section applies only to modifications by the business</i>	“A modification proposed by <i>the business</i> of a standard contract term in a consumer contract governing an ongoing relationship is adopted ...”	
§ 3(a): <i>Adds statement that “business” has burden to “demonstrate” that each element of adoption of modification of standard terms has occurred</i>	“A modification ... is adopted if <i>the business demonstrates</i> that: ...”	
§ 3(a)(1) and (3): <i>Adds Comment that “reasonable notice” requirements of § 3 incorporate the “totality of the circumstances” test for “reasonable notice” under § 2; black letter requiring that consumer receive “reasonable notice” of the proposed modified term has not changed since Tentative Draft No. 1 and is stated here for convenience; “reasonable notice” requirement in § 3(a)(3) is new</i>	“A modification ... is adopted if the business demonstrates that: (1) the consumer received a <i>reasonable notice</i> of the proposed modified term ...; ... (3) the consumer received <i>reasonable notice</i> that continuing the contractual relationship without rejecting the proposed modified term will result in the modification becoming legally binding.”	Comment 3: “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 <i>totality of the circumstances</i> , the notice and opportunity to review and reject are <i>reasonable</i> .”
§ 3(a)(1) and (3): <i>Adds in Comment that in the case of a modification “reasonable notice” requires a description of the “specific changes”</i>	[Please see relevant black letter in preceding row]	Illustration 5: “If the business does not provide the consumer with a distinct or separate notice of the modification, <i>describing specific changes to the agreement</i> and the effective date of those changes, the new terms are not adopted as a binding modification.”
§ 3(a)(3): <i>Adds statement that consumer must receive reasonable notice that continuing relationship will make proposed term legally binding</i>	“A modification ... is adopted if the business demonstrates that: ... (3) the consumer received reasonable notice that continuing the contractual relationship without rejecting the proposed modified term <i>will result in the modification becoming legally binding</i> .”	

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<p>§ 3(a)(4)(B): <i>Adds statement that modification effective only if consumer “continues to take the benefit of” the executory contract (derived from Restatement Second of Contracts § 69(1)(a)) (where there is no prior agreement for a modification process), after consumer receives required notices and time period has elapsed</i></p>	<p>“A modification proposed by the business of a standard contract term in a consumer contract governing an ongoing relationship is adopted if the business demonstrates that: ... (4) the consumer either: ... (B) did not reject the proposed modified term and <i>continues to take the benefit of</i> the contractual relationship after the expiration of the rejection period provided in the proposal.”</p>	
<p>§ 3(c): <i>Adds statement that modification adopted only if it is “fair and equitable” (derived from Restatement Second of Contracts § 89(a))</i></p>	<p>“(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 <i>fair and equitable</i> ...”</p>	<p>Comment 1 newly elaborates on the “good faith” test: “[the modification] must be proposed in good faith, which means that the business must have an <i>objectively demonstrable legitimate reason for the modification</i>.” Comment 7 addresses the “fair and equitable” component: “The <i>fair and equitable</i> provision in subsection (c) is intended to ensure that the modification does not unduly disadvantage the consumer, even if the requirements of subsections (a) and (b) have been met.”</p>
<p>§ 3(d): <i>Adds statement that standard terms may not be modified if either party has “substantially” performed the contact</i></p>	<p>“(d) Standard contract terms may not be modified in a consumer contract that has been <i>substantially</i> performed by at least one party.”</p>	
<p>§ 5. Unconscionability</p>		
<p>§ 5(b): <i>Adds statement that procedural and substantive unconscionability are “factors,” which has the effect of setting a holistic test for unconscionability</i></p>	<p>“(b) In determining whether a contract or a term is unconscionable at the time the contract is made, a court examines the following <i>factors</i>: ...”</p>	<p>Also, clarifies that court <i>must</i> (not “<i>should</i>”) “examine” the factors (§ 5(b), lead in)</p>
<p>§ 5(b)(2): <i>black letter that “absence of meaningful choice on the part of the consumer” creates per se procedural unconscionability (low level) has not changed</i></p>	<p>“(b) In determining whether a contract or a term is unconscionable at the time the contract is made, a court examines the following factors: ... (2) procedural unconscionability, namely a contract or term that results in unfair surprise or results from the <i>absence of meaningful choice on the part of the consumer</i>.”</p>	<p>Given some comments about burden of proof, note that this provision creates a <i>per se</i> rule and makes any burden of proof here unnecessary</p>

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<p>§ 5(b) [end]: <i>Adds statement that finding of “unconscionability” does not require showing of both procedural and substantive unconscionability when appropriate</i></p>	<p>“In appropriate circumstances, a sufficiently high degree of one of the factors is sufficient to establish unconscionability.”</p>	<p>Clarifies that procedural <i>or</i> substantive unconscionability can be sufficient to establish unconscionability (§ 5(b))</p>
<p>§ 5(d): <i>Adds specific examples of per se procedural unconscionability, along with factors to use in making that determination</i></p>	<p>“(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. <i>Factors</i> relevant to making such a determination include:</p> <ul style="list-style-type: none"> (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.” 	
§ 6. Deception		
<p>§ 6(b)(2): <i>Adds specific examples of per se deception, where a material term is obscured</i></p>	<p>“Without limiting the scope of subsection (a), an act or practice by the business <i>is</i> deceptive if it has the effect of: ... (2) obscuring the presentation of a material term of the contract or of its effect, including a charge to be paid by the consumer or the overall cost or detriment to the consumer ...”</p>	
<p>§ 6(b)(3): <i>Provision of specific examples of per se deception added, where there is obscuring of the absence of a material term beneficial to the consumer which was reasonably expected by the consumer</i></p>	<p>“Without limiting the scope of subsection (a), an act or practice by the business <i>is</i> deceptive if it has the effect of: ... (3) obscuring the fact that the subject matter of the contract does not have a material beneficial attribute that consumers to such transactions reasonably expect it to have.”</p>	

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<p><i>Comment 2 affirms that an “omission” can constitute a “deceptive act or practice”</i></p>		<p>Comment 2: “In both subsections (b)(2) and (b)(3), a deceptive obscuring may be done affirmatively, as when information necessary to correct misperceptions is overshadowed by other terms the business prioritizes. The obscuring may also result from an <i>omission</i> by the business, as when the business has reason to believe that the consumer reasonably but mistakenly expects a particular term or a particular benefit and fails to correct that expectation. A business that discloses part of the truth about the transaction but fails to add qualifications or other information necessary to avoid a reasonable but mistaken expectation engages in both an act and an <i>omission</i> that obscure a term or a fact. (Cf. Restatement of the Law Third, Torts: Liability for Economic Harm § 5, Comment <i>e.</i>)”</p>
<p><i>Comment states that § 6 addresses only common law</i></p>		<p>Comment 8(b): “This Section is consistent with federal and state anti-deception law, but it <i>restates only the common law consequences</i> of deception and does not incorporate the tests and remedies of that anti-deception law.”</p>
<p>§ 7. Affirmations of Fact and Promises that Are Part of the Consumer Contract</p>		
<p>§ 7(a): <i>Clarifies that Section addresses “affirmation of fact or promise” that a “particular attribute becomes part of the consumer contract”</i></p>	<p>“(a) An affirmation of fact or promise made by the business that creates a reasonable expectation by a consumer who is its intended audience that the subject matter of the contract will have a <i>particular attribute</i> becomes part of the consumer contract between the business and the consumer.”</p>	

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§ 9. Effects of Derogation from Mandatory Provisions		
§ 9(a): <i>Adds statement that § 9 does not displace remedies available outside this Restatement</i>	“(a) If a court finds that a contract or any term excludes, limits, or violates any mandatory provision of law, or is otherwise unenforceable, the court should, <i>in addition to any other remedy available in law</i> , do one of the following: ...”	
§ 9(a)(3): <i>Adds statement that consumer can enforce part of contract not made unenforceable</i>	“If a court finds that a contract or any term excludes, limits, or violates any mandatory provision of law, or is otherwise unenforceable, the court should, in addition to any other remedy available in law, do one of the following: ... (3) <i>enforce the remainder of the contract</i> but limit the application of the derogating term.”	
§ 9(b)(3): <i>Adds statement that in case of “extreme derogation” from mandatory rule, court may replace term with a term “proportional” to severity and willfulness of departure</i>	“(b) If the court enforces the remainder of the contract without the derogating term, the court may replace the derogating term with: ... (3) if the contravening term was placed by the business not in good faith, or if it purports to effect <i>extreme derogation</i> from a mandatory provision of law, a term that is calculated in a manner <i>proportional</i> to the severity and willfulness of the violation to give the business an incentive to avoid placing such terms in consumer contracts.”	
§ 9(b)(3): <i>Replaces “bad faith” with “not in good faith”</i>	“(b) If the court enforces the remainder of the contract without the derogating term, the court may replace the derogating term with: ... (3) if the contravening term was placed by the <i>business not in good faith</i> , or if it purports to effect extreme derogation from a mandatory provision of law, a term that is calculated in a manner <i>proportional</i> to the severity and willfulness of the violation to give the business an incentive to avoid placing such terms in consumer contracts.”	

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