The Draft Restatement of the Law, Consumer Contracts Follows the Law

By Steven O. Weise, Proskauer Rose LLP

Last fall, the ALI Council approved Council Draft No. 5 of the Restatement of the Law, Consumer Contracts, for submission to the members at the ALI Annual Meeting in May 2019, subject to the discussion at the Council meeting and the usual editorial prerogatives. The Reporters are now working on the draft to be presented in May. As is the case with any Restatement project, there have been many helpful meetings and written comments. The Consumer Contracts Restatement has received some quite spirited comments from both consumer and business interests. Some of these comments concerning the Restatement's assent provisions are discussed below.

I am a member of the ALI Council and have been extensively involved in reviewing and working with the Reporters on this Restatement. I have read every draft of this Restatement, all of the submitted comments, and every decision cited in the Reporters' Notes to § 2. Adoption of Standard Contract Terms (and all of the decisions cited in the Notes to § 5. Unconscionability and most of the decisions cited in the Reporters' Notes to the other Sections), as well as many other relevant decisions and articles. I believe that the Reporters have faithfully followed and implemented the traditional ALI process (described below).

This Restatement has followed the traditional ALI approach to Restatements

One critic calls upon this Restatement to be 'buil[t] upon a firm foundation of contract law established over hundreds of years." That is what this Restatement does.

Under the ALI's *Handbook for ALI Reporters*, the preparation of a Restatement follows four principal steps:

- "ascertain the nature of the majority rule;"
- "ascertain trends in the law;"
- "determine what specific rule fits best with the broader body of law and therefore leads to more coherence in the law;" and
- "ascertain the relative desirability of competing rules."

This Restatement reports on the law as it is. Because the common law of contracts is developed at a state level, the law is rarely identical from state to state and the decisions do not always precisely line up one with the other. The Reporters review the law, identify the baseline rules, and "restate" the law as a set of coherent and consistent rules. When a Restatement draft varies from the majority rule in any substantive way, the Restatement must carefully note that it is doing so and explain why.

Other comments have raised concerns about the Reporters' methodology for identifying and assessing the cumulative effect of court decisions in this area. I have addressed that separately in an online symposium organized by the *Yale Journal on Regulation* (*bit.ly/2CIzhSC*).

The preparation of a Restatement is an iterative process. That's why drafts are called "drafts." The Reporters receive comments from an ALI Advisers group, members of the ALI Members Consultative Group, additional ALI members, and others. These comments are taken in, reviewed, discussed, and implemented as appropriate. This Restatement has followed that approach and each succeeding draft has implemented many changes in response to comments, including in the assent rules. Each draft has been an improvement on the preceding drafts.

The draft of this Restatement includes voluminous Reporters' Notes, which are packed with case citations and surveys of state law. This is careful work. It has taken a long time. The Reporters (Omri Ben-Shahar of University of Chicago Law School, Florencia Marotta-Wurgler of NYU School of Law, and Oren Bar-Gill of Harvard Law School) are leaders in this subject. The Advisers and MCG members who have helped to guide the project are judges, academics, and practitioners (representing in their private practice both businesses and consumers) with a broad range of interests and expertise.

The Restatement applies the common law of contracts

Some critics representing business interests have stated that this Restatement has created a new body of law — consumer contract law.

As with other Restatements, this Restatement describes what the courts are doing. As such, as provided in the Handbook for ALI Reporters, this Restatement assumes the perspective of a common law court. The Introduction to this Restatement states that:

> "[the Restatement] draws on common-law principles that have antecedents in the Restatement of the Law Second, Contracts. … [t]he application of these principles in the area of consumer contracts produced the rules that are restated here."

continued on page 8

CONSUMER CONTRACTS CONTINUED FROM PAGE 7

Comment 14 to § 2 reaffirms this process in connection with the assent provisions of the Restatement:

> "The common-law rules restated herein are consistent with, and elaborate on, the general principles of contract formation."

The Reporters do not say this just because they are supposed to take this approach. A review of the decisions (see the discussion and chart below) confirms that the blackletter follows the common law of contracts. This Restatement does not create "an entirely new body of law for contracts between businesses and consumers" as suggested in one comment. The court decisions in this area apply the common law of contracts as developed by the courts to state a set of requirements that a process must meet to form an enforceable agreement in an online, consumer context (subject to the application of other policing provisions, such as unconscionability).

The assent provisions of § 2 have been the subject of extensive comment from both people expressing business perspectives and people expressing consumer perspectives. As explained below, there has been a convergence of (i) court decisions applying the common law of contracts to the necessary elements for the formation of a contract in the context of an online contract with (ii) leading academic and bar association articles and reports on the same subject. The case law and these writings and reports come to the same result. The black letter of § 2 embraces this convergence and implements the collective approach of these decisions, articles, and reports.

There has also been some criticism that the Restatement (in § 2 and elsewhere) adopts statutory law as common law rules and, at the same time, fails to give sufficient deference to statutory law. The Restatement does neither. As stated above and as shown below, the Restatement is solidly based on the common law of contracts, as the courts have applied it to contracts involving consumers (particularly in the online context). In addition, this Restatement carefully observes that, as a Restatement of the common law of contracts, the provisions of the Restatement are inherently subject to federal and state statutory rules.

The Restatement includes contract law elements protecting consumers, including elements suggested in leading academic and bar association materials

Some critics representing consumer interests have stated that the assent provisions do not adequately protect consumers. An influential and prescient article published in 2003 in the American Bar Association journal *The Business Lawyer* recommends that a set of four elements must exist for an online browsewrap agreement to be formed. See "Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements," a product of the Joint Working Group on Electronic Contracting Practices (Christina L. Kunz, John E. Ottaviani, Elaine D. Ziff, Juliet M. Moringiello, Kathleen M. Porter, Jennifer C. Debrow), of the Electronic Commerce Subcommittee of the Cyberspace Law Committee of the Uniform Commercial Code Committee of the Business Law Section of the American Bar Association. That article built on an earlier article published in *The Business Lawyer* in 2001, "Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent" (Christina L. Kunz, Maureen F. Del Duca, Heather Thayer, Jennifer C. Debrow). The 2003 article continues to be cited in law reviews and ABA publications, and its approach appears in the ALI Principles of the Law of Software Contracts § 2.02, where it is cited in the Reporters' Notes.

Steven O. Weise

As noted in those articles and in the decisions, the formation of online agreements takes many forms, which are often not readily pigeon-holed. This Restatement recognizes that and provides (as the courts have done) for a single, unified set of requirements, which the courts would apply based on the applicable context and circumstances. Generally the courts more closely scrutinize "browsewraps" than they review "clickwraps." A test that provides for contract formation for a "browsewrap" process would also satisfy a "clickwrap" process.

The 2003 article concluded that assent in these circumstances should require that each of the following exists:

> "Based on the precedents discussed in this Article, as well as policy arguments, the authors posit that a user validly and reliably assents to the terms of a browse-wrap agreement if the following four elements are satisfied:
>
> "(i) The user is provided with adequate notice of the existence of the proposed terms.
>
> "(ii) The user has a meaningful opportunity to review the terms.
>
> "(iii) The user is provided with adequate notice that taking a specified action manifests assent to the terms.
>
> "(iv) The user takes the action specified in the latter notice."

Convergence

The chart below demonstrates how the court decisions, the noted academic literature and reports, and the Restatement align with each other, using the four elements from the article as the specified components. It includes quotes from the leading decision of *Specht v. Netscape Communications Corp.* (2d Cir. 2002) and a selection of recent federal appellate decisions applying state law and considering the formation of contracts using browsewrap, clickwrap, shrinkwrap, and similar processes: *Register.com, Inc. v. Verio, Inc.* (2d Cir. 2004); *Schnabel v. Trilegiant Corp.* (2d Cir. 2012); *Nguyen v. Barnes & Noble Inc.* (9th Cir. 2014); *Sgouros v. TransUnion Corp.* (7th Cir. 2016); *Nicosia v. Amazon.Com, Inc.* (2d Cir. 2016); *Noble v. Samsung Electronics America, Inc.* (3d Cir. 2017); *Meyer v. Uber Technologies, Inc.* (2d Cir. 2017); *Cullinane v. Uber Technologies, Inc.* (1st Cir. 2018); *Starke v. SquareTrade, Inc.* (2d Cir. 2019); *Bekele v. Lyft, Inc.* (1st Cir. 2019).

Consumer Contracts project meeting

All emphasis below has been added, except as noted.

The decisions:

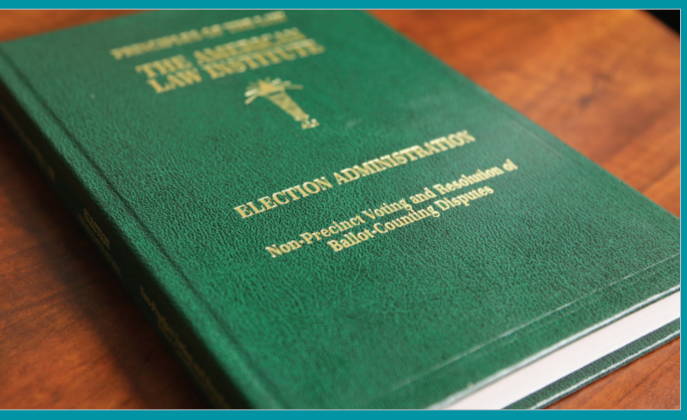
- Expressly state that they are applying general principles of *state* contract law to the formation of online agreements; for example:
  - "[A] court should generally apply *state-law* principles to the issue of contract formation." *[Specht]*
  - "While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the *principles of contract*." *[Register.com]*
  - "[T]here is no reason to think that *Illinois's general contract principles* do not apply." *[Sgouros]*
  - "*... general contract principles under Washington* law apply to agreements made online" *[Nicosia]*
  - "*... California state* [contract] law applies" *[Meyer]*
  - "Whether or not the parties have agreed to arbitrate is a question of *state contract law*." *[Schnabel]*
  - "We apply these same *contract law principles* to online transactions." *[Starke]*
- Cite numerous state contract law decisions (the states covered are California, Connecticut, Illinois, Massachusetts, New Jersey, New York, and Washington)
  - "The reasonable notice standard has governed online contracts *across jurisdictions* since the early days of the internet ..." *[Bekele]*
- Are often in turn cited by state courts applying state contract law
- Observe that there are not clear lines between "clickwrap" contracts and "browsewrap" contracts, and that there are "hybrid" (*Nicosia*) forms and there are an "infinite" (*Meyer*) variety of forms; so, instead, the courts take a "contextual" (*Meyer*), "contextualized" (*Cullinane*), and "context- and fact-specific" (*Bekele*) approach when applying the requirements for contract formation:
  - "*Classification* [as clickwrap or browsewrap] ... *does not resolve* the notice inquiry." (*Meyer*)
  - "Yet, our analysis regarding the existence of an arbitration agreement is *not affected by how we categorize* [clickwrap, browsewrap, or some other form of "wrap"] the online contract at issue here. 'While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.'" [*Cullinane*]
  - "Manifestation of assent to an online contract is *not meaningfully different* [from shrinkwrap agreements] ..." [*Nicosia*]
  - "We hold merely that on the *totality of the circumstances in this case*, ... [the consumer] was not on sufficient notice of the terms of the Post-Sale T&C ..." [*Starke*]
- Conclude that the subject matter of the agreement does not change the analysis:
  - "While the clauses at issue in *Ajemian* did not include an arbitration clause, '*the essential question presented was the same*: what level of notice and assent is required in order for a court to enforce an online adhesion contract?'" [*Cullinane*]
  - "*But despite the strong federal policy favoring arbitration, arbitration remains a creature of contract*.... Thus, courts must still decide whether the parties to a contract have agreed to arbitrate disputes.... That question is governed by *state-law principles of contract formation*." [*Starke*]

continued on page 10

CONSUMER CONTRACTS CONTINUED FROM PAGE 9

The following chart demonstrates how **the courts, the literature, and the Restatement align** when specifying the elements necessary to form a contract under the common law of contracts in an online context.

ISSUE	COURT DECISIONS	*THE BUSINESS LAWYER* ARTICLE	RESTATEMENT § 2(A) BLACKLETTER
Notice of terms	• Consumer must receive "*[r]easonably conspicuous* notice of the existence of contract terms ..." *[Specht]* • "existence of terms [must be] *reasonably conspicuous*" *[Nicosia]* • "... contractual terms ... will only be binding when they are '*reasonably conspicuous*'" [Noble] • Notice of terms must be "reasonably conspicuous" and "*reasonably communicated*" to the consumer [*Meyer*] • "[there must be] '*[r]easonably conspicuous* notice of the existence of contract terms ...'" [*Cullinane*] • "Where an offeree does not have actual notice of certain contract terms, he is nevertheless bound by such terms if he is on *inquiry* notice ..." (Emphasis in original) [*Starke*]	"The user is provided with a*dequate notice of the existence of the proposed terms* ..."	"A standard contract term is adopted as part of a consumer contract if the consumer manifests assent to the transaction after receiving: ... a *reasonable notice of the standard contract term* ..."
Opportunity to review	• "'... whether the circumstances surrounding the ... purchase ... permitted the ... [consumer] to become *meaningfully informed* of ... [the] contractual terms ...'" [*Sgouros*] • "A party cannot manifest assent to the terms and conditions of a contract prior to having an *opportunity to review* them ..." [*Register.com*]	"The user has a *meaningful opportunity to review* the terms ..."	"A standard contract term is adopted as part of a consumer contract if the consumer manifests assent to the transaction after receiving: ... a *reasonable opportunity to review* the standard contract term ..."



Now Available: Principles of the Law, Election Administration

Principles of the Law, Election Administration is now available at *www.ali.org*. The Principles apply to any type of elective office and are structured to be useful to multiple audiences, including state legislatures, state courts, and state officers such as secretaries of state and local election officials.

ISSUE	COURT DECISIONS	*THE BUSINESS LAWYER* ARTICLE	RESTATEMENT § 2(A) BLACKLETTER
Intent to be bound by terms	• "[consumer have] notice ... that [its] act would *manifest assent to contract terms*" [*Specht*] • "[consumer must receive] warn[ing] ... that by completing a purchase he would be *bound by the terms*" [*Sgouros*] • "[consumer must receive] reasonable notice that a click will *manifest assent to an agreement*" [*Sgouros*] • "...agreements [must] clearly inform[ ] consumers that they ... [are] *agreeing to certain terms*" [*Noble*] • "[Circumstances must be such that the consumer] should have ... understood that acceptance of the benefit would be construed by the [business] ... as an *agreement to be bound*." [*Meyer*] • "[website should contain] an explicit textual notice that continued use will act as a *manifestation of the user's intent to be bound* ..." [*Nguyen*] • "So long as the purchaser's attention is adequately directed to a conspicuous hyperlink that is *clearly identified as containing contractual terms* to which the customer *manifests assent* by completing the transaction or retaining the product or service, a hyperlink can be an effective device for specifying contract terms." [*Starke*]	"The user is provided with *adequate notice* that taking a specified action *manifests assent to the terms* ..."	"A standard contract term is adopted as part of a consumer contract if the consumer manifests assent to the transaction after receiving: ... a *reasonable notice ... of the intent to include the term as part of the consumer contract* ..."
Manifestation of assent	• "[consumer must make] *unambiguous manifestation of assent*" [*Specht*] • "[there must be] '*unambiguous manifestation of assent* to [the] ... terms ...'" [*Cullinane*] • [See reference in *Starke* in preceding row requiring that customer "manifests assent"]	"The user *takes the action* specified in the latter notice ..."	"A standard contract term is adopted as part of a consumer contract if the consumer *manifests assent* to the transaction after receiving: ..."

Conclusion

This Restatement is well-grounded on the common law rules of contract law, which have converged with the suggested approach of academic and bar association articles that look out for consumers. The black letter of § 2 implements the decisions and those suggestions in a unified text, which supports the common law.