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FOCUSING ON SIGNIFICANT CASELAW AND
EMERGING TRENDS

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EXPERT ANALYSIS

A CRITIQUE OF ALI'S CONSUMER CONTRACTS RESTATEMENT

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The ALI now is poised to approve a Restatement of the Law Consumer Contracts at its May 2019 annual meeting.

For a century, the American Law Institute's Restatements of the Law have exerted a significant influence on the common law as developed in the courts. But the Consumer Contracts Restatement has generated criticism not only for how it addresses various technical issues, but also for ALI's decision to go beyond a restatement of the common law as articulated in court decisions and anticipate future trends as perceived by ALI.

In my opinion, ALI's approach is deserving of criticism both for its inappropriate focus and for attempting to emulate a legislative function that is ill-suited to a restatement of the law. Such an approach will promote litigation, increase compliance costs, and

potentially reduce rather than increase consumer protection and options.

By highlighting the Restatement's deficiencies in this article, I hope that ALI will reconsider its approach.

What's the purpose of a Restatement?

ALI's Restatements of the Law are commonly described as "a set of treatises on legal subjects that seek to inform judges and lawyers about general principles of common law." They are, as defined in *Wikipedia*, "essentially compilations of case law, which are common law judge-made doctrines that develop gradually over time. ... They are meant to reflect the consensus of the American legal community as to *what the law is*." (*Emphasis added*).



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ALI itself, however, goes much further, describing Restatements as “aim[ed] at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or *might* appropriately be stated by a court.” (*Emphasis added.*) (Revised ALI Style Manual, approved January 2015.)

ALI’s further statement in the Handbook for ALI Reporters, as revised in 2015, that “[t]he official voice toward which the Institute aspires ... is that of an informed consensus ... on what the law is, or should be, for a given subject,” perhaps prompted the following comment from Justice Antonin Scalia.

In his partial concurrence and partial dissent in *Kansas v. Nebraska*, 135 S.Ct. 1042 (2015), Justice Scalia wrote:

[M]odern Restatements... are of questionable value, and must be used with caution. The object of the original Restatements was to present an orderly statement of the general common law. ... Over time, the Restatements’ authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be. ... Restatement sections [doing so] should be given no weight whatever as to the current state of the law, and no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar.

Justice Scalia’s remarks describe precisely what is problematic about the Restatement of the Law Consumer Contracts: Bringing order to numerous court opinions, describing their holdings, and even inter-

preting them, is a proper role for a Restatement while legal reform is not — in our democratic society, changing the law is the role of the legislature.

But would not this view result in arresting the development of the law? Apparently not, given the fact Restatements can be superseded, as, for example, in the Restatements of Contracts 1932 and 1981.

How does the Consumer Contracts Restatement measure up in general?

The Reporters’ Introduction in Council Draft No. 5, September 19, 2018, makes the usual argument about asymmetry in consumer contracts — meaning because the consumer side is less sophisticated and has less information and bargaining power than the industry side, consumers need more information through mandated disclosures and, when that is insufficient to address the imbalance, policing of terms is needed. It then limits the Restatement’s scope to transactions for a personal or household purpose, the common definition of a consumer transaction.

The Restatement’s approach, even though based on a common argument, is arguably flawed from the start. Aside from the issues that may arise in determining whether a transaction is for a consumer purpose, limiting its scope to consumer purpose transactions allows it to include the attorney or the CEO of GM buying an automobile for his son (hardly unsophisticated), and excludes the farmer or small business person who may closely approximate the characteristics of a “true consumer.”

The focus instead should be on the tools needed to achieve symmetry rather than on who needs protection.

First, for information to serve as the basis for mutual assent and valid consent, both sufficient, understandable information and an opportunity to read such information must be provided. This involves policy choices regarding how much information and opportunity is necessary, since providing too much information can result in “information overload” and no information being read. Can a judge really assess the right balance for a broad range of consumers or is that more properly the role of a legislature?

Second, the determination of what restrictions on contract terms are appropriate seems to be a legislative task and not a judicial one. A legislature can conduct appropriate studies and legislate broadly. A judge only has a limited and particular set of facts before him or her, which typically leads to uncertainty about the application of any ruling on restrictions to other cases and scenarios. Moreover, unlike a judicial decision, a statute requires consensus and gives interested parties an opportunity to provide input.

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What are other critics saying?

The Consumer Contracts Restatement has received an avalanche of critical comments. (See, e.g., Levitin, “The Faulty Foundation of the Draft Restatement of Consumer Contracts,” 36 Yale Law J. on Reg. 447 (2019).) Other critical comments are available on the ALI website.

In general, such criticism ranges from general comments echoing those of Justice Scalia or noting that the Restatement’s provisions look both to common and statutory law, to more specific complaints that the Restatement:

- Expands the concept of unconscionability.
- With respect to arbitration provisions, largely ignores the U.S. Supreme Court decisions establishing the strong federal policy under the Federal Arbitration Act and preemption of conflicting state law.

- Expands the concept of deception by incorporating statutory language, including standards judges as opposed to legislators are ill-suited to apply, such as what is “likely to mislead the reasonable consumer.”

Conclusion

Given the deference that the ALI system accords its Reporters, it is unclear whether the storm of criticism will induce any real change.

Nevertheless, as the ultimate control of an ALI project rests with ALI members attending the annual meeting, neither the Reporters nor the ALI Council will have the final say.

Attendance at the 2019 annual meeting and lobbying by members through letters and other methods will thus play a critical role in what ultimately happens to this project — and perhaps the reputation of ALI as it enters its 100th year.