Restatement of the Law Third, Consumer Contracts

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Outline

Background

There are two main types of contracts: (1) business-to-business (B2B) contracts, and (2) business-to-consumer contracts or, simply, consumer contracts. They share many features and are governed by a unified legal framework, but they also have important distinctions relating to formation, interpretation, remedies, and protective rules.

The influential Restatement Second of Contracts (1981) (hereinafter: "Restatement"), following the tradition of the Common Law, lumps the two categories together, laying out a unified "law of contract" applicable to both. Similarly, the Uniform Commercial Code's Article 2 (hereinafter: "U.C.C.") does not, by and large, distinguish between the sale of goods to consumers via mass-distributed standard form contracts and a sales contract concluded between commercial parties dealing at arm's length.

This unified approach is valuable, but it also suffers from important shortcomings: B2B contracts and consumer contracts are two very different species of transaction. Their formation, interpretation, and enforcement are guided by policies that often diverge, which in turn are based on different economic, sociological, and psychological principles. They have also, over the past 50 years, been governed by an increasingly divergent set of legal principles.

The typical B2B contract fits nicely within the classical notion of assent-based obligations. Two (more-or-less) equally situated and equally sophisticated parties negotiate a set of obligations that make both of them better off. The role of the courts, and of contract law, in this context is relatively clear:

(1) To enforce the obligations specified in the contract.
(2) To provide clear guidelines on how to form binding obligations.
(3) To interpret vague contractual obligations and to fill gaps in the contract in a way that comports with the parties' joint interests.
(4) To deter opportunistic behavior, such as fraud and misrepresentation.

Consumer contracts often lack the distinctive features of the classical, assent-based contract. It is well known, and empirically established, that consumers rarely read the contracts that govern so many aspects of their everyday life. And, without reading, there is no meaningful assent to the concrete content of the contracts. Writing on form contracts, of which consumer contracts are a primary example, Karl Llewellyn famously distinguished between the few "dickered terms" that consumers actually assent to and the many boilerplate terms to which there is "no assent at all."[1] Instead, consumers provide what Llewellyn regarded as "blanket assent"—the agreement to be bound by the unknown terms of the fine print, so long as they do not exceed some boundaries of reason and custom.

Llewellyn's dichotomy might seem to suggest a clear division between the legal regulation of negotiated terms versus boilerplate terms. The former fit well within classical, assent-based common law of contract, the rules of the Restatement, and the U.C.C. The latter—the standard fine-print terms—do not fit well within this classical framework, since they were not bargained over, and should be subject to a different type of scrutiny by the law.

In general, however, there is no clear division in the law of contracts. First, the negotiated terms and the boilerplate terms are inexorably linked. For example, by inserting one-sided, pro-seller boilerplate terms, the seller is able to offer other, more pro-consumer terms of the deal, specifically a lower price. For this reason, and others, courts have recognized that it is problematic to scrutinize some terms in isolation from the rest of the contract.[2] Second, recent scholarship casts doubt on the dickered-boilerplate distinction itself. Imperfectly rational consumers, even if they are aware of certain terms, might not fully appreciate the implications of these terms. For example, in many consumer contracts the archetypal negotiated term—the price—is itself multi-dimensional and contingent on how the consumer will use the product or service, so that the average consumer cannot accurately anticipate how much he or she would end up paying. And, third, if boilerplate terms were to be more closely scrutinized, sellers may well be driven to offer consumers opportunities to negotiate these terms, but at the same time forgo the cost saving that standard form contracting enables.

While there might be some implicit bargaining over consumer transactions (e.g., consumers choosing one seller over another), the legal terms of consumer contracts are not the product of bilateral negotiations. Rather, they are the product of market forces, influenced by sociological and psychological factors. These forces ought to be central in designing the legal regulation of standard form contracts. The law of consumer contracts should be grounded in a sophisticated understanding of the nature of competition and its limits, including the limitation of consumer rationality. Competition may be relied upon to produce the bundles of price/terms that consumers demand when consumers are aware of the terms and their value, but less so otherwise. For example, sophisticated sellers, competing for consumer

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[1] Karl Llewellyn, The Common Law Tradition: Deciding Appeals 370 (1960).

[2] See Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007) (determining unconscionability of a class action waiver by looking to the contract as a whole); Restatement Second of Contracts § 208, Comment *e* (1981) ("[T]erms may be unconscionable in some contexts but not in others. Overall imbalance and weaknesses in the bargaining process are then important."). In some cases, pro-consumer negotiated terms in one contract are linked to pro-seller boilerplate terms in another contract. The link between negotiated terms and boilerplate terms should then be examined at the seller's-business-model level, rather than at the single contract level.

demand, may design form contracts to maximize not the *true* (net) benefit to the consumer, but the (net) benefit *as perceived by the imperfectly rational consumer*.[3]

These fundamental differences between the typical B2B contract and the typical consumer contract justify substantially different legal approaches. Indeed, these different types of contracts are often treated differently by courts, legislators, and regulators. For example, the Amendment to Article 1 of the Uniform Commercial Code, § 1-301(e), applies a heightened standard concerning the enforcement of "choice of law" clauses in consumer contracts. Although recently rebuffed by the Supreme Court, many state courts have similarly applied a tighter scrutiny to mandatory arbitration clauses in consumer contracts. Further, consumer contracts are treated differently by statutes and regulations that apply to specific areas of contracting: insurance, consumer credit, doorstep sales, timeshares, funeral services, residential real estate, automobile warranties, and many others. Further, Federal Law has created a variety of protections that are largely applicable only in consumer contracts, concerning warranties, fraud and deception, unfair and abusive practices, enforcement tactics, and mandated disclosure. Other legal systems—most notably, the European Community—have increasingly treated consumer contracts differently from general commercial law. For example, in the most recent proposal for a new uniform sales law for the EU ("The Common European Sales Law"), drafters have carved out over 50 special rules for consumer contracts.[4]

While the original approach of the Restatement was to lump together all contracts and distill the unified rules, the current trend is to move beyond the "unification" approach and recognize instead the special policies that underlie some of the branches of contract law. Accordingly, recent ALI projects recognize the importance of special categories of contracts. In particular, the Principles of the Law of Software Contracts address the challenges that are unique to software contracts and to transactions over digital content. The Principles of the Law of Liability Insurance address the specific interpretation and enforcement rules that are unique to the field of insurance contracts. The Restatement of the Law Third, Consumer Contracts (hereinafter: "the Restatement Project"), will carry on this important trend of distinguishing the unique foundations of designated areas.

It is important to recognize, however, that consumer contracts are not just another special category of contracts. Rather, they have emerged as an autonomous field of transactional law—an overarching category encompassing many different branches of contracts. Transactional law would thus be divided, in principle, between two main classes: commercial law (B2B) and consumer law.[5] The Restatement Project

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[3] See Oren Bar-Gill, Seduction by Contract: Law, Economics and Psychology in Consumer Markets (2012).

[4] REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Common European Sales Law, Annex I: Common European Sales Law. See also Directive 2011/83/EU.

[5] Compare: Alan Schwartz and Robert E. Scott, Contract Theory and the Limits of Contract Law, 113 Yale L.J. 541 (2003) (distinguishing between contracts between firms and contracts between a firm and an individual). Schwartz and Scott go further and suggest that contract law,

would thus operate at a level of generality that is below the Restatement Second of Contracts but above the "Principles" of special categories of contracts.

<u>General Structure of the Restatement Project</u>

The Restatement Project will include only the rules of contract law that treat consumer contracts differently than commercial contracts. These rules will be distilled from the common law of contracts as applied by state and federal courts. The influence of broad statutory standards, such as deceptive, unfair, or abusive practices, on courts' application of contract law doctrines will also be considered. In addition, and where appropriate, it will identify the scope of regulatory techniques applied in consumer protection statutory law and regulations.

The purpose of this project is to clarify the conceptual and normative foundations of consumer contract law, to identify existing patterns within contract law of treating consumer contracts distinctly, the trends that these patterns reveal, and the general principles that can be articulated from these patterns. The purpose is not to reform the law.

The Restatement Project will be divided into four major Parts:

I. Procedure: Doctrines Scrutinizing the Quality of Assent
II. Substance: Doctrines Scrutinizing the Substance of the Contract/Terms
III. Unconscionability
IV. Interpretation and Supplementation

[An Introductory Part will delineate the Scope of the Restatement and define "consumer contracts."]

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comprising of U.C.C. Article 2, and the Restatement Second of Contracts, is primarily invoked to resolve disputes arising from contracts between firms. Id., at 545.

Part I: Procedure: Doctrines Scrutinizing the Quality of Assent

A major concern in the law of consumer contracts is that consumers lack sufficient understanding of the obligations that they are undertaking and that their agreement is therefore not informed and not meaningful. The following rules are designed to address this concern.

A. Regulation of Information Prior to Contract

The main question addressed by these doctrines is whether assent was adequately informed.

(1) Mandated disclosure of information in the pre-contractual stage

Mandated disclosure is a standard response to the concern that consumers lack sufficient information about and understanding of the contract. It is an overarching principle in the common law (e.g., Restatement § 161). It is also found in numerous statutes and regulations, which impose disclosure duties on parties who deal with consumers (e.g., the Truth-in-Lending Act). It has also been a prominent solution embodied in the Principles of the Law of Software Contracts. The mandated disclosure technique sometimes requires that specific language be used to inform consumers of rights, risks, and costs; other times it requires that terms of the contract be conspicuously communicated to the consumer.

Mandated disclosure poses a profound regulatory challenge. While it is a plausible regulatory technique in many contexts, its enormous growth and the complexity and extensiveness of the terms being disclosed have often made it ineffective. For example, iTunes terms and conditions, which are modified periodically, are stretched over 32 pages of 10-point font. Can disclosures be redesigned to be more effective?

Further, mandated disclosure has various legal consequences. Importantly, it may often provide a safe harbor for businesses that otherwise engage in sharp dealings. Compliance with disclosure mandates is thought to be an effective defense against claims of fraud, notwithstanding the reality that most mandated disclosures are not read or understood, and are often unreadable.[6]

While the requirement of disclosure is ubiquitous, the format and timing of disclosure vary and have evolved over time. The objective of the present project is to articulate the principles governing disclosure that have emerged

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[6] See Omri Ben-Shahar and Carl Schneider, More than You Wanted to Know: The Failure of Mandated Disclosure (Princeton University Press, forthcoming).

in the law and discuss their evolution (possibly guided by the social science of information).

(2) Voluntary transmission of information: Fraud and Deception

Voluntary disclosure is also prevalent. Consumers receive much information in the form of advertisements, solicitations, samples, promotions, product descriptions, instructions, and the like. This information comes both at the precontractual phase, inducing consumers to enter a transaction, and during the performance of the contract. A major concern is that sellers will voluntarily disclose information that is inaccurate or misleading. The Restatement contains specific rules regarding fraud and misrepresentation, but the bulk of consumer protection in this area originates from FTC law and state anti-deception policies (e.g., the Federal Trade Commission Act, Sec. 5; The Uniform Deceptive Trade Practices Act). The project will distill and organize the patterns and principles that have been developed under this statutory fabric.

(3) Unknown Terms and the Opportunity to Read

Over the past several decades, as technology changed the way by which consumer transactions are concluded, the presumption of assent to the standard terms has also evolved. What counts as valid assent, when is affirmative assent required, and what are the legal consequences of "silence" (or a failure to return the product)—are questions that courts have struggled to answer.[7]

In many of the cases addressing these questions, the underlying concern is about the opportunity to read the contract: Was the consumer informed about the terms of the contract?

The ALI's Principles of the Law of Software Contracts attempt to reform the law in one particular context—software contracts—but the issues arise more broadly and implicate non-digital contexts. The solution endorsed by the Principles of the Law of Software Contracts focuses on disclosure: Standard terms are binding as long as consumers had a meaningful opportunity to access, read, and store the terms. Several courts have rejected this approach, based on the low levels of readership of standard form terms. The Restatement of Consumer Contracts will not revisit the solution proposed in the Principles of the Law of Software Contracts. Instead, it will describe the evolution of courts' approaches to these issues.

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[7] See, e.g., Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332 (D. Kan. 2000); James J. White, Contracting Under Amended 2-207, 2004 Wis. L. Rev. 723 (2004); James J. White, Autistic Contracts, 45 Wayne L. Rev. 1693 (2000).

B. Assent

The doctrines of offer and acceptance have long provided the conceptual framework for mutual assent. In consumer contracts, however, where negotiations are reduced to take-it-or-leave-it formats, offer and acceptance has ceased to be a useful tool. Instead, the law has to determine when, under the circumstances, the consumer and the business were bound, and who had the power to conclude the agreement. For example, are advertisements "offers"? What about store displays? Are online sales "accepted" and become binding when a consumer checks out and clicks "Buy," or do businesses have the power to turn down the sale? While circumstances vary, the purpose of the Restatement Project is to clarify the principles and results that have been reached in case law, and to provide a clear conceptual framework that adapts the offer/acceptance model to the passive negotiations environment.

In addition, various concerns exist regarding defects in the assent of the parties.

- On the consumer side, the most pressing set of questions concern the voluntariness of consumers' assent, in areas in which businesses have greater bargaining power and use it to dictate the terms of the deal. The development of online shopping and rating services, which facilitate price comparison and enhances reputation mechanisms, have likely increased the relative bargaining power of consumers and diminished this concern. Still, it is important to evaluate whether the unique features of consumer transactions have given rise to a heightened application of the general doctrine of duress.

- On the business side, mass marketing and promotions may at times be afflicted with mistakes and error. Can business revoke bargains on the basis of such mistakes?

C. Modification of Agreement

Contracts, especially long-term consumer contracts, are regularly modified. A modification requires fresh assent and thus must comply with the requirements applying to contract formation. In the world of consumer contracts, however, modifications exhibit assent that is even more passive than original contracting rituals. At best, sellers simply send a new mass printed form contract, or a modification notice, to the consumer, and this modification takes effect when the consumer continues to use the product or service without objecting to the change (and, usually, without even reading the change-of-terms notice).

Moreover, when standard forms are extensive and complex, even the most diligent readers among consumers would find it next to impossible to compare the successive versions and figure out what are the specific modifications embedded in the most recent document.

The Restatement includes a specific rule governing contract modifications (§ 89), but this rule addresses historical problems (the requirement of consideration) and does not address the problems unique to consumer contracts. It requires that modifications be "fair and equitable" but does not address the problem of passive assent. Similarly, U.C.C. § 2-209 provides particular rules that govern the modification of commercial contracts, but it too is tailored to the circumstances of transactions among sophisticated parties.

The Restatement Project will review the courts' treatment of modifications in the consumer contracts area and clarify the legal consequences of various modification techniques. Recognizing that modifications are often necessary and desirable, but that they may also be opportunistic and unfair, there is an increasing need to clarify this area of the law.

Part II: Substance: Doctrines Scrutinizing the Substance of the Contract/Terms

The legal doctrines summarized in Part I address the quality-of-assent problem by scrutinizing the process leading to the manifestation of assent. In addition, the law of consumer contracts in some cases independently addresses the substance of the contract/terms (which is often perceived as evidence of poor-quality assent).

Courts, as well as legislators and regulators, have identified several categories of contract terms, where special scrutiny is warranted.

A. Modification and Termination

(1) Modification: Unilateral Modification Clauses

Many consumer contracts include broad modification clauses that authorize sellers to change the terms almost at will. Courts have questioned the enforceability of such terms, applying different doctrines: the old doctrine of "illusory contract" (holding that such modification clauses undermine the binding nature of the contract and render it unenforceable entirely); the doctrine of unconscionability and the doctrine of good faith have also been invoked by courts to police the unilateral modification of consumer contracts.[8]

On the regulatory front, legislators have intervened to restrict specific modifications. For example, the CARD Act restricts issuers' ability to increase interest rates.

(2) Right to Withdraw

One of the most potent techniques of consumer protection is "exit." If consumers are free to walk away from a transaction that they already agreed to, there is less risk that sellers will hide nasty provisions in the contract.

Many consumer contracts provide a right to withdraw. Most mainstream retailers allow consumers a generous period to return goods for any reason, and receive a full refund. For example, Walmart and Target offer a 3-month return period.

When the contract does not provide an affirmative right to withdraw, the general default rule in contract law is no withdrawal. This rule has been

[8] For cases applying the "illusory contract" doctrine—see, e.g., Harris v. Blockbuster, 2009 WL 1011732 (N.D. Tex.). For cases that construe change-of-terms clauses narrowly to permit only modifications made in good faith—see, e.g., Stone v. Golden Wexler & Sarnese, P.C., 341 F. Supp. 2d 189, 196–198 (E.D.N.Y. 2004); Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 280–285 (Ct. App. 1998). For cases invoking the doctrine of unconscionability (or the related doctrine that contracts violating public policy are unenforceable)—see, e.g., Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1179 (9th Cir. 2003); Discover Bank v. Shea, 827 A.2d 358, 363 (N.J. Super. Ct. Law Div. 2001).

revised in some narrow contexts. For example, the FTC mandates a cooling-off period of 72 hours in door-to-door sales.[9] Similarly, Section 125 of the Truth-in-Lending Act imposes a mandatory three-day rescission (cooling-off) period for mortgage loans (which is extended to three years, if the creditor fails to provide the required disclosure concerning the right to rescind), as does Section 407 of the Credit Repair Organization Act. Many state statutes provide similar protections for particular types of transactions, such as sales made by telemarketers. For example, Alabama provides a 14-day cancellation period.[10] Foreign jurisdictions similarly mandate withdrawal periods for a growing list of consumer transactions. For example, under Article 9 of the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011, consumers enjoy a right to withdraw from distance and off-premises contracts, within a 14-day period, at no cost to the consumer. Under these regulations, the right to withdraw is mandatory and cannot be contracted away.

The Restatement Project will review the principles that underlie the present regulation of withdrawal rights. Given that withdrawal rights are salient and familiar to most consumers (in many, though not all, markets), we find little justification for a broad *mandatory* right to withdraw. Concrete mandatory cooling-off periods should be justified by context and should be designed in a standard fashion. They should not extend to areas in which withdrawal rights are normally bargained over.

However, when the right to withdraw is secured by contract, it is important for the law to protect the integrity of the commitment (against other contract provisions, or seller practices, that make withdrawal logistics onerous). If consumers are drawn to the transaction by the promise of free withdrawal, the withdrawal should indeed be free and simple.
Finally, statutory rights to withdraw are often subject to specific disclosure rules, raising the same issues described in the mandatory disclosures discussion above. The Project will review the courts' treatment of those issues as they pertain to statutory withdrawal rights.

(3) <u>Termination Penalties</u>

In many consumer markets, e.g., telecommunications markets and markets for various subscription services, sellers demand long-term commitments from their customers. While customer loyalty can be achieved by offering "carrots" and loyalty programs (frequent flyer miles, rewards programs, etc.), or simply by providing high quality products and services, it is often achieved by threatening to use "sticks"—termination penalties.

[9] 16 CFR pt. 429 (2008).
[10] Code of Alabama 1975, sec. 8-19A-14.

Termination penalties are a type of switching costs. A large body of research highlights the effects—on consumers and the economy—of these contractual switching costs. Of particular concern is consumers' imperfect information about and imperfect understanding of the implications of these contractual devices.

Common law courts have viewed termination penalties as liquidated damages and subjected them to scrutiny under the penalty doctrine.
In some jurisdictions, the use of termination penalties has been restricted by statutes.

Recently, market forces (sometimes aided by the threat of regulatory action) have led sellers to use fewer and smaller termination penalties. Consumers are offered alternative arrangements under the misnomer "No Contract." The rise of competition over termination clauses should be an important factor in evaluating the need and scope of legal response.

B. Enforcement and Remedies

(1) Warranties

The issue of warranties deserves special attention. Consumers are often imperfectly informed about various dimensions of a product or service. An imperfectly informed consumer would assume that a product is of average quality. High-quality sellers, seeking to differentiate themselves and their products, can do so by offering warranties. Warranties can thus serve an important function, effectively addressing the imperfect information problem. There is a concern, however, that sellers will offer warranties that appear to be broader than they actually are. The law addresses this concern through statutes like the Magnuson Moss Warranty Act, and through limitations on disclaimers of warranties.

Moreover, imperfectly rational consumers often overestimate the quality of a product or service and underestimate the risk associated with the product or service. By allocating risk to the seller, warranties can align consumer expectations with the contractual reality. Since sellers will not always supply such warranties, the law steps-in and provides the warranties. In some cases, the law mandates the inclusion of certain warranties.[11] Examples: Lemon laws. In other cases, the law sets the warranty as a default rule (implied warranties) and regulates the opt-out mechanism to render the default sticky and alert the consumer of the opt-out.[12] Examples: Magnuson Moss, U.C.C., § 2-316.

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[11] See also the Principles of the Law of Software Contracts, which include a mandatory warranty.

[12] See Sec. IV.E. below.

The law of express warranties has to address special issues, like the nature of the warranty created by affirmation made on packages of goods and in advertisements, and questions of privity as applied to pass-through warranties (like the proposed U.C.C. §§ 2-313A and 2-313B).

The law of express and implied warranties also needs to clarify the line between merchantability (the contract standard) and defective products (the tort standards). Warranties and products liability are often invoked in overlapping circumstances, subject to similar limitation under doctrines like proximate cause (tort) and foreseeability (contracts). The purpose is to bring the treatment of consumer contract law into conformity and consistency with the ALI's Restatement Third of Torts: Liability for Economic Harm.

(2) <u>Limitation on Remedies</u>

Like disclaimers of warranties, limitations on remedies reverse the default rules that purport to protect consumers against non-conforming performance. Certain limitations on remedies are understood and expected by consumers and can reduce the price that consumers pay. For example, many sellers limit their liability to restitution of the price paid; or, airlines limit their liability for losses suffered by passengers from delayed flights. Such limitations should generally be enforced.

Other limitations do not reflect the normal bargain that consumers would be willing to accept, and are also not reflected in the price that consumers pay. The proper use and enforceability of such limitations needs to be articulated and clarified.

(3) <u>Cancelation</u>

Contract law remedies provide the right to cancel a contract in response to a "material breach" by the other party. The Restatement Project will clarify the application of this doctrine in the consumer context.

(4) <u>Supra-Compensatory Damages</u>

Various consumer protection statutes allow consumers to recover supra-compensatory damages (e.g., Equal Credit Opportunity Act, Section 707) or statutory damages (e.g., Truth in Lending Act, Section 130). In some areas, punitive damages are open ended, as in the case of bad faith denial of insurance benefits.

The Restatement Project does not intend to restate the various statutory rules, but rather to formulate the principles for punitive treatment of some types of willful breaches of consumer contracts.

(5) Attorney's Fees

An important issue to address is the recovery of attorney's fees. Because the monetary stakes in many consumer complaints are smaller than the cost of litigation, fee shifting and aggregation of claims may be necessary and justified in a substantial class of consumer cases; and contractual provisions banning fee shifting and aggregation have been scrutinized by courts.

(6) Governing Law and Forum

One of the major issues that set consumer contracts apart from other commercial contracts is the role of choice of forum and choice of law clauses. Presently, several statutes limit the power of sellers to drag consumers away from their home forum and from their state's law. For example, § 1-301 of the Uniform Commercial Code, adopted by some states but not all, limits the power of choice of law clauses to disclaim mandatory consumer protections that exist in the consumer's home state.

The issues involved in choice of forum clauses have received much attention by courts scrutinizing mandatory arbitration clauses. Many courts have attempted to invoke the unconscionability standard to limit the enforceability of arbitration clauses, but this trend has been superseded by extra-contractual policies relating to arbitration law and federalism, as determined by the Supreme Court's decision in AT&T v. Concepcion.[13] The issues relating to the application of the unconscionability doctrine will be discussed in Part III.

C. Pro-Consumer Mandatory Rules in Legislation and Regulation

Legislators and regulators often intervene in specific markets by mandating some contract terms and banning others:

- Mandatory pro-consumer arrangements are provisions that automatically become part of any contract (or any contract of a certain type) and that the parties cannot opt out of. For example, the Credit Card Accountability, Responsibility and Disclosure Act of 2009 (the CARD Act) requires that card issuers, when allocating a cardholder's monthly payment across different balances, to first allocate the payment to the balance bearing the highest interest rate.
- Banned terms are provisions that cannot be included in the contract (or are not enforceable against consumers). Bans are usually area-specific and are enacted in statutes and regulations. For example, the CARD Act bans contractual provisions that impose "no activity" fees. Or, the FTC Fair Credit

[13] 131 S. Ct. 1740.

> Practice Rule has long prohibited the use of "cross-collateral" clauses (made famous by the Williams v. Walker-Thomas Furniture case). And the Dodd-Frank Act bans provisions that impose excessive (by magnitude or by duration) pre-payment penalties in mortgage contracts. Also various federal laws prohibit unfair contracting practices, like the billing of consumers for unsolicited mailed merchandise, or the advertising of products not available for sale.

These areas of the law are constantly evolving, and would likely exhibit some development with the creation of the new Consumer Financial Protection Bureau. The enactment of mandatory rules is therefore best left for the elected bodies of government. Accordingly, the Restatement Project will not include a list of mandatory or banned terms, nor propose to add or subtract from existing ones. Instead, it will articulate principles that courts and legislators have followed, and provide a conceptual and theoretical framework for the design of such mandates. Because the specific details of individual mandatory terms and bans are context specific, the proper role of the Restatement Project would be to unify the framework under which such details are developed.

Part III: Unconscionability

The "Unconscionability" doctrine, which plays a central role in the common law of consumer contracts, will be treated separately. The doctrine combines both procedural elements and substantive elements, and thus requires a separate treatment. Part III will thus apply the principles articulated in Parts I and II in offering a framework for unconscionability jurisprudence.

The common law doctrine of unconscionability, articulated in the Restatement (§ 208) and in the U.C.C. (§ 2-302), has been regularly invoked by courts. The doctrine combines both process and substance and is specifically divided into two components: (1) procedural unconscionability, and (2) substantive unconscionability. The relationship between the two components is not always clear. It is sometimes referred to as a "sliding scale": Where a greater degree of procedural uncoscionability has been shown, a lesser degree of substantive unconscionability needs to be proved; and vice versa. Or: Focusing on low-quality assent (bad process) as the source of concern in consumer contracts, substantive unconscionability is sometime viewed as further evidence of procedural problems.

The Restatement Project will clarify the conceptual contours of unconscionability doctrine, and the principles that have guided common law courts in applying it. [14]

One important area where courts have invoked the unconscionability doctrine involves pre-dispute arbitration clauses. The Restatement Project will clarify the application of unconscionability doctrine in this area. (The focus will be on *contract law* issues, albeit with reference to federal statutory law as interpreted by the Supreme Court in AT&T v. Concepcion.[15]) The Restatement Project will not create a special category of unconscionability related to arbitration—neither a heightened nor a more lenient standard.

Closely related to unconscionability doctrine, is the "unfair and deceptive acts and practices" jurisprudence, developed in both Federal and State law. In Federal Law, the starting point is Section 5 of the Federal Trade Commission Act (banning "unfair and deceptive acts and practices"). States have largely followed this approach, enacting their own "mini-FTC statutes." The new "abusive practices" standard, introduced in the Dodd-Frank Act, is also relevant here. Without attempting a comprehensive survey of the statutory landscape, the Restatement Project will seek to distill the common principles that ought to guide this fairness inquiry.

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[14] One goal will be to translate research on consumer decisionmaking, and on the limits of consumer understanding, into specific guidelines for courts. See Russell B. Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 University of Chicago Law Review 1203 (2003).

[15] 131 S. Ct. 1740.

Part IV: Interpretation and Supplementation

Another set of doctrines and regulatory techniques aim to answer the question: What did the consumer assent to? Restatement § 200, and almost all other sources, treat interpretation as an exercise in ascertaining a term's *meaning* – a semantic exercise. Searching for the "meaning" of a term is a valid interpretive step when it is clear that the parties jointly drafted the term; less so when one party was never party to the choice of terms and language.

A. Interpretation in Favor of Consumers

When a clause in the seller's form is vague, courts sometimes prefer the pro-consumer interpretation. This technique (*contra proferentem)* is occasionally used to interpret ambiguous insurance contracts. It is also recognized by general contract law (see, Restatement § 206), but courts rarely invoke it outside the insurance context. The Restatement Project will clarify what situations are consistent with broader reliance on this doctrine.

Of particular importance is the treatment of conditions. Sellers might avoid their contractual obligations, because the consumer did not comply with a condition precedent. The Restatement Project will clarify any limits on the enforceability of conditions in the consumer context and create consistency with the ALI's Principles of the Law of Liability Insurance.

B. "Reasonable Reader" Standard

When interpreting contractual fine print, courts have applied different standards. Some courts presume consumers read contracts carefully and understand their terms in the same way the court understands those terms. Some courts presume that consumer reading is more cursory and use an average reader standard. Other courts apply a standard that is specific to the type of consumer targeted by the seller and the cultural norms surrounding the transaction. The Restatement Project will trace the evolution of this jurisprudence.

C. Parol Evidence Rule

Consumers often discover that oral representations made to them in the course of shopping differ from the characteristics of the actual performance or from the terms included in the fine print. Overcoming such gaps is a major role of consumer contract law.

Some statutes already deal with this tension, and craft special rules to protect consumers. A prominent example is Section 108 of the Magnuson Moss Warranty Act, dealing with express warranties that are disclaimed in the fine print. More generally, the Restatement Project will consider the application, in consumer contracts, of the parol evidence rule, which normally bars any reference to oral representations that preceded the written document. The enforceability of merger clauses, which sellers draft into the standard terms in an attempt to reinforce the parol evidence rule, will also be considered. Any protection that consumers receive vis-à-vis the less strict application of the parol evidence rule should survive the boilerplate inclusion of merger clauses.

D. Good Faith

The doctrine of good faith serves to deter opportunistic behavior by implying obligations consistent with the parties' intentions. In the world of consumer contracts, the doctrine serves mainly to protect consumers from sellers seeking to exploit the power or discretion that they reserved in the contract or to fill contractual gaps in a self-serving manner.

The content of the good faith standard has been developed in extensive jurisprudence. The Restatement Project intends neither to impose new limitations on sellers' discretion, nor to import a particular morality into consumer transactions. It intends to build on the tools developed in sales law (for example, in adjudicating the good faith requirement under § 2-305(2) of the U.C.C.), in the common law, and in particular areas of consumer law, and articulate them in a way that would add more consistency and predictability to the existing jurisprudence.

A requirement of good faith would also apply to the behavior of consumers and can be used to curb consumer opportunism and fraud in appropriate areas.

E. Pro-Consumer Defaults

Contract law supplies many default rules to assist parties and economize on transaction costs. In the law of consumer contracts, default rules serve an additional purpose: Pro-consumer default rules are intended to both align contractual obligations with consumer expectations and to alert consumers when the seller seeks to opt out of the pro-consumer default.

However, as currently designed, many pro-consumer default rules are ineffective in achieving these goals. As we explained above, consumer contracts are not likely to leave gaps and are explicitly drafted to disclaim the pro-consumer default arrangements. Accordingly we believe that there are more subtle functions in designing pro-consumer defaults.

First, the law of consumer contracts can regulate the methods by which default rules are disclaimed. At times, a simple statement buried in the fine print would suffice. Other times, a more elaborate procedure will have to be followed. In particular, default rules can be designed to be "sticky." Sticky defaults are disclaimable, but at a cost. While much thinking in general contract law is about how to make opt out cheap—how to reduce transactions costs—the goals of consumer contract law are often the opposite: how to make opt out expensive, how to increase transactions costs, so as to guarantee that it occurs only when there is sufficient justification for it. One such justification is information. The alerting function of pro-consumer defaults depends on a minimum level of stickiness. Specifically, the alerting function would be frustrated if sellers could opt out using a fine-print provision in their form contract.[16] The law surrounding the procedure by which parties can opt out of pro-consumer default rules will need to develop substantially. The Restatement Project will review developments in this area to date and make broad, conceptual suggestions about future development in this area.

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[16] See Ian Ayres, Regulating Opt-Out: An Economics Theory of Altering Rules, 121 Yale L.J. 2032 (2012) (identifying and analyzing "altering rules"—the rules that determine how to effectively opt out of the default rule). See also Michael S. Barr et al., *Behaviorally Informed Financial Services Regulation*, New America Found. (2008) (arguing that, in the consumer contracts context, it may be particularly difficult to make defaults sticky); Lauren E. Willis, Slippery Defaults (explaining why both altering rules and framing rules are necessary to make pro-consumer defaults sticky when firms oppose them, and the difficulty the law has in establishing and enforcing these altering and framing rules effectively).