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COMING TO TERMS: RE-RESTATING THE TENTATIVE DRAFT OF THE RESTATEMENT OF CONSUMER CONTRACTS

Louis J. Hallow, III[†]

[†] © 2020 Louis J. Hallow, III, is a J.D. Candidate, Wake Forest School of Law, 2021; B.A. Public Policy Leadership, *magna cum laude*, University of Mississippi, 2018. Louis would like to thank the *Wake Forest Journal of Business and Intellectual Property Law* Board of Editors and Staff for their hard work in bringing this article to publication. He also would like to thank his parents, John and Kim Hallow, his family, and his friends for their continuing support and encouragement.

I. INTRODUCTION

For better or worse, the rise of technology in the consumer marketplace has undoubtedly changed the practice of consumer contracting.[1] Consumers, whether they are aware or not, regularly enter into standard form agreements with businesses when purchasing goods, software, services, and other products online.[2] For instance, consumers encounter these standard-form consumer contracts when purchasing tickets to a concert,[3] creating and using social media accounts,[4] subscribing to cable packages,[5] ordering food online,[6] and using mobile phone applications.[7] Accordingly, "most of us make more legal agreements in a year than our grandparents made in a lifetime."[8]

Although consumers benefit from the simplicity and efficiency of completing transactions through consumer contracts, they also face a number of disadvantages[9] caused by their lack of awareness and inability to understand the legal implications of the terms in these standard form agreements.[10] The main concern is that consumers, with good reason, will never read or understand any of the standard terms, yet will manifest assent to and thereby accept the terms of the contract.[11] Generally speaking, this concern is the reality.[12] Hence, there is no

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[1] *See* Mark E. Budnitz, Abstract, *Touching, Tapping, and Talking: The Formation of Contracts in Cyberspace*, 43 NOVA L. REV. 235, 236 (2019) (explaining how technology and mobile devices have changed the way that consumers enter into consumer contracts); Orrin Broberg, *Eight Ways Technology Is Changing Business*, MODUS: MODUS BLOG (Dec. 5, 2013, 1:35 AM), http://www.gomodus.com/blog/eight-ways-technology-changing-business.

[2] Budnitz, *supra* note 1, at 236.

[3] *Terms of Use*, TICKETMASTER, https://help.ticketmaster.com/s/article/Terms-of-Use?language=en_US (last updated Aug. 5, 2020).

[4] *Terms of Service*, FACEBOOK, https://www.facebook.com/terms.php (last updated July 31, 2019).

[5] *Terms of Service/Policies*, SPECTRUM, https://www.spectrum.com/policies/terms-of-service.html (last visited Sept. 9, 2020).

[6] *Terms of Use*, PAPA JOHN'S, https://www.papajohns.com/terms-and-conditions.html (last visited Sept. 9, 2020).

[7] *U.S. Terms of Use*, UBER, https://www.uber.com/legal/terms/us/ (last updated July 15, 2020).

[8] David A. Hoffman, *From Promise to Form: How Contracting Online Changes Consumers* 91 N.Y.U. L. REV. 1595, 1596 (2016) (citing Eric Felton, *Postmodern Times: Are We All Online Criminals?*, WALL ST. J., Nov. 18, 2011, at D8).

[9] *See* Jared S. Livingston, *Invasion Contracts: The Privacy Implications of Terms of Use Agreements in the Online Social Media Setting*, 21 ALB. L.J. SCI. TECH. 591, 603 (2011).

[10] *See, e.g.*, *id.*

[11] *See id.* at 602.

[12] Hoffman, *supra* note 8, at 1596 n.3 (citing Yannis Nakos et al., *Does Anyone Read the Fine Print?*, 43 J. LEGAL STUD. 1, 19 (2014) (showing the results of a study

"check" on businesses, therefore enabling them to include prejudicial and consumer unfriendly terms in the contract that the consumer, if fully informed, would likely reject.[13]

In a consumer contract, the business generally drafts most (and often all) of the terms.[14] These terms are typically non-negotiable[15] and presented on a "take-it-or-leave-it basis."[16] In most cases, even if the contract's terms are negotiable, the majority of consumers are either unaware of the possibility to negotiate or lack the legal knowledge to understand the terms and their legal consequences.[17] Businesses typically draft these terms without consumer input and present the terms to the consumer in lengthy and technical language.[18] But in reality, the overwhelming majority of consumers never read any of the terms in standard-form agreements regardless of how the business presents the terms to the consumer on the webpage.[19]

In an attempt to better balance the interests of consumers in standard-form contracting, particularly in electronic consumer contracting, the American Law Institute promulgated *The Restatement of Consumer Contracts*, which is now evolving through a series of drafts ("Restatement Draft").[20] As with any Restatement, the goal is to restate the law as it presently stands in a manner that allows courts to render consistent and accurate judgements.[21]

Overall, the Reporters' efforts in composing this draft are exceptional. At first glance, the Restatement Draft seems applicable to the many variations of consumer contracts and synchronous with the majority of case law.[22] But the Restatement Draft is not perfect,

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in which consumers visited the End-Used License Agreement pages for 0.08% of paid and 0.22% of freeware retailers)).

[13] Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. REG. 45, 53 (2019).

[14] Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 432 (2002).

[15] *See* James P. Nehf, *The Impact of Mandatory Arbitration on the Common Law Regulation of Standard Terms in Consumer Contracts*, 85 GEO. WASH. L. REV. 1692, 1693 (2017).

[16] Klass, *supra* note 13, at 52 ("The business . . . gives those standard terms to many consumers, all on a take-it-or-leave-it-basis.").

[17] *See id.*

[18] *Id.*

[19] Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 1 (2014).

[20] *See* Richard L. Revesz, *Foreword* to RESTATEMENT OF THE LAW CONSUMER CONTRACTS, at xv (AM. LAW INST., Tentative Draft 2019).

[21] THE AMERICAN LAW INSTITUTE, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 4 (2015 ed. 2005).

[22] RESTATEMENT OF THE LAW CONSUMER CONTRACTS, at xi.

especially with respect to Section Two. In particular, the Reporters give a faulty approach for the adoption of standard terms under Section Two.[23] For reference, the language for Subsection 2(a) is as follows:

> A standard contract term is adopted as a part of a consumer contract if the consumer manifests assent to the transaction after receiving: (1) a reasonable notice of the standard contract term and of the intent to include the term as part of the consumer contract, and (2) a reasonable opportunity to review the standard contract term.[24]

There are two significant problems with this subsection. First, the language of Subsection 2(a) is ambiguous because it is impossible for consumers to determine which terms they adopt upon the manifestation of assent.[25] Second, the reasonable notice requirement is not a clear representation of the current state of consumer contract law.[26] In effect, the language of Section Two allows businesses to enforce agreements against consumers—many of which neither read nor understand the terms[27]—by meeting a considerably low bar for assent and notice.[28]

Section Two of the Restatement of Consumer Contracts cannot effectively balance the asymmetry of information between business and consumers in standard-form contracting based solely on rules which truly reflect the current state of the case law. This article focuses on Section Two of the Restatement Draft's requirements for the adoption of standard terms in a consumer contract agreement. With an emphasis on the language of Subsection 2(a)'s notice requirement, this article analyzes the general workability of the Restatement Draft with regard to various forms of consumer contracts. Finally, this article suggests ways to strengthen the Restatement Draft's approach to the incorporation of standard terms in consumer contracts.

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[23] *See infra* Part III(A)(1).
[24] RESTATEMENT OF THE LAW CONSUMER CONTRACTS § 2(a).
[25] Livingston, *supra* note 9.
[26] Klass, *supra* note 13, at 56.
[27] *Id.* at 52.
[28] *Id.* at 48.

II. BACKGROUND

A. Life Cycle of a Restatement

Founded in 1923,[29] the American Law Institute ("ALI") is an independent organization that seeks to simplify and develop the common law through Restatements of the Law, model codes, and Principles of Law.[30] Restatements of the Law are primarily addressed to courts and "aim 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."[31] In creating Restatements, the ALI seeks to improve and transform the law and keep up with societal trends by communicating with lawyers, judges, and other scholars throughout the drafting process.[32]

Restatements are composed primarily by Reporters, who are tasked with structuring the ALI's project, and preparing and presenting drafts to Advisers and the Members Consultative Group (MCG)[33] for discussion.[34] Generally, Reporters first prepare a "Preliminary Draft" of the project, which is then sent to the project's advisors and members for revision and review.[35] After the draft is revised, the Reporters prepare a "Council Draft" for consideration by the Council and project participants.[36] If approved by the Council, the Reporters incorporate the revisions made by the Council, and create a "Tentative Draft" for review and approval by the membership at the Annual Meeting.[37] Alternatively, if the Council concludes that the Council Draft is not ready for submission to the membership, the draft will be discussed at an Annual Meeting, and later resubmitted as a "Discussion Draft" once the appropriate changes are made.[38] Finally, if both the Council and Membership approve of the draft, the Reporters prepare the official document for publication.[39] This process repeats itself "until each

[29] THE AMERICAN LAW INSTITUTE, *supra* note 21, at 2.
[30] *Id.* at ix.
[31] *Id.* at 3.
[32] *Id.* at 4.
[33] The MCG is composed of current ALI members. These individuals volunteer to participate in the project and provide insight by submitting comments to the Reporters and/or attending project meetings. *How the Institute Works*, AM. LAW INST., https://www.ali.org/about-ali/how-institute-works/ (last visited Sept. 9, 2020).
[34] THE AMERICAN LAW INSTITUTE, *supra* note 21, at 1.
[35] *Id.* at 15.
[36] *Id.* at 17.
[37] *Id.* at 18.
[38] *Id.* at 18.
[39] *Id.* at 19.

segment of the project has been approved by both the council and the membership."[40]

B. A Brief History of the Restatement of Consumer Contracts

In 2012, following Harvard Law Professor Oren Bar-Gill's presentation at the 2011 ALI Annual Meeting on his study about the asymmetry of information and of negotiation between consumers and businesses in standard-form contracts,[41] the ALI launched a Restatement of the Law on Consumer Contracts ("Restatement").[42] In creating this Restatement, Professor Bar-Gill, now joined by Professor Omri Ben-Shahar of the University of Chicago Law School and Professor Florencia Marotta-Wurgler of New York University School of Law as Reporters, aim to

> [C]larify how the courts have applied the principles embodied in the Restatement of the Law Second, Contracts, and the Uniform Commercial Code to transactions that either were either not contemplated at the time those projects were completed (and therefore not addressed), like the purchase of software license and all online transactions, or that became a more significant part of the economy since that time.[43]

The ALI's Council approved a Discussion Draft of all Sections of the Restatement at the ALI's 2017 Annual Meeting.[44] Two years later at the Annual Meeting, both the Council and Membership approved Section One of the Restatement.[45] All other Sections, however, have only been approved by the ALI's Council and are currently pending review by the membership as a "Tentative Draft."[46]

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[40] *Project Life Cycle*, AM. LAW INST., https://www.ali.org/projects/project-life-cycle/ (last visited Sept. 9, 2020).

[41] New York University School of Law, *NYU Law Professor Oren Bar-Gill on Consumer Psychology and Consumer Protection*, YOUTUBE (June 1, 2011), https://www.youtube.com/watch?v=frvcS69juSs.

[42] Revesz, *supra* note 20.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

C. The Tentative Draft for the Restatement of Consumer Contracts: Section Two

Section Two of the Restatement focuses on the adoption of standard contract terms in consumer contract agreements.[47] This Section attempts to maintain the simplicity of streamlined contracting while providing consumers a reasonable opportunity to understand the contract's standard terms and reject undesirable transactions.[48] The Reporters designed Section Two to "operate[] in a reality in which consumers are fully unaware of some 'core' aspects of the transaction but are unlikely to read and exercise meaningful informed consent to the non-core standard contract terms."[49]

A consumer contract, as defined by Section One of the Restatement, is "[a] contract between a business and a consumer other than an employment contract."[50] As noted above, these standard-form consumer contract agreements allow businesses to increase productivity levels because they are not required to negotiate each individual contract with consumers when selling products or services.[51] According to the Reporters, "[t]he efficiencies of mass production and mass distribution of products and services would be hindered if the terms of each transaction with each consumer had to be individually negotiated."[52] In addition, consumer contracts enable businesses to avoid liability in online transactions by allocating risks and liabilities to consumers through standard form agreements.[53]

Although consumer contracts facilitate and expedite the process of conducting online transactions,[54] these standard form agreements can be problematic for both consumers and courts.[55] As the Reporters note, "[c]onsumer contracts present a fundamental challenge to the law of contracts, arising from the asymmetry in information, sophistication, and stakes between the parties to the contracts—the business and the consumers."[56] For instance, businesses can understand the contract's

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[47] RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS § 2 cmt. 1 (AM. LAW INST., Tentative Draft 2019).

[48] *Id.*

[49] *Id.*

[50] *Id.* § 1(a)(4).

[51] *Id.* at 1; *see also* Nehf, *supra* note 15, at 1693; Schmitz, *supra* note 17, at 218.

[52] *See* RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS, reporters' introduction at 1.

[53] *See* Hillman & Rachlinski, *supra* note 14, at 463–64 (discussing the importance of allocating risks and liabilities in standard form agreements).

[54] *Id.* at 491–92.

[55] *Id.* at 440–41.

[56] RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS, reporters' introduction at 1.

detailed legal terms and consequences through their experience with transactions and the advice of counsel.[57] Consumers, on the other hand, typically neither have the assistance of legal counsel nor the same level of experience as businesses in conducting transactions.[58] In reality, consumers rarely read standard contract terms, no matter where the terms are located.[59] This asymmetry in information creates a lack of bargaining power between the parties, and causes consumers to enter into contracts without understanding the terms or their legal implications.[60]

D. The Presentation of Consumer Contracts

The Reporters note that businesses can often enforce consumer contracts through clickwrap, browsewrap, or shrinkwrap agreements.[61] Clickwrap agreements require consumers to play an active role and physically manifest assent by clicking an "I agree" box and confirming that they have read the terms and conditions before entering a transaction.[62] Courts regularly enforce these agreements, so long as "the manner in which terms and notice of terms are presented satisfy the constructive-notice requirements that focus on language, placement, and conspicuousness of the terms" because of the consumer's active role in manifesting assent.[63]

In contrast, browsewrap agreements generally do not require a "click" for consumers to manifest assent.[64] Instead, browsewrap agreements appear as a hyperlink on the website that, if clicked, redirects the consumer to a webpage containing the terms and

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[57] *Id.*; *see also* Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIA. L. REV. 1263, 1269–70 (1993) ("It is no secret that consumers neither read nor understand standard form contracts . . . . Moreover, businesses hardly want the consumer to read form contracts.").

[58] *See* RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS § 2, reporters' notes at 35.

[59] *Id.*; Hoffman, *supra* note 8, at 1296.

[60] Hillman & Rachlinski, *supra* note 14, at 432–33.

[61] *See id.* at 429, 431–32, 464 (explaining how businesses increasingly use browsewrap and clickwrap software in the electronic contracting environment); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1448 (7th Cir. 1996) ("Shrinkwrap licenses are enforceable unless their terms are objectionable on the grounds applicable to contracts in general . . . .").

[62] Hillman & Rachlinski, *supra* note 14, at 464.

[63] RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS § 2, reporters' notes at 44–45 (citing Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 403; Corwin v. NYC Bike Share, LLC, 248 F. Supp. 3d 475, 489 (S.D.N.Y. 2017) (explaining the various methods of online contracting must meet the constructive-notice requirement)).

[64] *Id.* at 46.

conditions.[65] For courts to enforce browsewrap agreements, consumer must have reasonable notice of the terms to which they are agreeing.[66] Stated simply, the hyperlink to the terms must be conspicuous.[67]

Shrinkwrap differs from clickwrap and browsewrap agreements in that the consumer does not receive the terms until *after* she has paid for the product or service.[68] Further, the method for manifesting assent to shrinkwrap agreements typically occurs when the consumer opens the box for the product or downloads the software that she has already purchased.[69] Prior to 1996, courts regularly refused to enforce shrinkwrap agreements.[70] Judge Easterbrook's influential decision in *ProCD v. Zeidenberg*,[71] however, changed this practice.[72] Relying on the Uniform Commercial Code,[73] Judge Easterbrook concluded that consumers can assent to the terms of an agreement in any manner agreed upon by the parties, including acceptance and contract formation that involves both buying software and thereafter "using the software after having an opportunity to read the license at leisure."[74]

E. Arbitration Provisions in Consumer Contracts

The inability to understand a consumer contract's terms can often lead to consumers unknowingly agreeing to mandatory arbitration provisions.[75] Following a series of Supreme Court decisions enforcing arbitration clauses against consumers, the practice of businesses including such agreements in consumer contracts became increasingly pervasive.[76] These clauses generally consist of several hyperlinks that

[65] *Id.*

[66] *Id.* at 47.

[67] *See, e.g.*, Nicosia v. Amazon.com, Inc., 834 F.3d 220, 233 (2d Cir. 2016) ("Whether there was notice of the existence of additional contract terms presented on a webpage depends heavily on whether the design and content of that webpage rendered the existence of the terms reasonably conspicuous.").

[68] Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 467 (2006).

[69] *Id.* at 468.

[70] *Id.*

[71] 86 F.3d 1447, 1448–49 (7th Cir. 1996).

[72] *See id.*

[73] U.C.C. § 2-204(1) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

[74] *ProCD*, 86 F.3d at 1452.

[75] Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191, 1221 (2001).

[76] *See generally* AT&T Mobility, L.L.C. v. Conception, 563 U.S. 333 (2011) (finding that the arbitration clause was not unconscionable); Rent-A-Ctr. W., Inc. v. Jackson, 561 U.S. 63 (2010) (finding that the arbitration clause in the employment agreement was valid and enforceable).

lead to different terms, and ultimately provide that privately appointed arbitrators govern all legal disputes between the parties.[77]

In addition, arbitration clauses often include legal provisions that bar class action remedies, implement choice of law clauses, alter statutes of limitations, place limitations on discovery, and exclude certain damages remedies.[78] Moreover, businesses commonly include provisions in consumer contracts providing for an arbitrator, and not a court, to determine both the enforceability of the contract and the validity of the arbitration provision.[79] Hence, because arbitration agreements lack an appellate process, arbitrators may govern an entire legal proceeding between a business and a consumer.[80]

F. The Reporters' Safeguard: The Doctrine of Unconscionability

The long-standing common law doctrine of unconscionability serves as a safeguard for consumers in the Restatement.[81] In Section Five, the Reporters provide a two-pronged unconscionability test to "protect contracting parties against fundamentally unfair and unreasonably one-sided terms."[82] There the Reporters call for "heightened judicial scrutiny of the substance of standard terms . . . to ensure that the terms are fair, reasonable, and conform to [the] consumers' actual expectations" through the unconscionability doctrine.[83] Section Five attempts to prevent the enforcement of "substantively"[84] and "procedurally"[85] unconscionable contracts that are "fundamentally unfair"[86] or "unreasonably one-sided"[87] that either

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[77] Nehf, *supra* note 15, at 1706.

[78] *Id.* at 1709 n.79 (Griffin, J., dissenting) (quoting Mercedes Homes, Inc. v. Colon, 966 So. 2d 10, 20 (Fla. Dist. Ct. App. 2007)) ("[A]ll consumer transactions, no matter the size or type, now contain an arbitration clause. And with every reinforcing decision, these clauses become ever more brazenly loaded to the detriment of the consumer—who gets to be arbitrator; when, where, how much does it costs; what claims are excluded; what damages are excluded, what statutory remedies are excluded; what discovery is allowed; what notice provisions are requires; what shortened statutes of limitation apply; what prerequisites even to the right to arbitrate are thrown up—not to mention the fairness or accuracy of the decision itself.").

[79] *Id.* at 1707.

[80] *Id.* at 1707–08.

[81] RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS § 5 cmt. 1 (AM. LAW INST., Tentative Draft 2019).

[82] *Id.*

[83] Klass, *supra* note 13, at 53.

[84] RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS § 5(b)(1).

[85] *Id.* § 5(b)(2).

[86] *Id.* § 5(b)(1).

[87] *Id.*

limit the business's liability[88] and the consumer's remedies, or unfairly expand the consumer's liability or the business's remedies.[89] The crux of this doctrine relies on the substantive prong, which attempts to prevent binding consumers with egregiously unfair terms in standard-form contracts.[90]

Indeed, Section Five eliminates some disadvantages that consumers face in standard-form agreements, namely, egregiously one-sided contracts and unfair terms;[91] however, consumers face a number of disadvantages under Section Two's approach for the adoption of standard terms.

III. ANALYSIS

A. An Overview of Section Two

Section Two of the Restatement Draft provides two distinct subsections for determining the adoption of standard contract terms in a consumer contract.[92]

Subsection 2(a) of the Restatement governs the adoption of terms if such terms are reasonably available to the consumer prior to manifesting assent to the transaction.[93] Under this section, the Restatement adopts the standard contract term if—before manifesting assent—the consumer receives "(1) a reasonable notice of the standard contract term and the intent to include the term as part of the consumer contract, and (2) a reasonable opportunity to review the standard contract term."[94] In this scenario, the Reporters claim that the consumer contract adopts the "core deal terms"[95] along with the other standard and nonstandard contract terms reasonably available to the consumer before the consumer manifests assent.[96]

Subsection 2(b), on the other hand, governs the requirements for adopting a standard contract term when the term is available for the consumer to review *after* the consumer manifests assent.[97] In this section, the Restatement adopts the standard contract term if

[88] *Id.* § 5(c)(1).
[89] *Id.* § 5(c)(2).
[90] *Id.* § 5, reporters' notes at 89.
[91] *See id.* § 5, cmt. 1.
[92] *See id.* § 2.
[93] *See id.* § 2(a).
[94] *Id.*
[95] *Id.* § 2 cmt. 3 ("Such core deal terms often include price and payment methods, a shorthand description of the product, key delivery arrangements, and a few successfully communicated legal limitations . . . .").
[96] *Id.* § 2 cmt. 4.
[97] *Id.* § 2(b)(1).

> [b]efore manifesting assent to the transaction, the consumer receives a reasonable notice regarding the existence of the standard contract term intended to be provided later and to be part of the contract, informing the consumer about the opportunity to review and terminate the contract, and explaining that failure to terminate would result in the adoption of the standard contract term.[98]

Furthermore, the Restatement provides that after the consumer manifests assent, the consumer must receive both a reasonable opportunity to review the standard contract term[99] and to "terminate the transaction without unreasonable cost, loss of value, or personal burden, and does not exercise that power."[100] Finally, Subsection 2(c) provides that a consumer contract exists if the consumer manifests assent to the transaction, *even if* some of the standard contract terms are not adopted.[101] In these cases, however, "the terms of the contract are those adopted under subsections (a) and (b), and, if the consumer elects, the unadopted standard terms along with any terms supplied by law."[102]

In essence, the Reporters distinguish Subsection 2(a) and Subsection 2(b) based on whether the terms of the agreement are reasonably available for review *prior to* or *after* the consumer manifests assent.[103] In either scenario, the Reporters claim that a consumer contract is not formed unless the consumer manifests assent to the transaction.[104] The standard adopted for consumer assent is relatively low and serves as an advantage for businesses[105]—"[a] consumer may manifest assent to the transaction proposed by the business in any manner and by any medium reasonable in the circumstances."[106] In creating these separate, temporal-based adoption rules, the Reporters "seek to preserve the convenience of streamlined contracting while providing consumers [a] reasonable opportunity to scrutinize the standard contract terms and avoid unwanted transactions."[107]

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[98] *Id.*
[99] *Id.* § 2(b)(2).
[100] *Id.* § 2(b)(3).
[101] *Id.* § 2(c) (emphasis added).
[102] *Id.*
[103] *See id.* § 2 cmt. 2.
[104] *Id.*
[105] Klass, *supra* note 13, at 48.
[106] RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS § 2 cmt. 2.
[107] *Id.* § 2 cmt. 1.

1. The Adoption of Terms Under Subsection 2(a): An Illustration

As mentioned, Subsection 2(a) of the Restatement of Consumer Contracts adopts a standard contract term if a consumer manifests assent to the term after receiving reasonable notice of the term, the intent to include the term in the consumer contract, and a reasonable opportunity to review the term.[108] This part of the article examines and tests the general workability of the requirements for Subsection 2(a) through the Restatement's Illustration examples.

Illustration Two in the Restatement Draft represents a prototypical clickwrap[109] agreement between a business and consumer.[110] In this Illustration, the consumer wishes to purchase a product from the business's website.[111] The website asks the consumer to read the "Terms and Conditions" provided in a scroll-down text box and click "I Agree" for the consumer to effectively manifest assent.[112] According to the Illustration, if the consumer clicks the box, she has manifested assent to the transaction and adopts *all of the terms* in the scroll-down box as a part of the contract.[113] But if the consumer does not click the box, "the website does not allow the consumer to complete the purchase."[114]

Illustration Two seems like a relatively straight-forward clickwrap agreement. But the Restatement's language in Subsection 2(a) states that "[a] standard contract *term*" is adopted as part of a consumer contract if the consumer manifests assent after receiving notice and a reasonable opportunity to review the standard contract term.[115] So, why does Illustration Two claim that the consumer contract adopted *all of the terms* in the scroll-box when Section 2(a) only provides for the adoption of a standard contract *term*? Based on the Restatement's use of the word *term*, and not *terms* in Section 2(a), is it even possible for the consumer to adopt multiple or all the terms of the contract under Subsection 2(a)? This language is ambiguous. Subsection 1(a)(5)'s

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[108] *Id.* § 2(a).

[109] Even though this Illustration is demonstrated with a clickwrap agreement, the analysis would be the same for other forms of consumer contracts with respect to the adoption of standard terms.

[110] RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS § 8, reporters' notes at 118 (Illustration 2 is based on Bob Robertson, Inc. v. Webster, 609 S.W.2d 683, 685–86 (Tex. Ct. App. 1984)).

[111] *Id.* § 2, illus. 2.

[112] *Id.*

[113] *Id.* (emphasis added).

[114] *Id.*

[115] *Id.* (emphasis added).

definition of a "standard contract term"[116] does not resolve this ambiguity, nor do the Reporters provide an explanation for their choice of the word "term" instead of "terms" in the Restatement's plain language.

Although this detail may seem minute, the plain language of the Restatement leaves consumers (and courts) merely guessing as to which term, or terms, a consumer adopts upon manifestation of assent. Accordingly, to resolve this ambiguity the Reporters must clarify whether the consumer, upon manifestation of assent, adopts a "term"[117] as proposed in the black letter language of Section Two or all of the terms[118] as suggested in the Illustration.

2. The Restatement's Faulty Notice Requirement Under Subsection 2(a)(1)

As with any other common-law contract, Section Two of the Restatement requires that the consumer receive notice of the standard contract term in order to include the term as a part of the contract.[119] Put simply, under either subsection, consumer contracts do not adopt any standard terms if the consumer does not receive reasonable notice. Section Two, however, slightly varies the "notice" requirement between Subsections 2(a) and 2(b). Under Subsection 2(a)(1), the consumer must receive "a reasonable notice *of the standard contract term* and of the intent to include the term as a part of the consumer contract."[120] Subsection 2(b), on the other hand, describes a slightly different, slightly tighter requirement for giving reasonable notice that better represents the existing state of the law. In short, Subsection 2(b) requires that the consumer receive reasonable notice *to the existence of the term*, not the actual term itself or its contents.[121]

Despite the Reporters' aim in Section Two to ensure consumers receive reasonable notice, their efforts fall short. The plain language of Subsection 2(a)(1) is clear, but unhelpfully abstract. The Reporters fail to define "reasonable notice" anywhere in the Restatement.[122] Instead, they reference several cases in the *Reporters' Notes* in which courts made fact-specific inquiries to determine whether the consumer had

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[116] *Id.* § 1(a)(5) ("A *term*, relating to a consumer contract, that has been drafted prior to the transaction for use in multiple transactions between business and consumer parties.") (emphasis added).

[117] *Id.* § 2.

[118] *Id.* § 2, illus. 2.

[119] *Id.* § 2.

[120] *Id.* § 2(a)(1) (emphasis added).

[121] *Id.* § 2(b)(1) (emphasis added).

[122] *See generally id.*

"reasonable notice."[123] Moreover, the Reporters' best explanation of reasonable notice is that "[i]n some contexts, market norms, or course of dealing, may provide sufficient notice to the consumer that additional standard contract terms are intended to apply to the transaction."[124]

The Reporters fail to address the bottom line, which is the efficacy of giving consumers reasonable notice of the standard contract term. Fundamentally, they fail to answer if it actually matters that consumers are not sufficiently alerted as to the substance of the standard contract terms to "scrutinize"[125] the terms. The Reporters note that "credible empirical evidence, as well as common sense and experience, suggest that consumers rarely read standard contract standard terms no matter how they are disclosed."[126] In fact, one study showed that "only one or two in 1,000 shoppers access a product's EULA [end-user license agreement] for at least 112 seconds."[127] Furthermore, this data demonstrates only that the consumer *opened*, not *read*, the product's EULA.[128] Finally, even if consumers actually read the standard contract terms, they are unlikely to understand the terms and their legal consequences because of the agreement's technical and complex language.[129]

A rule seems somewhat empty—maybe pointless—that provides for giving consumers reasonable notice *of the terms* of an agreement when consumers never open or read the hyperlink to the terms. Surely the Reporters do not believe that notice of the terms is meaningfully given in consumer contracts considering their acknowledgement that consumers rarely read the terms.[130] In addition, the second clause of Subsection 2(a)(1) is similarly suspect in also requiring that the consumer has notice of the "intent to include the term as part of the consumer contract."[131] Again, how can a consumer have notice of the "intent to include the term"[132] when the consumer is actually oblivious to the term itself?

Essentially, Subsection 2(a)'s language requiring reasonable notice "to the term" does not reflect the existing state of the law because courts simply do not care if the consumer has notice of the actual term.[133]

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[123] *Id.* § 2, reporters' notes at 35–52.
[124] *Id.* § 2, cmt. 9.
[125] *Id.* § 2, cmt. 2.
[126] *Id.* § 2, reporters' notes at 35.
[127] Yannis Bakos et al., *supra* note 19, at 3.
[128] *See id.*
[129] Klass, *supra* note 13, at 52.
[130] *See, e.g.*, RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS § 2, reporters' notes at 35; Yannis Bakos et al., *supra* note 19, at 1.
[131] RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS § 2(a)(1).
[132] *Id.*
[133] *See* Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 397 (E.D.N.Y. 2015)

Instead, courts regularly find notice for browsewrap, clickwrap, and shrinkwrap agreements—despite whether the consumer reads, views, or understands any of the actual terms—so long as the hyperlink to the terms is conspicuous.[134] Thus, for Subsection 2(a)'s requirement of reasonable notice to better represent the current state of the law, the language for notice must change.

B. Requiring Constructive Notice in Consumer Contracts

One improvement for Section Two of the Restatement's notice requirement is simple: change the language of Subsection 2(a)'s reasonable notice requirement to match the language of Subsection 2(b). In other words, Subsection 2(a) should adopt the language of Subsection 2(b) requiring consumers to have reasonable notice *to the existence* of the standard contract terms. The effect would be to require, in both circumstances, that consumers receive constructive notice of the terms of a standard form contract.

As mentioned previously, Restatements seek to provide clear formulations of common law and reflect the existing status of the law as it might be stated in court.[135] Although the proposal above does not necessarily improve the consumer's position to acknowledge and understand the terms, the proposed constructive notice requirement serves as a more accurate representation of the current state of the law.

In determining reasonable notice under Subsection 2(a), courts do not consider if the consumer opens or reads the contract's terms, which are often presented in detailed and extensive arbitration clauses.[136] Nor do courts care if the consumer reads or understands the terms of the contract.[137] Instead, courts are more concerned with the

(explaining that courts generally find clickwrap agreements enforceable because of the active role the consumer plays in manifesting assent by clicking the box); Forrest v. Verizon Commc'ns, Inc., 805 A.2d 1007, 1010 (D.C. 2002) (finding a binding contract because the consumer clicked "Accept" before proceeding with the transaction); Moore v. Microsoft Corp., 741 N.Y.S.2d 91, 92 (N.Y. App. Div. 2002) (enforcing a contract because the consumer manifested assent by clicking the box before downloading the software).

[134] *See, e.g.*, Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1178–89 (9th Cir. 2014) (explaining that enforceability of a browsewrap consumer contract turns on the conspicuousness of the hyperlink).

[135] *See* discussion *supra* Section II(A).

[136] *See, e.g.*, *Nguyen*, 763 F.3d at 1179 ("[F]ailure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract . . . .").

[137] *Id.* at 1177 ("Whether a user has inquiry notice of a browsewrap agreement . . . depends on the design and content of the website and the agreement's webpage."); Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 23 (2d Cir. 2002) (refusing to enforce terms of use that were not easily visible); *see also* In re Zappos.com Inc.,

conspicuousness and accessibility for the link to the terms in consumer contracts.[138] In other words, courts are likely to find notice if consumers have reasonable notice *to the existence* of the standard contract terms.[139]

With the adoption of this proposed language, courts would not have to falsify the notion that a consumer has "reasonable notice" of the standard contract term when the consumer fails to read or understand any of the agreement. Rather, despite whether the consumer reads or understands the terms, the constructive notice requirement would allow courts to find reasonable notice so long as the consumer is aware of the *existence* of the consumer contract's terms.[140] In effect, this existence standard would allow courts to enforce unread and uninformed consumer contracts. With the proposed language, however, courts would no longer have to stretch the truth by finding notice "reasonable" when the consumer is oblivious and wholly without the opportunity to "scrutinize"[141] the terms. Accordingly, the proposed constructive notice requirement more accurately reflects the current approach that courts take in determining notice in consumer contracts.

1. Constructive Notice in Consumer Contracts: An Illustration

Imagine that a consumer enters a business's website to purchase a product. When the consumer reaches the checkout page, she enters her credit card and personal information and is then asked to click "I AGREE" to complete the transaction. Directly above the "I AGREE" button, the business places a stand-alone link to the terms and conditions in large, bold font, notifying the consumer that the transaction is subject

Customer Data Sec. Breach Litig., 893 F.Supp. 2d 1058, 1064 (D. Nev. 2012) (refusing to enforce arbitration clause in browsewrap agreement where terms were not easily visible).

[138] *See* Nicosia v. Amazon.com, Inc., 834 F. 3d 220, 232 (2d Cir. 2016) ("[A]n internet user need not actually read the terms and conditions or click on the hyperlink that makes them available as long as she has notice of their existence."); *Nguyen*, 763 F.3d at 1177 (explaining that notice turns on whether the hyperlink to the terms is conspicuous); Schnabel v. Trilegiant Corp., 697 F.3d 110, 121 (2d Cir. 2012); *Berkson*, 97 F.Supp.3d at 382 ("Reasonably conspicuous notice of the existence of contract terms . . . [is] essential if electronic bargaining is to have integrity and credibility.")

[139] *See, e.g.*, *Nicosia*, 834 F.3d at 233 ("In determining the validly or browsewrap agreements, courts often consider whether a website user had actual or constructive notice of the conditions."); *Nguyen*, 763 F.3d at 1179–80 (refusing to enforce a consumer contract because the consumer did not have constructive notice of the terms and conditions).

[140] *Nguyen*, 763 F.3d at 1173.

[141] RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS, reporters' introduction at 2 (AM. LAW. INST. Tentative Draft 2019).

to the terms and conditions in the link above. In this scenario, the Reporters claim that if the "I AGREE" box and conspicuous hyperlink are visible when the consumer clicks the "I AGREE" button, the consumer has reasonable notice and contract adopts the terms.[142] By contrast, the Reporters claim that the consumer does not have reasonable notice of the terms if the business places the Terms and Conditions in at the bottom of all webpages (including the checkout page), and the link is in a small font and unviewable to the consumer when she clicks "I AGREE."[143]

In either scenario, however, the Restatement's Illustration fails to mention whether the consumer actually opened and viewed the terms. Operating under the assumption that the consumer failed to read or view the terms,[144] the issue arises of the whether the consumer actually had reasonable notice "of the standard contract *terms*."[145] As noted earlier, the Restatement draft's finding of enforceability[146] in the first contract scenario is irrational as the consumer cannot have notice of a standard contract term when the consumer never viewed or read the term. Regardless of whether the consumer opened or read the terms in the second scenario, the business provided the consumer with notice to the existence of the standard contract terms[147] simply through the conspicuousness of the link, which is displayed in large, bold, and contradicting font.[148] Therefore, courts could enforce this agreement without having to misrepresent the notion that the consumer had reasonable notice of the standard contract term. For these reasons, the Restatement should adopt the proposed requirement of constructive notice to the existence of the standard contract terms.

2. The Counterargument to Adopting an Actual Notice Requirement

Although the constructive notice requirement better represents the current state of the law, it does not harmonize the asymmetry of

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[142] *Id.*

[143] *Id.*

[144] An overwhelming majority of consumers fail to open or read terms and conditions in consumer contracts. *See* Hoffman, *supra* note 8.

[145] RESTATEMENT OF THE LAW CONSUMER CONTRACTS § 2 (emphasis added).

[146] *See id.* § 2, illus. 15.

[147] *See id.*

[148] *See id.* ("If . . . there is a prominent, stand-alone notice in a central portion of the checkout page, in contrasting, large font, not blended with other notices, stating that the transaction is subject to Terms and Conditions that are noticeably linked for the consumer to access, all visible when the consumer clicks 'I agree to purchase', then the terms are adopted as a part of the consumer contract under subsection [2](a).").

information between businesses and consumers in standard-form agreements. As some courts require either actual notice or constructive notice,[149] some may suggest that the Restatement Draft require only *actual* notice to the terms in order to balance this asymmetry.[150] This argument, however, fails because requiring actual notice would burden both businesses and consumers.[151]

Regarding consumers, actual notice would phase out the effortless and swift practice of conducting online transactions by obligating consumers to open and view all of the terms. Many websites contain several layers of individual hyperlinks for each particular set of the business's terms and conditions.[152] Thus, requiring consumers to open each set of terms when entering transactions would be tedious and time consuming, and ultimately would fail to meet the Reporters' aim to maintain the simplicity of consumer contracting.[153] As for business, such a requirement would demand costly, sophisticated software to meet this actual notice requirement.[154] Moreover, requiring actual notice would not be a clear representation of the existing state of the law.[155]

IV. CONCLUSION

The Reporters' endeavor in composing the Tentative Draft for the Restatement of Consumer Contracts is remarkable. In drafting this project, the Reporters analyzed and extracted the UCC and common law principles that courts use in adjudicating consumer contract disputes[156] and formulated them into a predominantly accurate Restatement. Despite the Reporters' efforts, however, Section Two of the Restatement is imperfect. In particular, the Restatement provisions for

[149] *See, e.g.* Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1176 (9th Cir. 2014); Van Tassell v. United Mktg. Grp., LLC, 795 F. Supp. 2d 770, 790 (N.D. Ill. 2011).

[150] RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS, reporters' introduction at 1.

[151] *See id.* (explaining consumers' disadvantages in consumer contracts because of the asymmetry of information). *See generally* Budnitz, *supra* note 1, at 237–40 (discussing the presence of technology in the consumer marketplace and the benefits that come from the simplicity of conducting online transactions).

[152] *See, e.g.*, TICKETMASTER, *supra* note 3.

[153] *See* RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS § 2 cmt. 1.

[154] *See* Guy A. Rub, *Contracting Around Copyright: The Uneasy Case for Unbundling Rights in Creative Works*, 78 U. CHI. L. REV. 257, 266 (2011) (discussing the unreliability and costliness of clickwrap software).

[155] Nicosia v. Amazon.com, Inc., 834 F.3d 220, 233 (2d Cir. 2016).

[156] RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS, reporters' introduction at 5.

adoption of standard contract terms and reasonable notice fail to align with the purpose of the Restatement.[157]

Foremost, the Reporters' failure to specify which term, or terms, a consumer adopts upon manifesting assent will likely trouble courts when adjudicating consumer contract disputes. The language of the Restatement Draft provides that a consumer adopts the standard contract term[158] upon manifesting assent to the transaction, but fails to account for which term the consumer adopts, and whether the consumer can adopt multiple terms upon the manifestation of assent. Although this critique seems minimal, courts already struggle with adjudicating consumer contracts,[159] and the failure to implement clear language for the adoption of standard terms will further hinder courts' ability to resolve these disputes.

Furthermore, the Restatement's requirement for "reasonable notice of the standard contract term"[160] is not a clear representation of the current state of consumer contract law. The Reporters claim that one purpose of Section Two is to provide the consumer with a reasonable opportunity to scrutinize the contract's terms.[161] As mentioned earlier, the Reports are irrational to claim that a consumer has reasonable notice to something that they never read.[162] Even if the consumer did read the terms, it is not likely to understand the legal implications of the terms because businesses commonly draft these terms in lengthy and technical language.[163]

Thus, to better reflect the present state of consumer contract law, the Restatement should implement a constructive notice requirement, providing that businesses give consumers notice *to the existence of* the standard contract terms. A constructive notice requirement is preferable because courts are willing to enforce these agreements, regardless of whether the consumer reads the terms, so long as the hyperlink to the terms is conspicuous.[164] Therefore, even if this requirement fails to equalize the asymmetry of information between businesses and consumers in standard-form agreements, the proposed language serves as a better reflection of the current state of the law.

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[157] THE AMERICAN LAW INSTITUTE, *supra* note 21, at 1.

[158] RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS § 2.

[159] *See, e.g.*, *id.* at 6.

[160] *Id.* § 2.

[161] *Id.* § 2, cmt. 1.

[162] *See* discussion *supra* Section III.

[163] *See* Klass, *supra* note 13, at 52; Schmitz, *supra* note 17.

[164] *See* Nicosia v. Amazon.com, Inc., 834 F.3d 220, 233 (2d Cir. 2016) ("[W]hen terms are linked in obscure sections of a webpage that users are unlikely to see, courts will refuse to find constructive notice."); Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 30 (2d Cir. 2002) ("Clarity and conspicuousness of arbitration terms are important in securing informed assent.").