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Via Email: RLCCcomments@ali.org.

Richard L. Revesz, Director
American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104-3099

Re: Tentative Draft, Restatement of the Law, Consumer Contracts

Dear Director Revesz:

I write to express deep concerns about the American Law Institute's Tentative Draft Restatement of the Law, Consumer Contracts. I write as former Director of the U.S. Consumer Financial Protection Bureau and former Ohio Attorney General, two positions where I was tasked with protecting consumers. In my view, the Tentative Draft would endorse principles of law that would facilitate malefactors in mistreating and harming individual consumers.

The common law, and especially the law of contracts, is often the first line of consumer protection. The ability to decide whether to contract and on what terms is critical to ensure that consumers get what they bargain for and are not bound to terms that they neither want nor reasonably anticipate. The ability of consumers to protect themselves as they contract is critical because of the limited resources of public enforcement agencies and the economic and legal limitations on consumers' ability to obtain remedies for themselves.

Both the CFPB and the FTC can prohibit and prosecute unfair and deceptive acts and practices (UDAP), and every state has a UDAP statute. Yet federal and state governments have limited enforcement resources and can police only a small fraction of the billions of contracts of adhesion that consumers execute each year. Federal UDAP statutes have no private right of action, and many state UDAP statutes lack private rights of action or are limited in the types of contracts covered or in the remedies available. Thus, contract law often provides the only line of defense for consumers against overreaching, unfair, and deceptive business practices.

At the same time, consumers' ability to vindicate their own rights is severely limited. Most consumer contracts involve sums that are too small to make individual litigation economically viable. Additionally, consumers frequently are barred from litigating contract, tort, and statutory claims as part of a class action. Under the Supreme Court's broad construction of the Federal Arbitration Act, consumers' only defense against being bound by arbitration clauses is generally applicable contract law. Thus, if a consumer is bound by whatever terms are buried in fine print or hidden behind a hypertext link, it is game, set, and match for the consumer, except in the rare cases when a regulator may be able to intervene.

The Tentative Draft Restatement is deeply troubling because it undermines contract as a meaningful protection for consumers. It would bind consumers to all of a business's "standard terms"—that is, to all the terms of a contract of adhesion if the consumer: (1) had notice of and opportunity to review the terms of the contract and (2) indicated assent to transact, though not necessarily assent to the particular terms. Under the Tentative Draft's rule, a consumer could readily be bound to terms the consumer does not comprehend and to which the consumer would never knowingly consent, such as unilateral modifications; class action waivers; commitment to resolve disputes through binding mandatory arbitration; and broad privacy waivers allowing tracking of consumers' internet browsing, the use of facial recognition technology, and the further sale or distribution of the resulting personal information.

The Tentative Draft's approach is inconsistent with the fundamental basis of contract law, namely that contracts are enforced by law because they are presumed to result in mutual gains from trade and thereby enhance social welfare. Such mutual gains can only be assumed to exist if the parties knowingly agree to the terms of the deal. Without such knowing assent, consumers could readily find themselves in bargains that do not in fact express their preferences. Traditional contract law has recognized such situations as deeply problematic, even if some courts have been willing to allow the convenience of business practices to trump both fairness and the economic concept of Pareto optimality on the heroic assumption that all efficiency gains by businesses will somehow redound to the benefit of consumers. Accordingly, section 211(3) of the Restatement (Second) of Contracts provides that in standardized agreements, "Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."

The Tentative Draft recognizes only two exceptions to when the terms of a contract of adhesion may be avoided: when there is deception in the formation of the contract or when the terms are unconscionable. Missing entirely from this picture is an important limitation on contracts of adhesion according to many state courts: consumers' reasonable expectations. Many state courts hold that "Contracts of adhesion will not be enforced unless they are conscionable and within the reasonable expectations of the parties." Broemmer v. Abortion Servs. of Phoenix, Ltd., 173 Ariz. 148, 153, 840 P.2d 1013, 1018 (1992). Similarly, comments (e) and (f) to the Restatement (Second) of Contracts explain that "courts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it" and that "[a]lthough customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation." Thus, even if the terms of a contract of adhesion are not so extreme as to be "unconscionable," they may still not be enforced if they fall outside the reasonable expectations of the consumer. This limitation is critical to ensure that contracts do not impose terms that the consumer neither wants nor reasonably anticipates. Yet it is entirely absent from the Tentative Draft. This is a serious flaw in the Tentative Draft that needs to be corrected.

This protection of consumers' reasonable expectations is deeply embedded in federal and state "unfairness" jurisprudence. "Unfair" is defined for the Consumer Financial Protection Act and by Federal Trade Commission Act as a practice or act that results in a substantial injury to

consumers that is not reasonably avoidable by consumers or outweighed by offsetting benefits to consumers or competition. Whether a harm is "reasonably avoidable" depends in no small part on consumers' reasonable expectations; a consumer who does not anticipate a harm cannot be expected to take steps to avoid it.

Thus, under my Directorship, the CFPB and the North Carolina and Virginia Attorneys General brought an enforcement action against Freedom Stores, Inc., which sold goods and services on credit primarily to military families at locations across the United States. No matter where the sale took place, all the contracts had a non-negotiable venue-selection clause that designated the state or federal courts of Virginia. The CFPB and the states alleged that this practice was "unfair" because many consumers did not comprehend the harmful effects of the venue-selection clause designating a distant forum unrelated to the consumer and could not, in any case, negotiate over it, yet it inevitably resulted in default judgments against many of them.

The Tentative Draft claims that it "reflects the principles of fairness and antideception guiding consumer-protection statutes and regulations" and "promotes a greater conceptual unity" across the "common law of contracts and statutory and regulatory consumer-protection law," yet it does not live up to these claims. Instead, by failing to limit the enforceability of contracts of adhesion to terms that consumers either reasonably expect, or to which they have specifically agreed, it is simply inconsistent with longstanding federal and state "unfairness" jurisprudence. In fact, the Tentative Draft would produce a distortion of the common law that treats consumers *worse than* businesses. Such a situation is contrary to established legal principles that always treat consumers *the same as* or *better than* businesses because of concerns about their lack of sophistication, unequal information, and unequal bargaining power. A revised Restatement that treats consumers worse than businesses does not promote any conceptual unity between the common law of contracts and any statutory or regulatory body of consumer protection law.

Finally, on the broadest level, the approach taken by the Tentative Draft is degrading to consumers. The ability to contract is a fundamental part of human dignity. It is a way for people to express their will about what they subjectively believe will improve their welfare. Nobody can effectively substitute for them in making those judgments. When consumers are bound to terms that they neither want nor reasonably anticipate, however, they are stripped of their ability to exercise their free will and thus of their individual dignity. Adding injury to insult, the terms to which consumers are supposedly bound in contracts of adhesion often deprive them of their privacy and of their right to a trial in a court of law. No consumer should be degraded this way.

For the reasons stated, therefore, I respectfully urge the ALI's membership not to adopt the Tentative Draft in its current form.

Sincerely,

Richard Cordray, Esq.