Properly Restating the Law of Consumer Contracting

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- Gregory Klass, Empiricism and Privacy Policies in the Restatement of Consumer Contract Law, 36 **Yale J. on Reg**. 45 (2019).
- Adam Levitin et al., *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 **Yale J. on Reg.** 447 (2019).

In May 2019 the ALI is scheduled to vote on the 5th Draft *Restatement of the Law of Consumer Contracts* ("5th Draft *Restatement*"), a project that seeks to help courts balance the integrity of contract doctrine and commercial reality. Two recent empirical studies in the *Yale Journal on Regulation* have convinced me that the ALI Council should click "pause" on its adoption because the 5th Draft seems more like a normative statement of what the law should be than a restatement of the common law of contracts in this area.

The two, related articles are Gregory Klass, Empiricism and Privacy Policies in the Restatement of Consumer Contract Law, 36 **Yale J. on Reg.** 45 (2019) ("Klass article), and Adam Levitin et al., *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 **Yale J. on Reg.** 447 (2019) ("*Faulty Foundation*"). This Jotwell essay focuses on the Levitin article, but readers interested in when a privacy policy is a contract should check out the Klass article.

The truly committed would benefit from reading letters submitted to the ALI that express concern about the Draft Restatement from Consumers Union, state Attorneys General, Sen. Elizabeth Warren, and a variety of other organizations.

The Reporters say in the Introduction to the September, 2018 Draft "[i]t is both irrational and infeasible for most consumers to keep up with the increasingly complex terms provided by businesses in the multitude of transactions, large and small, entered into daily." To resolve this tension between contract doctrine and commercial realities, the *Restatement* proposes what the Reporters have called a "Llewellynian Grand Bargain" that would jettison the common law requirement of mutual assent in consumer contracts in return for beefing up defenses to enforcement.[1]

The Klass and Levitin articles seek to replicate the Reporters' interpretation of the caselaw by reviewing the same dataset of cases. But the exercise did not validate the Reporters' findings. Instead both articles conclude that the data set is largely irrelevant to the rules proposed by the 5th Draft *Restatement*. While between a third and one-half of the cases do take the view of law propounded by the Reporters, the trend is not nearly as strong nor as uniform as the Reporters represent it to be.

Faulty Foundation is an offshoot of the drafting process for the Draft *Restatement*. Its authors are eight Advisors and members of its Consultative Group: Adam Levitin, Nancy Kim, Christina Kunz, Peter Linzer, Patricia McCoy, Juliet Moringiello, Elizabeth Renuart, and Lauren Willis. After becoming aware of Klass's attempt to validate the Reporter's interpretation of cases that address whether privacy policies are binding contracts, they sought to confirm the match between the Grand Bargain and case law in the two datasets regarding contract modification issues such as whether the right to unilateral change terms defeats contract formation and cases on clickwrap contract formation.

That review failed to replicate the Draft *Restatement's* claims regarding these two datasets. First, the review showed that between half and two-thirds of the cases are not relevant (i.e., were business-to-business cases or vacated decisions) or based on statutory rather than common law principles (i.e., the Federal Arbitration Act or state statutes allowing credit card agreements to contain unilateral modification clauses). Second, the remaining cases revealed a lower rate of courts disregarding contract doctrine re: modification and enforcement in consumer contracting than the Draft *Restatement* claims. Levitin et al see these gaps between the Reporters' claims and the cases holdings as "clear errors on a massive scale." These errors "raise[] questions about the accuracy and soundness of the entire project and [have] the potential to undermine the legitimacy of the ALI Restatement drafting process." (P. 451.)

Here's the big take-away from the Klass & Levitin articles: the 5th Draft *Restatement* is grounded on a faulty empirical foundation. The ALI's Annual Meeting in May 2019 should set aside time for thorough discussion of these two studies. ALI Members alarmed by the Levitin and Klass articles could move to change the *Restatement* to a Principles project that would better reflect its "Grand Bargain." In the alternative, the ALI Council could direct the Reporters to revise the 5th Draft *Restatement* and update the data set to include cases since 2014. Third and finally, the ALI could put the project on hold until the law in the area is sufficiently clear to restate. An "as is" adoption of the 5th Draft *Restatement* would endanger the reputation of the ALI and the larger Restatement drafting process by publishing a "Restatement" that does not actually restate the law.

Faulty Foundations Tested *Restatement* Claims by Replicating Reporter Study

The Reporters justify their Grand Bargain of disregarding contract formation requirements in consumer contracting by asserting that the courts already take this position. They claim that a data set of 353 cases support that conclusion. Levitin and his co-authors conducted a blind review of the two largest datasets: 88 modification cases, and 98 clickwrap cases. (P. 455) Although the authors are skeptical that dicta "restate" the law, they, like the Reporters, treated dicta as well as holdings as relevant. They built in verification for their case interpretation by having between two and three of them code each modification case, and between one and three of the authors code the clickwrap cases. (P. 455.)

Because the *Faulty Foundation* article replicates the Reporters' review, their data set excluded cases decided after 2015. More recent cases suggest a definite minority position in which courts follow conventional contract formation requirements to consumer contracting. (A list of some recent cases appears at the end of this Jotwell entry.)

Faulty Foundations separately reports on each data set. Here's the breakdown of errors in the modification dataset:

Problems with the Modification Data Set

Levitin et al identify two main reasons that the modification dataset does not justify the 5th Draft's approach to consumer contracting: (1) more than half of the cases are simply irrelevant to the common law doctrine re: modification; and (2) the remaining cases are either atypical or not precedential. Together these revelations greatly weaken the Reporters' claim that their Grand Bargain restates the law of consumer contracting.

First, irrelevance. The authors of *Faulty Foundations* found that more than half—61%—of the 88 modification cases are "irrelevant" to the issue of when a consumer has adopted modified standard terms in a contract. The biggest set of inapplicable cases—26 cases—were decided on statutory rather

than common law analysis, as when state statutes permit unilateral modification terms in a credit card agreement. The *Faulty Foundations* authors also identified other factors that made 28 other cases in the modification data set inappropriate for designating trends in common law doctrine re: modification of standard-form contracts between businesses and consumers. They found that the irrelevant cases:

- focus on the substance of the contract clause instead of modification;
- concern multiple contracts instead of modification;
- involve business-to-business disputes instead of consumer contracts;
- follow statutory cases on stare decisis grounds;
- address only retroactive modification;
- address illusory promise doctrine instead of modification;
- refuse to evaluate the contract as modified because it wasn't entered into the record;
- involve a consumer's effort to enforce a modified contract, instead of the business;
- appear twice in the data set (a case counted at the intermediate appellate and supreme court level);
- reserve the modification question for determination in arbitration; or
- are no longer good law (i.e., vacated).

In light of the U.S. Supreme Court's recent cases that impose a heavy thumb on the scale in favor of enforcing arbitration clauses—see e.g., *AT & T Mobility v. Concepcion*, 563 U.S. 333 (2011)—the dataset's reliance on cases regarding arbitration clauses is particularly likely to skew the data in favor of enforcing a variety of business-drafted terms. Another error in the modification dataset is that Levitin et al report finding cases that the Reporters should have included in the dataset, but did not.

If Levitin et al.'s case coding is correct, their analysis leaves a much smaller data set of 34 modification cases. According to *Faulty Foundations*, these remaining cases also make a much weaker case for the 5th Draft *Restatement's* approach than the Reporters claim. The vast majority of these cases—82%—involve contracts with express clauses allowing unilateral modification by one party. The cases don't tell us much about the enforceability of unilateral modification clause at common law because most of them are credit card or deposit account contracts decided under the state statutes that expressly allow courts to enforce unilateral modification clauses. In the many cases—88%—that involved attempts to compel arbitration, federal statutory law also constrains the ability of those cases to reflect the common law of consumer contracting. Finally, the *Faulty Foundation* authors found that many of the seemingly relevant cases were either unpublished, federal courts interpreting state law, or lower state courts. Startlingly, according to Levitin et al, "only ten of the relevant cases are state court decisions, with only a single decision from a state supreme court." (P. 460.)

Problems with the Clickwrap Data Set

The *Faulty Foundation* authors found similar defects in the 98-case clickwrap data set. Nearly half—46%—of the cases were irrelevant, the remaining cases did not strongly support the Reporter's version of consumer contracting law, and nearly half lacked precedential value because they apply the law of other jurisdictions.

Because of overlap between the defects in the modification and clickwrap data set, I'll focus on what, according to Levitin et al, make so much of the clickwrap data set irrelevant, and the most glaring defects with the remaining cases.

To my mind, three defects in this data set were most noteworthy:

- 16 of the cases were business to business cases, which may not reflect the law of consumer

contracting;
- 11 cases did not address contract formation; and
- 2 did not involve a contract of any sort.

If Levitin et al are right to exclude those cases, the *Restatement* would rest on 53 remaining clickwrap cases. The authors' review found a distinct minority position—11% of the cases—in which courts refused to enforce clickwrap terms. Yet the Draft *Restatement* Reporters found only a 2% rate of non-enforcement. Levitin et al contend that overlooking this minority but important position prevents the Draft *Resatement* from accurately restating the law.

The defects in the data sets overlap. For example, Levitin et al. criticize the clickwrap contract cases as not-precedential because they apply the law of other jurisdictions. Choice of law clauses that amplify the significance of state statutes enforcing unilateral modification clauses drown out common law patterns in other jurisdictions. Likewise, the fact that 40% of the remaining clickwrap cases involved efforts to compel arbitration shows the long shadow that the Federal Arbitration Act casts across both the modification and clickwrap data sets.

The painstaking replication project undertaken by the authors of *Faulty Foundations* is all the more credible because of the article's restraint from any ad hominem attacks or speculation as to why the data set did not reflect the Draft *Restatement's* conclusions. The article inspired me to do a quick and dirty investigation of what an updated and cleaned up data set might tell us about the state of consumer contracting.

As of spring 2019, a distinct minority of jurisdictions show a reluctance to enforce standard form contracts that do not meet contract formation requirements, even in cases involving arbitration clauses. Interested readers could check out the *Massachusetts and First Circuit cases of Nat'l Federation of the Blind v. Container Store*, 904 F.3d 70 (1st Cir. 2018); *Cullinane v. Uber Tech*., 893 F.3d 53 (1st Cir. 2018); and *Kauders v. Uber Tech*., 2019 WL 510568 (Mass. Super. Ct. 2019). The California cases include *Norcia v. Samsung Telecom. Am.,* 845 F.3d 1279 (9th Cir. 2017); *Metter v. Uber Tech*., 2017 WL 1374579 (N.D. Cal. 2017); *Velasquez-Reyes v. Samsung Elec. Am.,* 2017 WL 4082419 (C.D. Cal. 2017); and *McKee v. Audible*, 2018 WL 2422582 (C.D. Cal. 2018). These new developments should be reflected in any *Restatement of the Law of Consumer Contracting*.

Conclusion

The articles by Klass & Levitin et al provide readers with a few takeaways. First, the ALI membership should know about these attempts to replicate the case law interpretation underlying the 5th Draft of the *Restatement* of Consumer Contracts. ALI members who are troubled by the apparent mismatch between the law and the 5th Draft *Restatement* could speak up at the May 2019 Annual Meeting in a number of ways.

Motions that the ALI could and perhaps should debate and vote on include the following:

- A motion to change the *Restatement* to a Principles project;
- A motion to delay the *Restatement* project to reflect closer look at the existing data set and incorporate newly developing law; or
- A motion to put *the Restatement of Consumer Contracts* on hold and revisit it when trend of common law more clear.

If the ALI instead opts to adopt the Draft *Restatement* in its current form, contract law will suffer, as will the integrity of the Restatement drafting process as a whole.

The most pressing issue in contract doctrine today may well be what to do about the gap between the ideal of mutual assent required for contract formation and the reality that the vast majority of us click "yes" to agreements every day without reading a single clause. The long and tumultuous history of the ALI's attempt to update UCC Article 2 to reflect on-line communications shows how difficult it is to do this type of updating. Both the Klauss article & *Faulty Foundations* should help place this project on accurate foundations.

1. Reporter's Memo to ALI Council, Sept. 4, 2018 (acknowledging that the Reporters used the phrase "Grand Bargain" in earlier Drafts of the Reporters' Introduction to describe what they call "the Llewellynian paradigm of relatively permissive procedures for adopting standard contract terms (what Llewellyn called "blanket assent") along with the back-end scrutiny of these terms so as to prevent abuse and protect the reasonable expectations of consumers.")

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