# Essay

# The Faulty Foundation of the Draft Restatement of Consumer Contracts

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*Professor Gregory Klass's replication study of the Draft Restatement of the Law of Consumer Contract's empirical analysis of privacy policies found troubling and pervasive problems with the Reporters' coding of cases. We extended Professor Klass's study with a replication of the coding of the two largest datasets supporting the Draft Restatement, those on the enforceability of unilateral contract modifications and those on the enforceability of clickwrap assent. For the replication, we reviewed 186 cases blind to the Reporters' coding.*

*We found that nearly two-thirds of the cases in the unilateral modification dataset were irrelevant to the hypothesis tested by the Reporters. The irrelevant cases included business-to-business cases, vacated and reversed decisions, a duplicate decision, and cases determined on statutory grounds specific to credit card agreements. The remaining relevant cases were atypical, almost entirely*

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*involving enforcement of arbitration clauses, express contractual clauses permitting unilateral modifications, or credit card agreements.*

*Likewise, we found that nearly half of the cases in the clickwrap assent dataset were irrelevant to the Reporters' tested hypothesis. The irrelevant cases included business-to-business cases, another duplicate decision, and cases with neither contracts nor clickwrap agreements. The overwhelming majority of the relevant cases involved the sui generis contexts of enforcement of arbitration clauses or forum selection clauses. Among such cases, we also found a materially higher rate of non-enforcement of clickwrap agreements than the Reporters found.*

*Based on our attempt to replicate the Reporters' coding, we lack confidence that the Draft Restatement correctly and accurately "restates" the law of consumer contracts.*

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## Introduction

Restatements of the law walk a line between being positive and normative projects. While Restatements purport to simply "restate" the law, that is to

summarize it,[1] they inevitably involve choices about how the law is restated. At its most extreme, this might involve a choice between two alternative approaches taken by courts.[2] But it can also involve more subtle questions of how to characterize the law.

Restatements, however, are never wholly normative ventures. While they may have some normative elements, a Restatement not grounded in an accurate assessment of relevant case law has no legitimacy. Calling a project unmoored from actual case law a "Restatement" has the potential to mislead the ultimate users of Restatements—courts, litigants, legal scholars, and law students—who are unlikely to delve into the case law to verify the accuracy of the Restatement and are reasonably likely to assume it to be a true distillation of the common law.

The prestige accorded to Restatements rests in the first instance on the reputation of the American Law Institute (ALI). The ALI is a membership organization with over 4,500 members, consisting primarily of federal and state judges, law professors, and practitioners.[3] Most ALI members are elected by the ALI's governing Council following a nomination process; elected membership is capped at 3,000, with the remaining members serving as life, honorary, and ex officio members.[4] The ALI holds that membership in the organization is "a distinct professional honor."[5]

The purpose of the ALI is "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific work."[6] To this end, the ALI sponsors, among other things, Restatements of the Law and "principles" projects, the latter being expressly more normative than Restatements.

The ALI Restatement process cedes substantial control and direction of the project to the Reporters selected by the ALI Council, as experts in the area of law being restated. While the Reporters receive input from ALI members who are part of the Members Consultative Group and from Council-appointed Advisers, which include both ALI members and non-member experts,[7] the Reporters control the drafting process, subject to the review and direction of the

1. AM. LAW INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 3 (2015) (noting that Restatements "reflect the law as it presently stands or might appropriately be stated by a court").

2. For example, the Reporters would apply a more normative approach when precedent is inappropriate or inconsistent with the law as a whole. In this case, the Restatement may "propose the better rule and provide the rationale for choosing it." Restatement of the Law of Consumer Contracts, Council Draft No. 5, at xi (Sept. 19, 2018) (hereinafter "Draft Restatement").

3. AM. LAW INST., MEMBERSHIP PROPOSAL PROCESS, https://www.ali.org/members/membership-proposal-process/.

4. AM. LAW INST., ELECTION, https://www.ali.org/members/membership-proposal-process/election/ [https://perma.cc/55SE-DRAX].

5. *Id.*

6. AM. LAW INST., HOW THE INSTITUTE WORKS, https://www.ali.org/about-ali/how-institute-works/ [https://perma.cc/6KPJ-WH7D].

7. *Id.*

ALI Council and ultimately subject to a vote by the ALI membership. Given that most members of the ALI Council lack expertise in the particular field of any Restatement (and this is especially true for Consumer Contracts, which is not the area of expertise of any current ALI Council member), the ALI process is founded on an assumption that the Reporters will carry out their duties competently and with fidelity to the purposes of the Restatement.

For this reason, in our various roles as Advisers to or Members of the Members Consultative Group to the ALI Project on the Restatement of the Law of Consumer Contracts, we were greatly concerned when we read a summer 2017 draft version of Professor Gregory Klass's article, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*.[8] Professor Klass attempted to replicate one of the six empirical studies on which the draft Restatement of Consumer Contracts is based. He found that nearly two-thirds of the cases in the dataset were simply not relevant to the issue of whether privacy policies are contract terms. If correct, this would be an alarming error for a Restatement, one that goes to the fundamental legitimacy of the ALI's Restatement process.

Before receiving the Klass draft, some of us expressed concerns about the Reporters' failure to recognize particular cases and about the precedential value accorded to certain rulings. Others expressed doubts about the Reporters' use of a quantitative empirical methodology[9]—a novelty for Restatement projects. In addition, we were all skeptical of the particular normative approach of the draft Restatement. These concerns were the sort of disagreements that inevitably arise in a Restatement project.

Professor Klass's replication study raised the question of whether the draft Restatement's quantitative studies were reliable even on their own terms, and thus whether the draft Restatement is plausibly a fair and accurate summary of the law. Accordingly, some of us attempted to validate Professor Klass's study. We reviewed the cases in which Professor Klass's coding differed from that of the draft Restatement. We concluded that Professor Klass's readings were uniformly correct.

Consequently, we extended Professor Klass's replication study to the largest two of the other five datasets supporting the draft Restatement: the cases on contract modifications by businesses and the cases on clickwrap contract assent by consumers. Our findings are strikingly similar to the findings of Professor Klass in his replication study of the privacy policy dataset. Nearly two-thirds of the cases cited as "contract modification" cases and nearly half of the cases cited as "clickwrap assent cases" are simply not germane. The datasets included duplicate cases, business-to-business cases, cases that were vacated or

8. See Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. ON REG. 45 (2019), for the publication version of the article.

9. *See id.* This methodology is premised on counting the number of decided cases without regard to their precedential weight.

reversed, and cases not even involving contract disputes. These are not interpretive questions or instances where reasonable minds can differ. These are clear errors on a massive scale. These errors materially infect the Reporters' interpretation of the case law and the ultimate positions taken by the draft Restatement. The extent of these errors raises questions about the accuracy and soundness of the entire project and has the potential to undermine the legitimacy of the ALI Restatement drafting process. We detail the methodology of our review and its findings below.

## I. The Klass Study

The draft Restatement of Consumer Contracts is built on a foundation of six empirical studies. Although the Reporters state that the six empirical studies merely supplement more traditional methods of discerning the "DNA of the law,"[10] those studies are in fact the primary evidence for the draft Restatement's wholesale revision of the standard rules of contract law in the consumer context. Specifically, these studies provide the basis for the draft Restatement's normative move of eliminating the existing doctrinal requirements of meaningful consumer assent to contract formation and modification and replacing them with supposedly stronger litigation defenses: shifting consumer contract law from "hard to make, hard to break" to what will supposedly be "easy to make, easy to break."[11]

As stated *supra*, our concerns about the soundness of the draft Restatement's empirical work originated with a summer 2017 draft of Professor Gregory Klass's article.[12] Professor Klass attempted to replicate one of six empirical studies that underlie the draft Restatement, namely the study that looks to whether courts treat stand-alone privacy policies as contract terms. Professor Klass uncovered that there are fundamental methodological flaws in the Reporters' privacy policies study, as well as widespread misreading of cases.

Ultimately, Professor Klass determined that of the forty cases on which the draft Restatement based its conclusion that privacy policies are contract terms, only fifteen of the cases are relevant to that issue, and all fifteen of these decisions are trial court rulings (mainly from federal district courts sitting in diversity or exercising supplemental jurisdiction). This raised the question of whether there is *any* germane, binding law in the area to restate. Likewise, whereas the draft Restatement asserts that there is a clear trend in the courts

10. Draft Restatement, *supra* note 2, at 6. *See also* the discussion *infra* in the Conclusion regarding the change in the Reporters' claims about the role of the empirical studies in the draft Restatement. This discussion was added after the Reporters were presented with the findings of the Klass study and an initial version of our study.

11. We have separately expressed concerns that the draft Restatement ignores the economic and procedural realities of consumer contract litigation, such that it would produce a "Hotel California" world of consumer contracts, in which contracts are "easy to make, hard to break."

12. See Klass, *supra* note 8, for the publication version of the article.

favoring treating privacy policies as contracts,[13] Professor Klass concluded that there is no such trend. As Professor Klass explains:

> On the core question as to what most courts are holding, this study finds a much weaker effect (a less than a three-to-one ratio vs. a seven-to-one ratio) in a much smaller sample of cases (fifteen vs. forty). This is comparable to the difference between a baseball team winning eleven of its first fifteen games in a season and a team winning thirty-five of its first forty games. Both are winning records. But the latter win/loss ratio provides much more powerful evidence of the team's ability and likelihood of success in the season as a whole.[14]

The strength of judicial consensus is critical for determining whether there is a sufficient basis for a Restatement covering the topic at this time. Professor Klass's study raised doubts about whether the draft Restatement accurately gauges the strength of that consensus when it comes to the treatment of privacy policies.

The red flags raised by the Klass study called for a review of the other empirical studies underlying the draft Restatement. These studies are not mere illustrative ornaments buried in the Reporters' Notes in "below the line" sections of the Restatement, but are foundational to the draft Restatement. The draft Restatement's intellectual approach (originally styled as the "Grand Bargain") is premised upon a belief that the doctrine of mutual agreement has already been largely jettisoned by the courts in the context of consumer contract formation and modification. The draft Restatement attempts to accommodate this supposed reality with a reinvigoration of certain contract defenses. In other words, the Grand Bargain is a tradeoff that jettisons meaningful assent to contract in exchange for supposedly stronger defenses to contract enforcement. As the draft Restatement portrays it, the precedent overwhelmingly reduces consumer assent to constructive pre- or post-transaction notice, and therefore any approach that seeks more meaningful assent futile.[15]

Whatever one thinks of the draft Restatement's Grand Bargain approach, its persuasiveness rests on a set of empirical assumptions. If courts have not clearly abandoned the requirement of mutual assent in favor of simple notice when assessing contract formation, then there is no Grand Bargain to make. Absent empirical support for its claim regarding the decline of mutual assent, the

13. Draft Restatement, *supra* note 2, at 15-17.

14. Klass, *supra* note 9, at 50.

15. We note that the Grand Bargain approach is fundamentally different from a simple "restatement" of the law. It is instead attempting to recalibrate the law by adjusting the balance between separate but interlinked legal issues. Distinct legal issues are often interlinked, such as liability rules and remedies or contract formation and defenses to contract enforcement. In such cases, a stricter rule on one issue might counsel for lenity on the other or vice-versa. Courts generally address only one of the interlinked issues at a time; they are not typically engaged in an explicit balancing act. The draft Restatement, however, is attempting such a normative calibration, which goes beyond a mere restatement of the law.

Grand Bargain is a wholly normative shift in contract law and hardly a "restatement."

## II. Inadequacy of the Reporters' Response to the Klass Study

The Reporters responded to the Klass study with a brief memorandum to the ALI Council. That memorandum claimed that Council Draft No. 4 of the Restatement did not rest on the empirical findings of the six studies, that Professor Klass's data are faulty because he does not count dicta (instead relying only on holdings), and that even if his data were correct, his conclusions are wrong because his study similarly shows that a majority of courts have treated privacy policies as contract terms.[16]

These responses do not satisfactorily address the concerns raised by Professor Klass's study. As an initial matter, it is imperative that the findings in the Restatement, including those located in the Reporters' Notes, be able to withstand scrutiny. This is all the more so given the methodological novelty of quantitative empirical work in a Restatement. The ALI is perhaps the most widely-esteemed law reform organization in the United States, and its Restatements must reflect the highest standards in legal research.

Second, the draft Restatement plainly rests on the empirical studies. The draft Restatement's case counting method has enabled it to avoid engaging seriously with what it portrays as the rarely taken mutual agreement approach to consumer assent in contract formation and modification. Indeed, the draft Restatement's empirical studies are the basis and justification for adopting the "Grand Bargain."

The foundational role of the empirical studies for the draft Restatement is most obvious regarding privacy policies. The inclusion of privacy policies within the framework of the draft Restatement is premised entirely on it being the majority position of courts; the draft Restatement does not advance any argument for treating privacy policies as contract terms, other than its claim that this is what courts are doing.

Third, the Reporters' claim that Professor Klass's results differ from the draft Restatement's findings because of the dicta/holding distinction is simply false.[17] Professor Klass carefully explains that many of the cases in the privacy policies dataset are entirely inapposite, such as those not dealing with consumer

16. Memorandum from Oren Bar-Gill, Omri Ben-Shahar & Florencia Marotta-Wurgler to the ALI Council Regarding Council Draft No. 4 of Restatement of Consumer Contracts 1-2 (Dec. 21, 2017) (on file with authors).

17. We understand that prior Restatements have considered dicta—and we think that it is appropriate in certain circumstances—but those prior Restatements have never conflated dicta and holdings in a case counting exercise; such case counting is a novel approach for a Restatement. In any event, the dicta/holding distinction is foundational to law and should not be ignored. As has been the ALI's custom, the draft should be transparent about when and to what extent it relies on dicta rather than holdings.

disputes or contract disputes, or not involving privacy policies.[18] Professor Klass explicitly notes that these cases contain neither relevant holdings *nor* relevant dicta.[19]

Fourth, the Reporters' response does not address Professor Klass's first criticism—that almost all the cases cited were from federal trial courts sitting in diversity or exercising supplemental jurisdiction. We recognize that prior Restatements have considered federal opinions on matters of state law, but as far as we are aware, federal decisions on state law have previously been considered only as part of a mix with state court decisions. We are not aware of any prior Restatement of state common law that is based disproportionately on federal court decisions.[20]

Finally, the Reporters' observation that there are directionally similar findings between the Klass study and their privacy policies study is inadequate to the concern. It is not good enough for a Restatement to be merely directionally accurate. Every claim in a Restatement should be specifically accurate and supportable or the credibility of the enterprise suffers. Moreover, a weaker directional finding from a much smaller sample goes to the level of confidence one can have about the draft Restatement stating what the law *is* across the fifty states. This is especially true when the much smaller sample does not include a single state supreme court decision, as is true for the privacy policy cases. Nor does the Reporters' response address the concern that similar coding issues might exist with the five other studies, where a replication might point in a different direction.

## III. Data and Methodology

In light of the issues identified in the Klass paper, we requested that the data underlying all six studies supporting the draft Restatement be made available for review. The data were posted to a password-protected ALI website by the Reporters on October 31, 2017, in the form of six spreadsheets containing 353 cases in all.[21] Only ALI Members or Advisers have access to the data.[22]

18. Klass *supra* note 9, at Part III (finding 26 of 51 decisions to be irrelevant to the hypothesis the Reporters tested).

19. *Id.*

20. This is true not only of the privacy policy cases, but of all six datasets of cases. Collectively, out of the 353 cases cumulatively listed in the six studies, only 103 (29%) are from state courts; 250 (71%) come from the federal courts. Moreover, 158 (45%) of the cases are unpublished. There were only 83 published state court opinions in all six datasets combined (24% of all cases).

21. We note that 353 cases is a surprisingly small number of decisions nationwide over a period of around 35 years. The small number of cases points to the reality of consumer contract law: consumers seldom pursue their claims. The preponderance of arbitration enforcement decisions in the cases we reviewed (52% of those cases) also points to a second part of the reality: when consumers do pursue their claims, they are frequently compelled to arbitrate. This result contributes to the dearth of relevant judicial decisions. We also note that Council Draft No. 5, which was approved by the ALI Council in November 2018, contained several additional cases. The addition of these cases does not materially affect our analysis.

22. We note the transparency concerns this practice raises regarding the ALI process.

The posting date left us with approximately six weeks to review the 353 cases prior to the transmittal of Council Draft No. 4 and accompanying materials to the ALI Council. Given this abbreviated time schedule, we recognized that we could not realistically undertake a review of all the cases in the various datasets. Accordingly, we completed an investigation of only the two largest datasets: cases on contract modification (the "modification dataset," containing 88 cases) and cases on clickwrap assent (the "clickwrap dataset," containing 98 cases) within the time available.

We undertook our review as a blind review, meaning that reviewers knew only the name and citation of the cases, not how the Reporters coded the cases. Although we are skeptical of the value of dicta, which tend to reflect statements on issues that were not fully briefed or considered by the court, we followed the Reporters' convention in that we included both holdings and dicta. All cases were personally reviewed by Advisers and Members of the Consultative Group; no research assistants or associates were involved.[23]

For the modification dataset, every case was reviewed by at least two of us, and in cases where the initial two reviewers disagreed on coding, by an additional reviewer. For the clickwrap dataset, every case was reviewed by at least one of us, with a second and sometimes a third reader for cases where we disagreed with the Reporters as to coding. For both datasets, we recorded additional data fields because of particular concerns about the nature of the cases. Our findings are reported below.[24]

## IV. Results

### *A. Review of the Modification Dataset*

The draft Restatement says that "[t]he restated rules pertaining to the modification of standard contract terms are supported by an empirical study of all cases in state and federal courts addressing the enforceability of modifications in consumer transactions (excluding employment cases)," starting in 1981.[25] The draft further states that "[t]he study includes 89 cases, including 37 unpublished cases."[26]

Our review found that 63% of the cases in the dataset were simply inapposite. Moreover, the dataset overwhelmingly consisted of cases involving an atypical situation: attempts to enforce arbitration clauses that were inserted

23. Mr. George P. Slover, a member of the Members Consultative Group for the ALI Project on the Restatement of the Law of Consumer Contracts, also participated in the case review and was a signatory to the memorandum to the ALI Council on which this Essay is based.

24. The findings we report here vary slightly from those we reported in a memorandum to the ALI because of further review we undertook in the course of turning our memorandum into an essay.

25. Draft Restatement, *supra* note 2, at 63-64. It appears that no cases decided after some point in 2015 were included.

26. Draft Restatement, *supra* note 2, at 64.

into credit cardholder agreements pursuant either to express change-of-term clauses or state statutes that expressly permitted this sort of contract modification. We also discovered that the datasets provided to us were, and remain, incomplete.

1. Almost Two-Thirds of the Cases in the Dataset Are Not Relevant

Although the draft Restatement says that the modification dataset has 89 cases,[27] the dataset made available to us contained only 88 modification cases.[28] The modification dataset is used to support claims in the draft Restatement about when, under the common law, modified standard contract terms in a consumer contract are considered to be adopted (meaning when and whether a modification by a business of the terms in a standardized consumer contract is enforceable by the business).

Of the 88 cases included in the dataset, 54 cases (61% of the total cases in the dataset) were plainly not relevant to the question of when modified standard terms are considered to be adopted in a contract:

- 26 cases were decided based in whole or part on statutory grounds,[29] such as state statutes that expressly permit unilateral changes in terms for credit card agreements by the card issuer.
- 8 cases were determined not based on whether a modification was generally enforceable, but based on whether the particular substance of the contract clause was permissible.[30]
- 5 cases did not involve a contract modification at all, as the court determined that there were separate contracts.[31]
- 4 cases involved business-to-business disputes (and in one instance the modification was pursuant to a court order, rather than unilateral action

27. *Id.*

28. We also note that the modification dataset did not include fields relevant to the draft Restatement's claims about the number of cases explicitly discussing the requirement of good faith or about how the modification was presented.

29. A full citation list for these cases is appended as Appendix A.

30. Kaltwasser v. Cingular Wireless LLC, 543 F. Supp. 2d 1124 (N.D. Cal. 2008); Pokrass v. DirecTV Group, Inc., 2008 U.S. Dist. LEXIS 110441 (C.D. Cal. July 14, 2008); Long v. Fidelity Water Sys., 2000 U.S. Dist. LEXIS 7827 (N.D. Cal. May 24, 2000); Saver v. Principal Mut. Life Ins. Co., 2002 Cal. App. Unpub. LEXIS 2849 (Mar. 21, 2002); Szetela v. Discover Bank, 97 Cal. App. 4th 1094 (2002); Cohen v. DIRECTV, Inc., 142 Cal. App. 4th 1442 (2006); Firchow v. Citibank, N.A., 2007 Cal. App. Unpub. LEXIS 178 (Jan. 10, 2007); Citibank, N.A. v. Walker, 2008 Cal. App. Unpub. LEXIS 7199 (Sept. 11, 2008).

31. Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003); Bassett v. Elec. Arts, Inc., 2015 U.S. Dist. LEXIS 36175 (E.D.N.Y. Feb. 9, 2015); Ekin v. Amazon Servs., 2014 U.S. Dist. LEXIS 181912 (W.D. Wash. Dec. 10, 2014); Dottore v. Huntington Nat'l Bank, 2010 U.S. Dist. LEXIS 102196 (N.D. Ohio Sept. 10, 2010); Garber v. Harris Trust & Sav. Bank, 432 N.E.2d 1309 (Ill. App. Ct. 1982).

by a party).[32] A Restatement of the Law of *Consumer* Contracts cannot be founded on case law that does not involve consumers.

- 3 cases were not formally decided on statutory grounds themselves, but simply followed, as *stare decisis*, cases determined on statutory grounds.[33]
- 2 cases dealt solely with whether a modification could apply retroactively, not whether it could be enforced generally.[34]
- 1 case involved a question of whether a contract that reserved a unilateral right to terminate was illusory, rather than the question of whether there was a binding modification.[35]
- 1 case did not involve a modification issue because the modified contract was never entered into the record and was therefore never considered by the court.[36]
- 1 case involved a *consumer's* attempt to enforce a claimed modification against a business, rather than a business's attempt to enforce a modification against a consumer.[37]
- 1 case appears twice, being recorded at both the state appellate and state supreme court levels.[38]
- 1 case had no ruling whatsoever regarding the enforceability of the modification, but instead reserved the issue for an arbitrator under the separability doctrine.[39]
- 1 case was vacated.[40]

Thus, we found only 34 cases[41] that deal in their rulings or dicta with the general question of enforceability of unilateral modifications by businesses to

32. Morrison v. Amway Corp., 517 F.3d 248 (5th Cir. 2008); OTA v. Macerich CM Village, 2005 Cal. App. Unpub. LEXIS 11099 (Nov. 30, 2005); Panorama Residential Protective Ass'n v. Panorama Corp., 627 P.2d 121 (Wash. Ct. App. 1981); Koop v. Woodlake Trails Dev. Co., 549 N.W. 2d 285 (Wisc. Ct. App., 1996).

33. Eaves-Leanos v. Assurant, Inc., 2008 U.S. Dist. LEXIS 32651 (W.D. Ky. Apr. 18, 2008); FIA Card Servs., Cardenas v. Chase Manhattan Bank USA, 2006 Cal. App. Unpub. LEXIS 4599 (May 26, 2006); N.A. v. Weaver, 62 So. 3d 709 (La. 2011).

34. Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006); Cobb v. Ironwood Country Club, 233 Cal. App. 4th 960 (2015).

35. Sateriale v. R.J. Reynolds Tobacco Co., 697 F.3d 777 (9th Cir. 2012).

36. McKee v AT&T Corp., 191 P.3d 845 (Wash. 2008).

37. Lagen v. United Cont'l Holdings, Inc., 774 F.3d 1124 (7th Cir. 2014).

38. Mattingly v. Hughes Elecs. Corp., 810 A.2d 498 (Md. Ct. Spec. App. 2002), *aff'd by* DIRECTV, Inc. v. Mattingly, 376 Md. 302 (2003).

39. Cuadras v. MetroPCS Wireless, Inc., 2011 U.S. Dist. LEXIS 156399 (N.D. Cal. Aug. 8, 2011).

40. Jones v. Citigroup, Inc., 135 Cal. App. 4th 1491 (2006), *vacated by* Jones v. Citigroup, Inc., 171 P.3d 547 (Cal. 2007).

41. One case, Klein v. Verizon Commc'ns, Inc., 920 F. Supp. 2d 670 (E.D. Va. 2013), was subsequently reversed and remanded on appeal, Klein v. Verizon Commc'ns., Inc., 674 Fed. App'x. 304 (4th Cir. 2017), but on remand the trial court, applying different law, reached the same outcome as in the original decision, Klein v. Verizon Commc'ns, Inc. 2017 U.S. Dist. LEXIS 221585 (E.D. Va. Aug. 9, 2017). We have consequently treated the original trial court ruling that is in the Reporters' dataset as a germane decision, although it was formally reversed.

consumer contracts. Conversely, we also found in the course of our review a number of modification cases that were *not* included in the modification dataset, including cases that appear in one or more datasets for the other five studies underlying the draft.[42] Thus, the draft Restatement includes irrelevant cases in the modification dataset even as it excluded relevant ones that were known to the Reporters.

2. The Few Remaining Relevant Cases Are Atypical

Once the inapposite cases are removed from the dataset, the 34 remaining cases provide a much thinner basis for evaluating the law of contract modifications, as all but one of them involve at least one of three atypical features of contract modification situations generally.

First, 28 of the remaining 34 relevant cases (82%) involve contracts with express clauses allowing unilateral changes of terms in some circumstances.[43] Courts are likely to analyze a case in which the parties have expressly contracted for one party to be allowed to unilaterally change terms according to a certain procedure differently than those that are silent on the matter. When these cases are litigated, the argument is often not whether a modification requires consideration or consent, but whether the particular modification was in good faith, or was unconscionable because of its substance and procedure, or whether the modification process complied with the terms of the unilateral change-of-terms clause in the original contract.

Second, 27 of the relevant 34 cases (79%) involved enforcement of arbitration clauses.[44] Cases involving arbitration clause enforcement are substantively different from regular contract disputes because they are decided in the context of a federal statute and the resulting policy that strongly favors the enforcement of arbitration clauses. Moreover, many of these cases were decided prior to the Supreme Court's ruling in *AT&T Mobility v. Concepcion*[45] and followed now-preempted state case law making certain arbitration clauses unenforceable. As such, these cases were not squarely ruling on contract modification, but on the enforceability of arbitration agreements.

42. These include: Fineman v. Citicorp USA, Inc., 485 N.E.2d 591 (Ill. App. Ct. 1985); Tsadilas v Providian Natl. Bank, 13 A.D.3d 190 (N.Y. App. Div. 2004); Anonymous v. J. P. Morgan Chase & Co., 2005 U.S. Dist. LEXIS 26083 (S.D.NY. Oct. 29, 2005); Kulig v. Midland Funding, LLC, 2013 U.S. Dist. LEXIS 161960 (S.D.N.Y. Nov. 13, 2013); *In re* Hood, 449 Fed. App'x. 507 (7th Cir. 2011); Schnabel v. Trilegiant Corp., 697 F.3d 110 (2d Cir. 2012).

43. A full citation list for these cases is appended as Appendix B. Overall, 71 of the 88 of the cases listed in the modification dataset (81% of the cases) had express unilateral modification clauses.

44. A full citation list for these cases is appended as Appendix C. Overall, 69 of the 88 cases listed in the modification dataset (78% of the cases) involved enforcement of agreements to arbitrate.

45. 563 U.S. 333 (2011).

Third, 24 of the 34 on-point cases (71%) are credit card or deposit account cases.[46] Cases involving credit cardholder agreements are atypical modification cases, because many states have statutes that specifically authorize unilateral changes in terms for credit cards with no additional consideration from the issuer and prescribe that only notice must be given to consumers (consumers need not agree to the changes).[47] Courts frequently apply these statutes under choice-of-law clauses in the contracts. In other words, these are not common law decisions, but statutory decisions.

Even when courts do not look to statutory provisions in these cases, they have not consistently viewed the credit cardholder agreement as a contract. Some courts have treated the cardholder agreement as a solicitation, with a contract entered into via performance through use of the card, and each use of the card constituting a separate contract.[48] Accordingly, no modification is involved. Moreover, even when courts have treated these cases as contracts, they (like deposit account agreements) are terminable at-will by either party. Therefore, a modification (unless retroactively applied) is substantively different than a modification of, say, a term lease or an annual service contract.

These three sui generis categories are overlapping categories. Of the 24 relevant credit card or deposit account cases, 22 (92%) involved express change-of-terms clauses, and 21 (88%) involved attempts to compel arbitration, with 19 (80%) involving attempts to compel arbitration clauses inserted pursuant to express change-of-terms clauses.

Of the ten relevant cases that did not involve credit cards or deposit accounts, only one did not have an express change-of-terms clause, and only three were not about arbitration.

All in all, there are no cases in the entire dataset that are relevant and do not involve a credit card or deposit account agreement, an express change-of-terms clause, or an attempt to compel arbitration. This is not an adequate basis for making any conclusions about the state of the law generally on the modification of consumer contracts.

### 3. Lack of Precedential Value of Cases

Many of the cases in the modification dataset are unpublished or not for citation (including one case that was de-published).[49] Such cases form a weak basis for ascertaining the state of the law.

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46. A full citation list for these cases is appended as Appendix D. Overall, 60 of 88 cases listed in the modification dataset (68% of the cases) involved either credit card agreements (52 cases) or various types of deposit account agreements (8 cases).

47. *E.g.*, 5 DEL. CODE ANN. § 952 (2019); S.D. CODIFIED LAWS § 54-11-9 (2019); NEV. REV. STAT. § 97A.140(2) (2019). Delaware, South Dakota, and Nevada are home to nearly all major credit card issuers.

48. *E.g.*, Garber v. Harris Trust & Sav. Bank, 432 N.E.2d 1309 (Ill. App. Ct. 1982).

49. 39 of the cases listed in the modification dataset (44%) were unpublished; 49 were published.

Additionally, over two-thirds of the cases in the modification dataset involved courts applying the law of other jurisdictions, be it federal courts applying state law[50] or state courts applying another state's law.[51] These decisions do not serve as binding precedent on other courts.

The state court rulings in the total dataset (including irrelevant cases) are from only sixteen states, and only five state supreme court rulings are represented in the total dataset. More importantly, only ten of the relevant cases are state court decisions, with only a single decision from a state supreme court. This is too thin a basis for restating the common law across the fifty states.

4. Summary

Our review of the modification dataset finds that well over half of the cases in the dataset should not have been included in the first place. We also find that of the remaining cases, virtually all contain one or more factors that render them poorly suited for generalizing a common law rule for consumer contracts. Finally, the cases overall frequently lack any precedential value and represent only a small minority of states' law.

*B. Review of the Clickwrap Dataset*

The draft Restatement describes its empirical study on clickwrap-assent contracts as "a comprehensive empirical study of all cases in state and federal courts addressing the enforceability of clickwraps in consumer transactions . . . ."[52] The draft Restatement further states that "[o]ut of a total of 98 cases, courts have enforced clickwraps in every case, absent fraud, unconscionability, or other intervening factors."[53]

1. Nearly Half of the Cases in the Dataset Are Not Relevant

The clickwrap dataset provided to us contained 98 cases. Of the 98 cases in the dataset, 45 (46%) were not relevant to the question of when courts will enforce clickwrap contracts in consumer transactions, for various reasons, including some for multiple reasons:

50. 54 of the cases listed in the modification dataset (61%) were decided by federal courts; 34 were decided by state courts.

51. We did not consistently track this issue in our coding, which makes the 80% figure a conservative estimate.

52. Draft Restatement, *supra* note 2, at 44.

53. *Id.*

- 23 cases were either business-to-business cases[54] or employment cases. [55] Again, a Restatement of the Law of *Consumer* Contracts cannot be based on rulings in disputes that do not involve consumers if it is to be distinct from the existing Restatement (Second) of the Law of Contracts.
- 11 cases did not involve questions of contract formation.[56]
- 6 cases did not involve wrap contracts of any sort.[57]
- 4 cases were not clickwrap, but scrollwrap cases.[58]
- 2 cases did not involve a contract.[59]

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54. Superior Performers, Inc. v. Meaike, 2014 U.S. Dist. LEXIS 50302 (M.D.N.C. Apr. 11, 2014); Peters v. Amazon Servs. LLC, 2013 U.S. Dist. LEXIS 185964 (W.D. Wash. Nov. 5, 2013); Rassoli v. Intuit Inc., 2012 U.S. Dist. LEXIS 36433 (S.D. Tex. Mar. 19, 2012); Kraft Real Estate Investments, LLC v. HomeAway.com, Inc., 2012 U.S. Dist. LEXIS 8282 (D.S.C. Jun. 13, 2012); Segal v. Amazon.com, Inc., 763 F. Supp. 2d 1367 (S.D. Fla. 2011); Siedle v. National Ass'n of Securities Dealers, Inc., 248 F. Supp. 2d 1140 (M.D. Fla. 2011); Centrifugal Force, Inc. v. Softnet Communication, Inc., 2011 U.S. Dist. LEXIS 20536 (S.D.N.Y. Mar. 1, 2011); Beard v. PayPal, Inc., 2009 U.S. Dist. LEXIS 103075 (D. Or. Nov. 5, 2010); CoStar Realty Information, Inc. v. Field, 737 F. Supp. 2d 496 (D. Md. 2010); LTVN Holdings LLC v. Odeh, 2009 U.S. Dist. LEXIS 103075 (D. Md. Nov. 5, 2009); Novak v. Tucows, Inc., 73 Fed. R. Evid. Serv. (Callaghan) 331 (S.D.N.Y. 2007); Hauenstein v. Softwrap Ltd, 2007 WL 2404624 (W.D. Wash. Aug. 17, 2007); Burke v. E-Bay, Inc., 2007 U.S. Dist. LEXIS 100793 (W.D. Ark. Apr. 24, 2007); All Enthusiast Inc. v. Gunter, 2005 WL 1869395 (N.D. Cal. Aug. 4, 2005); Hotmail Corp. v. Van$ Money Pie Inc., 1998 U.S. Dist. LEXIS 10729 (D. Cal. Apr. 16, 1998); Blue Bird, LLC v. Nolan, 2009 Md. Cir. Ct. LEXIS 9 (Apr. 28, 2009); Whitnum v. Yahoo! Inc., 16 Misc. 3d 1137(A) (N.Y. Sup. Ct. 2007); West Consultants, Inc. v. Davis, 310 P.3d 824 (Wash. Ct. App. 2013).

55. Chatman v. Pizza Hut, Inc., 2013 U.S. Dist. LEXIS 73426 (N.D. Ill. May 23, 2013); Hill v. Hornbeck Offshore Services, Inc., 799 F. Supp. 2d 658 (E.D. La. 2011); Heath v. Travelers Cos., 2009 U.S. Dist. LEXIS 131422 (D. Minn. May 18, 2009); Verizon Communs., Inc. v. Pizzirani, 462 F. Supp. 2d 648 (E.D. Pa. 2006); Newell Rubbermaid Inc. v. Storm, 2014 Del. Ch. LEXIS 45 (Mar. 11, 2014); Forsyth v. First Trenton Indem. Co., 2010 N.J. Super. Unpub. LEXIS 1183 (Apr. 27, 2010).

56. Agence France Presse v. Morel, 934 F. Supp. 2d 547 (S.D.N.Y. 2013); In re iPhone Application Litig., 2011 U.S. Dist. LEXIS 106865 (N.D. Cal. Sept. 20, 2011); CoStar Realty Information, Inc. v. Field, 737 F. Supp. 2d 496 (D. Md. 2010); Roling v. E*Trade Sec., LLC, 756 F. Supp. 2d 1179 (N.D. Cal. 2010); A.V. v. iParadigms, Ltd. Liability Co., 544 F. Supp. 2d 473 (E.D. Va. 2008); Doe v. SexSearch.com, 502 F. Supp. 2d 719 (N.D. Ohio 2007); Davis v. Dell, Inc., 2007 U.S. Dist. LEXIS 94767 (D.N.J. Dec. 28, 2007); Dix v. ICT Group, Inc., 161 P.3d 1016 (Wash. 2007); All Enthusiast Inc. v. Gunter, 2005 WL 1869395 (N.D. Cal. Aug. 4, 2005); Hopkins v. Trans Union, L.L.C., 2004 U.S. Dist. LEXIS 16414 (D. Minn. Aug. 19, 2004); Motise v. America Online, Inc., 346 F. Supp. 2d 563 (S.D.N.Y. 2004); Whitnum v. Yahoo! Inc., 16 Misc. 3d 1137(A) (N.Y. Sup. Ct. 2007).

57. Klein v. Verizon Communications, Inc., 920 F. Supp. 2d 670 (E.D. Va. 2013); Fluke v. Cashcall, Inc., 2009 U.S. Dist. LEXIS 43231 (E.D. Pa. May 21, 2009); Hotmail Corp. v. Van Money Pie Inc., 1998 U.S. Dist. LEXIS 10729 (N.D. Cal. Apr. 16, 1998); Bonck v. Vict. White & Progressive Sec. Ins. Co., 115 So. 3d 651 (La. Ct. App. 2013); Hodges v Condors Swim Club of Clarkstown, Inc., 2014 N.Y. Misc. LEXIS 574 (App. Div. Jan. 29, 2014); Minnick v. Clearwire U.S. LLC, 275 P.3d 1127 (Wash. 2012).

58. Scrollwrap requires a user to scroll through or view an agreement before being allowed to indicate acceptance, in contrast to clickwrap, which merely requires a click to indicate acceptance and not the actual viewing (even if in a cursory fashion) of the agreement. As courts grapple with modern consumer contracts, some have distinguished the treatment of scrollwrap and clickwrap. *See, e.g.*, Applebaum v. Lyft, Inc., 263 F. Supp. 3d 454 (S.D.N.Y. 2017) (enforcing scrollwrap, but declining to enforce clickwrap).

59. Nazaruk v. eBay, Inc., 2006 U.S. Dist. LEXIS 66430 (D. Utah Sept. 14, 2006); Hotmail Corp. v. Van$ Money Pie Inc., 1998 U.S. Dist. LEXIS 10729 (N.D. Cal. Apr. 16, 1998).

- 2 opinions were from the same case, only one of which was relevant.[60]
- 1 case merely held that there was a triable issue of fact about formation.[61]

2. Clickwrap Terms Were Not Consistently Enforced

Of the 53 remaining apposite cases, the draft Restatement asserts that the clickwrap term was enforced in all but one case (2%).[62] In contrast, our review found that 6 cases (11%) did not enforce the clickwrap term.[63] (We agree with the draft Restatement regarding the one case in which it found the clickwrap term was not enforced.)[64] Accordingly, there is a distinct minority position rejecting enforcement of clickwrap contracts. By denying the existence of this minority but important position, the draft Restatement avoids having to address the merits of the minority position, which is inconsistent with the draft Restatement's "Grand Bargain."

3. Lack of Precedential Value of Cases

Over half of the cases in the entire clickwrap dataset are unpublished or not for citation.[65] These cases are a weak basis for describing the state of the law.

At least 80% of the cases in the dataset involved courts applying the law of other jurisdictions, be it federal courts applying state law[66] or state courts applying another state's law.[67] These decisions, too, have no binding effect on other courts.

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60. Grosvenor v. Qwest Corp., 854 F. Supp. 2d 1021 (D. Colo. 2012) (ruling on summary judgment); Grosvenor v. Qwest Communications Intern., Inc., 2010 U.S. Dist. LEXIS 109884 (D. Colo. Sept. 30, 2010) (ruling on motion to strike evidentiary declaration).

61. Sotelo v. DirectRevenue, LLC, 384 F. Supp. 2d 1219 (N.D. Ill. 2005).

62. The Reporters' Notes state that "[o]ut of 98 cases, courts have enforced clickwraps in every case, absent fraud, unconscionability, or other intervening factors, such as insufficient notice." Draft Restatement, *supra* note 2, at 44. The Reporters' coded dataset includes 98 cases, one of which was coded as not enforcing clickwrap.

63. *Grosvenor*, 854 F. Supp. 2d 1021; Mazur v. eBay Inc., 2008 U.S. Dist. LEXIS 16561 (N.D. Cal. Mar. 3, 2008); Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593 (E.D. Pa. 2007); Brazil v. Dell Inc., 2007 U.S. Dist. LEXIS 59095 (N.D. Cal. Aug. 2, 2007); Comb v. PayPal, Inc., 218 F. Supp. 2d 1165 (N.D. Cal. 2002); State ex rel. U-Haul Co. of West Virginia v. Zakaib, 752 S.E.2d 586 (W.V. 2013).

64. The one opinion coded as not enforcing a clickwrap is *Grosvenor*, 2010 U.S. Dist. LEXIS 109884. That opinion has nothing to do with contract formation; it was a ruling to strike an evidentiary declaration. The other opinion from the same case, *Grosvenor*, 854 F. Supp. 2d 1021, did not enforce the clickwrap term but was coded by the Reporters as having enforced the term.

65. 50 of the 98 cases listed in the clickwrap dataset (51%) were unpublished; 48 were published.

66. 78 of the 98 cases listed in the clickwrap dataset (80%) were decided by federal courts; 20 were decided by state courts. 76 of the federal court decisions were by district courts; only two were by courts of appeals.

67. We did not consistently track this issue in our coding, but note that it appears to be a not infrequent phenomenon.

There are only 20 state court rulings in the entire dataset (including what we believe are inapposite cases). Those 20 decisions come from only 13 states, with published rulings from only 8 states. Only 9 of those state court decisions actually dealt with the enforceability of clickwrap contracts. Of particular note, there is no California state court decision in the dataset on clickwrap contract assent. Only three cases in the entire dataset were from state supreme courts, and only one of these cases addressed the enforceability of clickwrap assent.[68] Again, as with the modification dataset, this is a very thin basis for restating the common law as developed across the United States.

4. Nearly All Relevant Cases Involved Enforcement of Arbitration Clauses or Forum Selection Clauses

Of the 53 remaining apposite cases, 21 (40%) involved enforcement of arbitration clauses and 25 (47%) involved the enforcement of forum selection clauses.[69] In short, 87% of the remaining apposite cases involved disputes about where the litigation should be heard. Decisions on just two types of contract clauses, and particularly these similar types of clauses, provide a poor basis for generalizing rules of contract law.

As discussed above, enforcement of arbitration clauses is decided in the shadow of a federal statute and the resulting strong policy preference favoring arbitration. Forum selection clause jurisprudence reflects the outsized influence of two Supreme Court cases, *The Bremen v. Zapata Off-Shore Company*[70] and *Carnival Cruise Lines v. Shute*.[71] Both of these heavily criticized rulings arose in admiralty jurisdiction and have no formal binding effect on state law issues, per *Erie R.R. Co. v. Tompkins*.[72] Indeed, the Consumer Financial Protection Bureau and state attorneys general have brought a statutory "unfairness" action based on inconvenient forum selection clauses.[73] Moreover, judicial economy concerns likely militate towards courts favoring enforcement of forum selection clauses that transfer litigation to other fora.

5. Summary

Nearly half of the cases in the clickwrap dataset are simply not relevant for the proposition they are supposed to support, and the remaining cases are

68. State *ex rel.* U-Haul Co. of West Virginia v. Zakaib, 752 S.E.2d 586 (W.Va. 2013).

69. 107 of the 186 cases (57%) in the two datasets involved attempts to enforce arbitration clauses. This suggests that the law of consumer contracts is primarily the law of enforcement of arbitration agreements, which is an area of law heavily shaped by the strong federal law preference for arbitration.

70. 407 U.S. 1 (1972).

71. 499 U.S. 585 (1991).

72. 304 U.S. 64 (1938).

73. Complaint at ¶¶ 62-68, 72-78, CFPB v. Freedom Stores, No. 2:14-cv-643 (E.D. Va., Dec. 18, 2014).

frequently *sui generis*, lack precedential value, and represent the law in only a small number of jurisdictions. For the relevant cases in this dataset, our findings are directionally the same as those reported in the draft Restatement, yet our findings show that there is an existing significant minority position: courts are not uniform in enforcing clickwrap contracts as the draft Restatement mistakenly claims. In addition, we are aware of one further case declining enforcement that was omitted from the dataset.[74]

The dataset includes opinions through 2014. Since 2014, several courts have addressed in great detail the enforceability of clickwrap terms. One of those courts denied the enforceability of clickwrap terms in one of the most extensive and thoughtful considerations of the issue to date.[75] Although that case, *Berkson v. Gogo, LLC*, was decided in April 2015, the Reporters failed to include any mention of it in their drafts dated October 2015, September 2016, December 2016, April 2017, October 2017, and December 2017. The opinion made its first appearance in Council Draft No. 5, dated September 19, 2018.[76] These omissions illustrate the Reporters' reluctance to consider the merits of the minority position.

## Conclusion

Based on our attempts to replicate the empirical studies of judicial treatment of consumer contract modifications and clickwrap assent plus our reexamination of the privacy policy cases, we lack confidence in the empirical reliability of the draft Restatement. While we recognize that there can be reasonable disagreements about certain coding decisions, the type of mistakes we have observed cause us grave concern about the reliability of the data used to support the Reporters' conclusions.

Notably, neither our study nor Professor Klass's has been rebutted by the Reporters or anyone else. There is no replication study that confirms the Reporters' coding of cases. At best, there is the Reporters' argument that Professor Klass (and presumably by extension, we) have only looked at holdings and ignored dicta, but as noted above this is neither true nor relevant, as Restatements are built on law and not dicta.

74. Scarcella v. America Online, 798 N.Y.S.2d 348 (N.Y. Civ. Ct. 2004), *aff'd* 811 N.Y.S.2d 858 (N.Y. App. Div. 2005) (refusing to enforce a forum selection clause).

75. Berkson v. Gogo LLC, 97 F. Supp. 3d 359 (E.D.N.Y. 2015). Other recent opinions that have refused to enforce clickwrap terms include *Cullinane v. Uber Techs., Inc.*, 893 F. 3d 53 (1st Cir. 2018) and *Applebaum v. Lyft*, 263 F. Supp. 3d 454 (S.D.N.Y. 2017).

76. Draft Restatement, *supra* note 2, at 39. The Reporters were aware of *Berkson* before they prepared their October 2015 Draft; the opinion was listed in the Supplementary Materials for the November 2015 meeting of the Advisers and Members' Consultative Group but was incorrectly classified as a privacy policy opinion. *See* Preliminary Draft No. 2 Supplementary Materials, Empirical Analysis – Case Tables, p. 5, https://www.ali.org/smedia/filer_private/3c/66/3c66c78c-94e9-403b-9152-ad28190d4c0b/consumer_contracts_-_supplementary_material_for_november_13_project_meeting.pdf.

In short, there is substantial, uncontroverted evidence of serious flaws in the Reporters' reading of case law. Unfortunately, despite being aware of these concerns, the Council greenlighted the draft Restatement, approving the presentation of an amended version of the draft to the full ALI Membership at the May 2019 Annual Meeting, with the expectation of a vote at the meeting to adopt the Restatement.

Professor Klass's study was initially written against the background of Council Draft No. 3 of the Restatement, dated December 20, 2016. That draft touted the quantitative empirical methodology of the Restatement as a major innovation.[77] The Reporters noted that "the quantitative approach bolsters the traditional qualitative approach with an added measure of comprehensiveness and transparency. Accordingly, in presenting the principles and rules of consumer-contract law, this Restatement relies on both methods."[78]

Council Draft No. 5, the latest draft of the Restatement, dated September 19, 2018, no longer makes such methodological claims and generally downplays the role of the quantitative empirical studies, even though it arrives at precisely the same positions as the earlier drafts of the Restatement. The Reporters' Memorandum to the ALI Council introducing Council Draft No. 5 notes that one of the primary changes in Council Draft No. 5 is that "[t]he black letter and Commentary of this Restatement do not reference the 'counting' methodology; the only reference to it is in the Reporters' Notes."[79] In the place of the quantitative claims, the draft Restatement now claims that "the Reporters read the *entire body of consumer-contract law decisions* relating to the rules of this Restatement."[80]

Council Draft No. 5 is the first draft of the Restatement undertaken subsequent to the transmission of both the Klass study and an initial version of our study to the ALI Council.[81] We read the Reporters' substantial downplaying of their empirical claims and their shift to averring reliance on traditional doctrinal analysis in Council Draft No. 5 as their response to the coding issues we and Professor Klass have identified.

Yet, given the patent and fundamental flaws in the Reporters' case coding, the Reporters' new claim to have discerned the law from reading "*the entire body of consumer-contract law*," rather than from case counting, is not reassuring. Case counting requires coding of cases, and coding requires a close and careful reading of the cases. Given that the Reporters failed to accurately code a majority

77. Restatement of the Law of Consumer Contracts, Council Draft No. 3, Reporters' Introduction at 5 (Dec. 20, 2016).

78. *Id.* at 6.

79. Draft Restatement, *supra* note 2, at xiii.

80. Draft Restatement, *supra* note 2, at 6 (emphasis in original). It is not clear whether the "entire body of consumer-contract law" refers to the 353 cases in the six datasets, or to a larger body of law, the parameters of which are known solely to the Reporters.

81. Council Draft No. 4 is dated December 18, 2017. We transmitted an initial version of our study to the Council and Reporters on December 19, 2017.

of the 186 cases we examined, it is difficult to credit their reading of the "*entire body of consumer-contract law decisions*" generally. And it is a remarkable coincidence that the Reporters arrive in Council Draft No. 5 at precisely the same substantive positions under their reformed approach as they did in previous drafts under the now debunked case counting methodology.

We refrain from speculating here why the empirical studies underlying the draft Restatement are so riddled with errors or why the ALI Council would approve such a flawed product for a membership-wide vote. But we can say this: no Restatement should be premised on an unsound empirical foundation. A Restatement need not be based on a quantitative empirical analysis, but if it is, that quantitative analysis must be rock-solid in its coding of cases or it throws into question the soundness of the entire project. Based on our findings, we lack confidence that the draft Restatement correctly and accurately "restates" the law of consumer contracts.

## Appendix A: Statutory Rulings

| | Case | Cite | Year | Federal | Cir. | State | Court |
|---|---|---|---|---|---|---|---|
| 1 | Stiles v. Home Cable Concepts | 994 F. Supp.1410 | 1998 | Federal | 5 | AL | Fed District |
| 2 | Grasso v. First USA Bank | 713 A.2d 304 | 1998 | State | . | DE | State Trial |
| 3 | Frerichs v. Credential Servs. Int'l | 1999 U.S. Dist. LEXIS 22811 | 1999 | Federal | 7 | IL | Fed District |
| 4 | Marsh v. First USA Bank, N.A. | 103 F. Supp. 2d 909 | 2000 | Federal | 5 | TX | Fed District |
| 5 | Stuart v. Household Retail Servs. | 2000 U.S. Dist. LEXIS 22509 | 2000 | Federal | 9 | CA | Fed District |
| 6 | SouthTrust Bank v. Williams | 775 So. 2d 184 | 2000 | State | . | AL | State Supreme |
| 7 | Pick v. Discover Fin. Servs., Inc. | 2001 U.S. Dist. LEXIS 15777 | 2001 | Federal | 3 | DE | Fed District |
| 8 | Bank One, N.A. v. Harris | 2001 U.S. Dist. LEXIS 9615 | 2001 | Federal | 5 | MS | Fed District |
| 9 | Gaynoe v. First Union Direct Bank, N.A. | 2001 NCBC 1 | 2001 | State | . | NC | State Trial |
| 10 | Edelist v. MBNA Am. Bank | 790 A.2d 1249 | 2001 | State | . | DE | State Trial |
| 11 | Discover Bank v. Shea | 827 A.2d 358 | 2001 | State | . | NJ | State App. |
| 12 | Rossman v. Fleet Bank (R.I.) Nat'l Ass'n | 280 F.3d 384 | 2002 | Federal | 3 | PA | Fed. Circ. Ct. |
| 13 | Citibank United States v. Howard | 2002 U.S. Dist. LEXIS 28474 | 2002 | Federal | 5 | MS | Fed District |
| 14 | Fields v. Howe | 2002 U.S. Dist. LEXIS 4515 | 2002 | Federal | 7 | IN | Fed District |
| 15 | Joseph v. M.B.N.A. Am. Bank, N.A. | 148 Ohio App. 3d 660 | 2002 | State | . | OH | State App. |
| 16 | Shea v. Household Bank (SB) | 105 Cal. App. 4th 85 | 2003 | State | . | CA | State App. |
| 17 | Johnson v. Chase Manhattan Bank USA | 784 N.Y.S.2d 921 | 2004 | State | . | NY | State Supreme |
| 18 | Maestle v. Best Buy Co. | 2005-Ohio-4120 | 2005 | State | . | OH | State App. |
| 19 | Dumanis v. Citibank (South Dakota), N.A. | 2007 U.S. Dist LEXIS 81586 | 2007 | Federal | 2 | NY | Fed District |
| 20 | Stinger v. Chase Bank, USA | 265 Fed. App'x. 224 | 2008 | Federal | 5 | TX | Fed. Circ. Ct. |
| 21 | Black v. JP Morgan Chase & Co. | 2011 U.S. Dist. LEXIS 99428 | 2011 | Federal | 3 | PA | Fed District |
| 22 | Rockwell v. Chase Bank | 2011 U.S. Dist. LEXIS 61279 | 2011 | Federal | 9 | WA | Fed District |
| 23 | FIA Card Servs., N.A. v. Weaver | 62 So. 3d 709 | 2011 | State | | LA | State Supreme |
| 24 | Guerrero v. Equifax Credit Info. Servs. | 2012 U.S. Dist. LEXIS | 2012 | Federal | 9 | CA | Fed District |
| 25 | Cayanan v. Citi Holdings, Inc. | 928 F. Supp. 2d 1182 | 2013 | Federal | 9 | CA | Fed District |
| 26 | Coppock v. Citigroup, Inc. | 2013 U.S. Dist. LEXIS 40632 | 2013 | Federal | 9 | WA | Fed District |
| 27 | Snow v. Citibank, N.A. | 2015 U.S. Dist. LEXIS 23624 | 2015 | Federal | 4 | NC | Fed District |

Appendix B: Change-of-Terms Clause Cases

| | Case | Cite | Year | Federal | Cir. | State | Court |
|---|---|---|---|---|---|---|---|
| 1 | Badie v. Bank of America | 67 App. 4th 779, 79 Cal. Rptr. 2d 273 | 1998 | State | . | CA | State App. Ct. |
| 2 | Powertel, Inc. v. Bexley | 743 So. 2d 570 | 1999 | State | . | FL | State App. Ct. |
| 3 | Goetsch v. Shell Oil Co. | 197 F.R.D. 574 | 2000 | Federal | 4 | NC | Federal District |
| 4 | Kennedy v. Conseco Fin. Corp. | 2000 U.S. Dist. LEXIS 17704 | 2000 | Federal | 7 | IL | Federal District |
| 5 | Herrington v. Union Planters Bank, N.A. | 113 F. Supp. 2d 1026 | 2000 | Federal | 5 | MS | Federal District |
| 6 | Bank One, N.A. v. Coates | 125 F. Supp. 2d 819 | 2001 | Federal | 5 | MS | Federal District |
| 7 | Beneficial Nat. Bank, U.S.A. v. Payton | 214 F. Supp. 2d 679 | 2001 | Federal | 5 | MS | Federal District |
| 8 | Lloyd v. MBNA Am. Bank, N.A. | 2001 U.S. Dist. LEXIS 8279 | 2001 | Federal | 3 | DE | Federal District |
| 9 | Hutcherson v. Sears Roebuck & Co. | 793 N.E.2d 886 | 2003 | State | . | IL | State App. Ct. |
| 10 | DIRECTV, Inc. v. Mattingly | 376 Md. 302 | 2003 | State | . | MD | State App. Ct. |
| 11 | Battels v. Discover Bank | 2004 U.S. Dist. LEXIS 28012 | 2004 | Federal | 11 | AL | Federal District |
| 12 | Perry v. FleetBoston Fin. Corp. | 2004 U.S. Dist. LEXIS 12616 | 2004 | Federal | 3 | PA | Federal District |
| 13 | Stone v. Golden Wexler & Sarnese, P.C. | 341 F.Supp.2d 189 | 2004 | Federal | 2 | NY | Federal District |
| 14 | Sears Roebuck & Co. v. Avery | 593 S.E.2d 424 | 2004 | State | . | NC | State App. Ct. |
| 15 | Citibank (S.D.), N.A. v. Wilson | 160 S.W.3d 810 | 2005 | State | . | MO | State App. Ct. |
| 16 | Spann v. Am. Express Travel Related | 224 S.W.3d 698 | 2006 | State | . | TN | State App. Ct. |
| 17 | Martin v. Comcast of California/Colorado/Florida/Oregon | 209 Ore. App. 82 | 2006 | State | . | OR | State App. Ct. |
| 18 | Englert v. Nutritional Scis., LLC | 2008 Ohio App. LEXIS 4290 | 2008 | State | . | OH | State App. Ct. |
| 19 | Enderlin v. XM Satellite Radio Holdings, Inc. | 2008 U.S. Dist. LEXIS 27668 | 2008 | Federal | 8 | AR | Federal District Ct. |
| 20 | Kortum-Managhan v. Herbergers NBGL | 204 P.3d 693 | 2009 | State | . | MT | State Supreme |
| 21 | Follman v. World Fin. Network Nat'l Bank | 721 F. Supp. 2d 158 | 2010 | Federal | 2 | NY | Federal District |
| 22 | Roling v. E*Trade Sec., LLC | 756 F. Supp. 2d 1179 | 2010 | Federal | 9 | CA | Fed District |
| 23 | Search v. Bank of Am., N.A. | 2012 U.S. Dist. LEXIS 142622 | 2012 | Federal | 9 | WA | Federal District |
| 24 | Daugherty v. Experian Info. Solutions, Inc. | 847 F. Supp. 2d 1189 | 2012 | Federal | 9 | CA | Federal District |
| 25 | Coiro v. Wachovia Bank, N.A. | 2012 U.S. Dist. LEXIS 24508 | 2012 | Federal | 3 | NJ | Federal District |
| 26 | Filho v. Safra Nat'l Bank | 489 Fed. App'x. 483 | 2012 | Federal | 2 | NY | Federal Circuit |
| 27 | Alwert v. Cox Communs., Inc. (In re Cox Enters.) | 2014 U.S. Dist. LEXIS 176061 | 2014 | Federal | 10 | OK | Federal District Ct. |
| 28 | Rodman v. Safeway Inc. | 2015 U.S. Dist. LEXIS 17523 | 2015 | Federal | 9 | CA | Federal District |

## Appendix C: Arbitration Cases

| | Case | Cite | Year | Federal | Cir. | State | Court |
|---|---|---|---|---|---|---|---|
| 1 | Badie v. Bank of America | 67 App. 4th 779, 79 Cal. Rptr. 2d | 1998 | State | . | CA | State App. |
| 2 | Powertel, Inc. v. Bexley | 743 So. 2d 570 | 1999 | State | . | FL | State App. |
| 3 | Goetsch v. Shell Oil Co. | 197 F.R.D. 574 | 2000 | Federal | 4 | NC | Fed District |
| 4 | Kennedy v. Conseco Fin. Corp. | 2000 U.S. Dist. LEXIS 17704 | 2000 | Federal | 7 | IL | Fed District |
| 5 | Herrington v. Union Planters Bank, N.A. | 113 F. Supp. 2d 1026 | 2000 | Federal | 5 | MS | Fed District |
| 6 | Bank One, N.A. v. Coates | 125 F. Supp. 2d 819 | 2001 | Federal | 5 | MS | Fed District |
| 7 | Beneficial Nat. Bank, U.S.A. v. Payton | 214 F. Supp. 2d 679 | 2001 | Federal | 5 | MS | Fed District |
| 8 | Lloyd v. MBNA Am. Bank, N.A. | 2001 U.S. Dist. LEXIS 8279 | 2001 | Federal | 3 | DE | Fed District |
| 9 | Walton v. Experian | 2003 U.S. Dist. LEXIS 16029 | 2003 | Federal | 7 | IL | Fed District |
| 10 | Hutcherson v. Sears Roebuck & Co. | 793 N.E.2d 886 | 2003 | State | . | IL | State App. |
| 11 | DIRECTV, Inc. v. Mattingly | 376 Md. 302 | 2003 | State | . | MD | State App. |
| 12 | Battels v. Discover Bank | 2004 U.S. Dist. LEXIS 28012 | 2004 | Federal | 11 | AL | Fed District |
| 13 | Perry v. FleetBoston Fin. Corp. | 2004 U.S. Dist. LEXIS 12616 | 2004 | Federal | 3 | PA | Fed District |
| 14 | Stone v. Golden Wexler & Sarnese, P.C. | 341 F. Supp. 2d 189 | 2004 | Federal | 2 | NY | Fed District |
| 15 | Sears Roebuck & Co. v. Avery | 593 S.E.2d 424 | 2004 | State | . | NC | State App. |
| 16 | Citibank (S.D.), N.A. v. Wilson | 160 S.W.3d 810 | 2005 | State | . | MO | State App. |
| 17 | Spann v. Am. Express Travel Related Servs. Co. | 224 S.W.3d 698 | 2006 | State | . | TN | State App. |
| 18 | Martin v. Comcast of California/Colorado/Florida/Oregon | 209 Ore. App. 82 | 2006 | State | . | OR | State App. |
| 19 | Douglas v. U.S. Dist. Court for Cent. Dist. of Cal. | 495 F.3d 1062 | 2007 | Federal | 9 | CA | Fed. Circ. Ct. |
| 20 | Enderlin v. XM Satellite Radio Holdings, Inc. | 2008 U.S. Dist. LEXIS 27668 | 2008 | Federal | 8 | AR | Fed District |
| 21 | Kortum-Managhan v. Herbergers NBGL | 204 P.3d 693 | 2009 | State | . | MT | State Supreme |
| 22 | Follman v. World Fin. Network Nat'l Bank | 721 F. Supp. 2d 158 | 2010 | Federal | 2 | NY | Fed District |
| 23 | Daugherty v. Experian Info. Solutions, Inc. | 847 F. Supp. 2d 1189 | 2012 | Federal | 9 | CA | Fed District |
| 24 | Coiro v. Wachovia Bank, N.A. | 2012 U.S. Dist. LEXIS 24508 | 2012 | Federal | 3 | NJ | Fed District |
| 25 | Filho v. Safra Nat'l Bank | 489 Fed. App'x. 483 | 2012 | Federal | 2 | NY | Fed. Circ. Ct. |
| 26 | Alwert v. Cox Communs., Inc. (In re Cox Enters.) | 2014 U.S. Dist. LEXIS 176061 | 2014 | Federal | 10 | OK | Fed District |
| 27 | Valle v. ATM Nat'l, LLC | 2015 U.S. Dist. LEXIS 11788 | 2015 | Federal | 2 | NY | Fed District |

Appendix D: Credit Card Cases

| | Case | Cite | Year | Federal | Cir. | State | Court | Credit Card or Deposit Account |
|---|---|---|---|---|---|---|---|---|
| 1 | Badie v. Bank of America | 67 App. 4th 779, 79 Cal. Rptr. 2d | 1998 | State | . | CA | State App. Ct. | Credit card |
| 2 | Goetsch v. Shell Oil Co. | 197 F.R.D. 574 | 2000 | Federal | 4 | NC | Federal District Ct. | Credit card |
| 3 | Kennedy v. Conseco Fin. Corp. | 2000 U.S. Dist. LEXIS 17704 | 2000 | Federal | 7 | IL | Federal District Ct. | Credit card |
| 4 | Herrington v. Union Planters Bank, N.A. | 113 F. Supp. 2d 1026 | 2000 | Federal | 5 | MS | Federal District Ct. | Deposit account |
| 5 | Bank One, N.A. v. Coates | 125 F.Supp.2d 819 | 2001 | Federal | 5 | MS | Federal District Ct. | Credit card |
| 6 | Beneficial Nat. Bank, U.S.A. v. Payton | 214 F. Supp. 2d 679 | 2001 | Federal | 5 | MS | Federal District Ct. | Credit card |
| 7 | Lloyd v. MBNA Am. Bank, N.A. | 2001 U.S. Dist. LEXIS 8279 | 2001 | Federal | 3 | DE | Federal District Ct. | Credit card |
| 8 | Walton v. Experian | 2003 U.S. Dist. LEXIS 16029 | 2003 | Federal | 7 | IL | Federal District Ct. | Credit card |
| 9 | Hutcherson v. Sears Roebuck & Co. | 793 N.E.2d 886 | 2003 | State | . | IL | State App. Ct. | Credit card |
| 10 | Battels v. Discover Bank | 2004 U.S. Dist. LEXIS 28012 | 2004 | Federal | 11 | AL | Federal District Ct. | Credit card |
| 11 | Perry v. FleetBoston Fin. Corp. | 2004 U.S. Dist. LEXIS 12616 | 2004 | Federal | 3 | PA | Federal District Ct. | Credit card |
| 12 | Stone v. Golden Wexler & Sarnese, P.C. | 341 F.Supp.2d 189 | 2004 | Federal | 2 | NY | Federal District Ct. | Credit card |
| 13 | Sears Roebuck & Co. v. Avery | 593 S.E.2d 424 | 2004 | State | . | NC | State App. Ct. | Credit card |
| 14 | Citibank (S.D.), N.A. v. Wilson | 160 S.W.3d 810 | 2005 | State | . | MO | State App. Ct. | Credit card |
| 15 | Spann v. Am. Express Travel Related Servs. | 224 S.W.3d 698 | 2006 | State | . | TN | State App. Ct. | Credit card |
| 16 | Kortum-Managhan v. Herbergers NBGL | 204 P.3d 693 | 2009 | State | . | MT | State Supreme Ct. | Credit card |
| 17 | DeBlasio v. Merrill Lynch & Co. | 2009 U.S. Dist. LEXIS 64848 | 2009 | Federal | 2 | NY | Federal District Ct. | Deposit account |
| 18 | Follman v. World Fin. Network Nat'l Bank | 721 F. Supp. 2d 158 | 2010 | Federal | 2 | NY | Federal District Ct. | Credit card |
| 19 | Anwar v. Fairfield Greenwich Ltd. | 742 F. Supp. 2d 367 | 2010 | Federal | 2 | NY | Federal District Ct. | Deposit account |
| 20 | Search v. Bank of Am., N.A. | 2012 U.S. Dist. LEXIS 142622 | 2012 | Federal | 9 | WA | Federal District Ct. | Credit card |
| 21 | Daugherty v. Experian Info. Solutions, Inc. | 847 F. Supp. 2d 1189 | 2012 | Federal | 9 | CA | Federal District Ct. | Credit card |
| 22 | Coiro v. Wachovia Bank, N.A. | 2012 U.S. Dist. LEXIS 24508 | 2012 | Federal | 3 | NJ | Federal District Ct. | Deposit account |
| 23 | Filho v. Safra Nat'l Bank | 489 Fed. Appx. 483 | 2012 | Federal | 2 | NY | Federal Circuit Ct. | Deposit account |
| 24 | Valle v. ATM Nat'l, LLC | 2015 U.S. Dist. LEXIS 11788 | 2015 | Federal | 2 | NY | Federal District Ct. | Deposit account |