

Submitted by the Council to the Members of
The American Law Institute
for Consideration at the Ninety-Sixth Annual Meeting on May 20, 21, and 22, 2019



THE AMERICAN LAW INSTITUTE

RESTATEMENT OF THE LAW CONSUMER CONTRACTS

Tentative Draft

(April 18, 2019)

SUBJECTS COVERED

- § 1. Definitions and Scope
- § 2. Adoption of Standard Contract Terms
- § 3. Modification of Standard Contract Terms
- § 4. Discretionary Obligations
- § 5. Unconscionability
- § 6. Deception
- § 7. Affirmations of Fact and Promises That Are Part of the Consumer Contract
- § 8. Standard Contract Terms and the Parol Evidence Rule
- § 9. Effects of Derogation from Mandatory Rules

APPENDIX Black Letter of Tentative Draft

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**Restatement of the Law
Consumer Contracts
Tentative Draft**

Comments and Suggestions Invited

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Once it is approved by both the Council and membership, a Tentative Draft represents the most current statement of the Institute’s position on the subject and may be cited in opinions or briefs in accordance with Bluebook rule 12.9.4, e.g., Restatement (Second) of Torts § 847A (Am. Law Inst., Tentative Draft No. 17, 1974), until the official text is published. The vote of approval allows for possible further revision of the drafts to reflect the discussion at the Annual Meeting and to make editorial improvements.

The drafting cycle continues in this manner until each segment of the project has been approved by both the Council and the membership. When extensive changes are required, the Reporter may be asked to prepare a Proposed Final Draft of the entire work, or appropriate portions thereof, for review by the Council and membership. Review of this draft is not *de novo*, and ordinarily is limited to consideration of whether changes previously decided upon have been accurately and adequately carried out.

The typical ALI Section is divided into three parts: black letter, Comment, and Reporter’s Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project’s Advisers and Members Consultative Group and by the Council and the membership, only the black letter and Comment are regarded as the work of the Institute. The Reporter’s and Statutory Notes remain the work of the Reporter.

**Restatements (excerpt of the Revised Style Manual approved by the ALI Council
in January 2015)**

Restatements are primarily addressed to courts. They aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court.

a. Nature of a Restatement. Webster’s Third New International Dictionary defines the verb “restate” as “to state again *or* in a new form” [emphasis added]. This definition neatly captures the central tension between the two impulses at the heart of the Restatement process from the beginning, the impulse to recapitulate the law as it presently exists and the impulse to reformulate it, thereby rendering it clearer and more coherent while subtly transforming it in the process.

The law of the Restatements is generally common law, the law developed and articulated by judges in the course of deciding specific cases. For the most part Restatements thus assume a body of shared doctrine enabling courts to render their judgments in a consistent and reasonably predictable manner. In the view of the Institute’s founders, however, the underlying principles of the common law had become obscured by the ever-growing mass of decisions in the many different jurisdictions, state and federal, within the United States. The 1923 report suggested that, in contrast, the Restatements were to be at once “analytical, critical and constructive.” In seeing each subject clearly and as a whole, they would discern the underlying principles that gave it coherence and thus restore the unity of the common law as properly apprehended.

Unlike the episodic occasions for judicial formulations presented by particular cases, however, Restatements scan an entire legal field and render it intelligible by a precise use of legal terms to which a body reasonably representative of the legal profession, The American Law Institute, has ultimately agreed. Restatements—“analytical, critical and constructive”—accordingly resemble codifications more than mere compilations of the pronouncements of judges. The Institute’s founders envisioned a Restatement’s black-letter statement of legal rules as being “made with the care and precision of a well-drawn statute.” They cautioned, however, that “a statutory form might be understood to imply a lack of flexibility in the application of the principle, a result which is not intended.” Although Restatements are expected to aspire toward the precision of statutory language, they are also intended to reflect the flexibility and capacity for development and growth of the common law. They are therefore phrased not in the mandatory terms of a statute but in the descriptive terms of a judge announcing the law to be applied in a given case.

A Restatement thus assumes the perspective of a common-law court, attentive to and respectful of precedent, but not bound by precedent that is inappropriate or inconsistent with the law as a whole. Faced with such precedent, an Institute Reporter is not compelled to adhere to what Herbert Wechsler called “a preponderating balance of authority” but is instead expected to propose the better rule and provide the rationale for choosing it. A significant contribution of the Restatements has also been anticipation of the direction in which the law is tending and expression of that development in a manner consistent with previously established principles.

The Restatement process contains four principal elements. The first is to ascertain the nature of the majority rule. If most courts faced with an issue have resolved it in a particular way, that is obviously important to the inquiry. The second step is to ascertain trends in the law. If 30 jurisdictions have gone one way, but the 20 jurisdictions to look at the issue most recently went

the other way, or refined their prior adherence to the majority rule, that is obviously important as well. Perhaps the majority rule is now widely regarded as outmoded or undesirable. If Restatements were not to pay attention to trends, the ALI would be a roadblock to change, rather than a “law reform” organization. A third step is to determine what specific rule fits best with the broader body of law and therefore leads to more coherence in the law. And the fourth step is to ascertain the relative desirability of competing rules. Here social-science evidence and empirical analysis can be helpful.

A Restatement consists of an appropriate mix of these four elements, with the relative weighing of these considerations being art and not science. The Institute, however, needs to be clear about what it is doing. For example, if a Restatement declines to follow the majority rule, it should say so explicitly and explain why.

An excellent common-law judge is engaged in exactly the same sort of inquiry. In the words of Professor Wechsler, which are quoted on the wall of the conference room in the ALI headquarters in Philadelphia:

We should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs.

But in the quest to determine the best rule, what a Restatement can do that a busy common-law judge, however distinguished, cannot is engage the best minds in the profession over an extended period of time, with access to extensive research, testing rules against disparate fact patterns in many jurisdictions.

Like a Restatement, the common law is not static. But for both a Restatement and the common law the change is accretional. Wild swings are inconsistent with the work of both a common-law judge and a Restatement. And while views of which competing rules lead to more desirable outcomes should play a role in both inquiries, the choices generally are constrained by the need to find support in sources of law.

An unelected body like The American Law Institute has limited competence and no special authority to make major innovations in matters of public policy. Its authority derives rather from its competence in drafting precise and internally consistent articulations of law. The goals envisioned for the Restatement process by the Institute’s founders remain pertinent today:

It will operate to produce agreement on the fundamental principles of the common law, give precision to use of legal terms, and make the law more uniform throughout the country. Such a restatement will also effect changes in the law, *which it is proper for an organization of lawyers to promote* and which make the law better adapted to the needs of life. [emphasis added]

PROJECT STATUS AT A GLANCE

No portion of this project has previously been submitted for membership approval.

History of Material in This Draft

This project was initiated in 2012.

Earlier versions of the material contained in this Draft can be found in Preliminary Draft Nos. 1, 2, and 3 (2014, 2015, 2017), Discussion Draft (2017), and Council Draft Nos. 1, 2, 3, 4, and 5 (2015, 2016, 2016, 2017, 2018).

Foreword

This project had a unique genesis. In 2011, the Institute announced the first winners of its new Young Scholars Medal (subsequently renamed the Early Career Scholars Medal). One of the two winners, Professor Oren Bar-Gill, then of New York University School of Law, now at Harvard Law School, had devoted a significant portion of his academic career to the study of contracts in which there is significant imbalance of information between sellers and buyers and in which contract terms are not negotiated by the parties. Many of us encounter contracts of this sort daily when we buy certain products or services, either in traditional stores or online. Following Professor Bar-Gill's presentation of his work at the 2011 Annual Meeting, the Institute launched a Restatement of the Law, Consumer Contracts, with Professor Omri Ben-Shahar of the University of Chicago Law School joining him as a Reporter. Professor Florencia Marotta-Wurgler of New York University School of Law became a Reporter a few years later.

This Restatement seeks to clarify how the courts have applied the principles embodied in the Restatement of the Law Second, Contracts, and the Uniform Commercial Code to transactions that either were not contemplated at the time those projects were completed (and therefore not addressed), like the purchase of software licenses and all online transactions, or that became a more significant part of the economy since that time. In this regard, two concepts have proven to be particularly challenging—assent and unconscionability—and the Restatement has devoted significant attention to these matters.

A Discussion Draft containing all of the Sections was presented at the Annual Meeting in 2017. The Council has now approved the whole project, which will be presented to the membership for final approval. The Reporters have done excellent work conceptualizing the project and responding to often inconsistent feedback and they deserve our collective gratitude, as do the Advisers and Members Consultative Group, who have grappled deeply with the knotty issues contained in this draft.

RICHARD L. REVESZ
Director
The American Law Institute

April 16, 2019

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To: ALI Members
From: Oren Bar-Gill, Omri Ben-Shahar, and Florencia Marotta-Wurgler, Reporters
Re: Tentative Draft of *Restatement of the Law, Consumer Contracts*
Date: April 15, 2019

Dear Members,

We are delighted to present to you the Tentative Draft of the *Restatement of the Law, Consumer Contracts*.

This Restatement provides courts and lawyers with an exposition to the rules of the common law of contracts as applied to standard-form consumer contracts. These contracts control a large and growing share of the economy. This Restatement thus responds to a growing need of courts to determine the terms of those agreements and their limits.

This document is a restatement: it closely follows the principles that guide a large majority of courts. This is a timely endeavor, as it identifies trends that have coalesced across a multitude of jurisdictions. Those principles and trends were distilled in accordance with the traditional ALI methodology—eliciting from leading cases the guiding rationales, clarifying their goals, and developing their conceptual implications. The pervasiveness of the rules restated was further confirmed by a secondary methodology of analyzing the entire body of consumer-contract law.

In producing this Restatement, the Reporters benefited from a broad range of comments and suggestions from the Advisers, the MCG, other ALI members, and experts in the field of contract law. We are especially grateful for the extensive comments provided by a group of ALI Council members who specialize in the rules of the Uniform Commercial Code and in contract law more broadly. The advice and support we received is reflected in every Section and in every page of this document.

This Restatement implements a framework originally developed by Karl Llewellyn long before the advent of digital contracting. Recognizing that consumers often do not read the fine print terms in a contract, this Restatement establishes the rules (which must be followed) for determining the terms of the agreement. It specifies the conditions for adoption of the standard contract terms, and it articulates the common-law doctrines that restrict the effect of intolerable terms.

RESTATEMENT OF THE LAW

CONSUMER CONTRACTS

1 **Reporters' Introduction:** Consumer contracts present a fundamental challenge to the law
2 of contracts, arising from the asymmetry in information, sophistication, and stakes between the
3 parties to these contracts—the business and the consumers. On one side stands a well-informed
4 and counseled business party, entering numerous identical transactions, with the tools and
5 sophistication to understand and draft detailed legal terms and design practices that serve its
6 commercial goals. On the other side stand consumers who are informed only about some core
7 aspects of the transaction, but rarely about the list of standard terms. These consumers enter the
8 transaction solely for personal or household purposes, without any professional understanding of
9 its legal contours. It is both irrational and infeasible for most consumers to keep up with the
10 increasingly complex terms provided by businesses in the multitude of transactions, large and
11 small, entered into daily.

12 There are many benefits to standard-form contracting, even in such asymmetric
13 environments. The efficiencies of mass production and mass distribution of products and services
14 would be hindered if the terms of each transaction with each consumer had to be individually
15 negotiated. These efficiencies can benefit all market participants, and the law has accordingly
16 viewed standard-form contracting favorably, enforcing such contracts without mounting special
17 impediments.

18 But the benefits of standard-form contracting are not without risks. Because consumers
19 typically lack the information, sophistication, and incentive to monitor the terms appended to their
20 transactions, there is a concern that businesses will include terms that are unreasonably one-sided,
21 unfair, and inefficient. In the absence of scrutiny from their customers, businesses might overreach
22 and draft terms of agreement that undermine some of the value that consumers reasonably
23 expected. Such overreaching might persist even in competitive environments.

24 In dealing with this fundamental challenge of potential abuse in asymmetric contracting
25 environments, consumer-contract law deploys several policing techniques. The first set of
26 techniques fit within the doctrine of mutual assent—the rules that determine how a contract is
27 formed, which terms are adopted into the agreement, and what processes a business must follow
28 to alert consumers to the terms being introduced and to the consequences of their adoption. The
29 second set of techniques involve mandatory restrictions over the substance of the deal—rules that

1 limit the discretion of the business in drafting contract terms and set boundaries to the permissible
2 terms of contracts.

3 Questions relating to these policing techniques have emerged at the forefront of consumer-
4 contract case law in recent decades. In the area of contract formation, technological advances have
5 made it easier for business parties to draft and disseminate lengthy documents with (often self-
6 serving) contractual terms at the initiation phases of consumer transactions and to modify those
7 terms periodically. Whereas shopping at a grocery store in the brick and mortar world entails very
8 few standard contract terms (and many legally supplied gap-fillers), shopping at the online outlet
9 of that store now entails a lengthy list of standard terms. The proliferation of lengthy standard-
10 term contracts, mostly in digital form, makes it practically impossible for consumers to scrutinize
11 the terms and evaluate them prior to manifesting assent. A signature at the bottom of the form, or
12 a click “I Accept” is, at best, a declaration “I know I am agreeing to something, but I don’t know
13 to what. I trust that if something really bad is buried in the fine print, the law will protect me from
14 its bite.” In such environments, whether the lengthy terms are presented to the consumer before or
15 after the decision to enter the transaction has little bearing on the consumer’s awareness or
16 understanding of the terms, as the process of review-and-scrutiny has become largely impractical.

17 Likewise, questions relating to the second set of policing techniques—the limits of
18 permissible contracting—have emerged at the other forefront of consumer-contract law. As
19 standard-form contracts increasingly replace longstanding default rules with provisions drafted by
20 business entities, courts have been called upon to police their reach. Whether the terms are
21 excessively one-sided and unfair, or merely diverge from the consumer’s reasonable expectations
22 as shaped by the business’s marketing practices, common-law courts and consumer-protection
23 statutes establish a framework for marking the boundaries. Traditional doctrines like
24 unconscionability and misrepresentation have been applied to police suspect practices and terms
25 relating to the subject matter of the transaction, to the remedies that consumers or the business may
26 seek when the transaction fails, to choices of law and forum, to the business’s discretion to specify
27 and adjust contractual obligations, and to many other areas of contracting.

28 Common-law courts have sought to address the concern for potential abuse in asymmetric
29 contracting environments through both techniques—the assent doctrine and mandatory limits over
30 permissible contracting. Courts have established some minimum requirements relating to the
31 manner in which the agreements are presented to consumers and to the conspicuousness of the

1 alerts that consumers receive. At the same time, courts have developed standards that prohibit
2 various intolerable or deceptive terms even if those terms pass through the filter of mutual assent.

3 Because the imbalance between businesses and consumers is so great, the application of
4 contract law's general rules of mutual assent alone are not likely to level the playing field. In a
5 world of lengthy standard forms, which consumers are unlikely to read, more restrictive assent
6 rules that demand more disclosures, more notifications and alerts, and more structured templates
7 for manifesting assent are unlikely to produce substantial benefit for consumers. Similarly, outside
8 the common law, the Uniform Commercial Code's rule that disclaimers of implied warranties
9 become effective and are adopted as part of the contract only if made in a conspicuous manner
10 induced lengthy disclaimer paragraphs in ALL CAPS typeface, but again without curing the
11 imbalance between the business and the consumer. As the length and incidence of standard-form
12 contracts have grown, it has become all the less plausible to expect consumers to read and take
13 informed account of the contracts' provisions. In these environments, strengthening the disclosure
14 requirements emanating from contract law's general rules of mutual assent would not prompt
15 consumers to read the terms, to carefully weigh them, and to ultimately make more prudent
16 contracting decisions. Since advance disclosure of standard terms generally does not render the
17 assent process any more meaningful, the "opportunity to read" technique, which courts have
18 embraced, is quite ineffective in consumer contracts. Some observers have even argued that
19 mandating more disclosures might "backfire" by creating a false presumption of meaningful
20 assent, thus undercutting the second policing technique—the ex post scrutiny of contract terms.

21 Despite the limited effectiveness of the assent doctrine and of advance disclosure rules in
22 producing environments of informed consent, courts have—without exception—endorsed and
23 enforced standard form contracts, as long as some necessary requirements are met. This
24 Restatement states the requirements developed by common-law courts for the adoption of standard
25 contract terms into consumer contracts. The requirements focus on the timing, format of
26 presentation, context, and substance of the notifications consumers receive regarding the existence
27 of terms applying to the transaction. The goal of these court-developed requirements is to afford
28 consumers a meaningful opportunity to review the terms and to avoid the transaction. While some
29 variation exists among courts and jurisdictions concerning the necessary substance and scope of
30 the notifications accompanying the presentation of standard contract terms, this Restatement
31 presents a comprehensive set of requirements unifying this common-law jurisprudence.

1 Satisfaction of such requirements does not impose significant burdens on businesses or consumers
2 interested in quick, streamlined completion of transactions. Adherence by businesses to these
3 procedures would provide certainty surrounding the process of adoption of standard contract terms.

4 In addition to the rules governing the adoption of standard contract terms, this Restatement
5 unifies and presents the primary common-law mandatory restrictions over the substance of those
6 terms. One category of restrictions, which common-law courts have developed primarily under the
7 unconscionability doctrine, protects consumers against egregiously unfair terms. Another category
8 of restrictions protects consumers from standard contract terms that negate or undermine
9 consumers' reasonably expected benefits from the bargain. At the center of this second safeguard
10 stand rules that give effect to representations, affirmations, and promises made to consumers, even
11 when meticulous language in the standard contract terms purports to undo such effect.

12 In recent decades, an important question regarding the scope of the unconscionability
13 safeguard is the effect of limits (stipulated in standard contract terms) on the ability of consumers
14 to pursue a complaint or to seek reasonable redress, particularly by channeling all disputes to
15 arbitration or barring class actions. Many courts have held that imposing express or de facto class-
16 action bars on consumers is unconscionable, because such limitations render the enforcement of
17 consumer contractual rights impractical. Recently, however, the enforceability of these terms has
18 turned also on the provisions of various federal statutes. One such statute is the Federal Arbitration
19 Act (FAA), which has been held by the U.S. Supreme Court to preempt, in some cases, the
20 application of the common-law doctrine of unconscionability to arbitration clauses.

21 The interpretation of the FAA and of other federal rules that regulate the procedures for
22 consumers' access to justice is outside the scope of the common law of consumer contracts. This
23 Restatement states the principles that, in the absence of constraints of federal law, guide the
24 application of the doctrine of unconscionability under state law. It takes no position on the proper
25 application of the Federal Arbitration Act or other statutes governing enforceability of or limits on
26 arbitration provisions, and the way such statutes affect the application of the unconscionability
27 standard.

28 The ex post scrutiny of permissible contracting, as well as the scrutiny of standard contract
29 terms that conflict with other promises and representations made to consumers, are not intended
30 to be (nor can they feasibly operate as) a replacement for private ordering. Parties are allowed to
31 design their transactions, and standard contract terms—despite being invisible to most

1 consumers—are an indispensable part of the transaction. Parties may agree to bargain-basement
2 terms, if they so wish, and for the right price. The ex post scrutiny by courts is only intended to
3 uproot terms so unfair that they would be unlikely to survive in an environment of meaningful free
4 choice, or that stealthily peel off the value that consumers bargained for.

5 Consumer-contract law as developed by courts reflects Karl Llewellyn's familiar model: a
6 fairly streamlined adoption of standard contract terms (the "supplementary boilerplate," in
7 Llewellyn's words), along with rigorous scrutiny to protect the spirit of the bargained-for deal
8 ("the dickered terms"). Llewellyn captured this with the concept of "blanket assent" to "any not
9 unreasonable or indecent terms." He recognized then—an insight that has become all the more
10 relevant in the digital era—that the manifestation of assent to a consumer contract results in the
11 adoption of standard contract terms but does not imply meaningful informed consent to these
12 terms. Llewellyn recognized that common-law courts scrutinize and uproot unfair terms and
13 enforce the standard contract terms only if they "do not alter or eviscerate the reasonable meaning
14 of the dickered terms." Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 370
15 (New York: Little, Brown, 1960).

16 This Restatement offers a roadmap to the implementation of Llewellyn's approach, which
17 continues to accurately characterize the approach taken by courts. This Restatement reflects the
18 common-law "blanket assent" principle, whereby courts allow businesses to draft and affix
19 standard contract terms to the transaction, as long as they provide consumers with adequate notices
20 and opportunity to review the terms, as well as a meaningful opportunity to avoid the transaction.
21 At the same time, this Restatement identifies the doctrines and rules arising from common-law
22 jurisprudence, which restrict the effect of standard contract terms by prohibiting businesses from
23 imposing intolerable terms or undermining the core bargain presented to consumers either as part
24 of the dickered terms or in precontractual communications.

25 In drafting the rules that apply contract law to consumer contracts, this Restatement relies
26 on two main sources. The first and primary source informing this Restatement are the common-
27 law principles that have been guiding courts in adjudicating consumer-contract disputes. Those
28 principles were originally found in the Restatement of the Law Second, Contracts (and often reflect
29 the statutory provisions of the Uniform Commercial Code), but have evolved in particular and
30 important directions that are specific to consumer contracts. When appropriate and consistent with
31 the common law of contracts and the UCC, the rules of this Restatement also reflect the principles

1 of fairness and antideception guiding consumer-protection statutes and regulations. The principles
2 that guide this latter body of law are manifested in several Sections of this Restatement that protect
3 consumers by enforcing the bargain as presented to them, even when some elements are missing
4 from, or qualified in, the standard contract terms. The two bodies of law that address consumer
5 contracts—the general common law of contracts and statutory and regulatory consumer-protection
6 law—appear together in many litigated cases. The present document promotes a greater conceptual
7 unity across these two bodies of law.

8 The challenges posed by consumer contracts have heightened over the past generation, as
9 courts have adapted traditional contract-law rules to consumer contracts. To track this
10 development, this Restatement follows the traditional ALI methodology and bolsters it with an
11 additional layer of transparency. Primarily, this Restatement follows leading court decisions,
12 eliciting from them the guiding rationales. It clarifies the policy goals underlying the rules applied
13 by courts, and develops their conceptual implications to accord them greater clarity and coherence.
14 In addition, and in order to confirm that the rules identified through this primary method indeed
15 reflect the “law in action,” the Reporters read the entire body of contract-law decisions relating to
16 consumer contracts and the rules of this Restatement—higher-court as well as lower-court
17 decisions, both state-court and federal-court cases, published and unpublished, and holdings as
18 well as dicta, made available in online legal-research directories and from secondary sources. By
19 looking at all the information flowing from case law and carefully organizing it according to
20 outcomes, rationales, and influence, this methodology made it possible to examine with greater
21 subtlety the emerging rules, their impact, and their prominence. It decreases the possibility that
22 important or well-reasoned cases may have been missed, and allows a closer consideration of the
23 evolution of the doctrine to better understand how courts address key issues. We thus present a
24 Restatement that reflects the rules as elicited from the most influential and persuasive court
25 decisions, along with the assurance that these rules are indeed widely accepted by the courts in the
26 many jurisdictions within the United States. It is important to emphasize that the examination of
27 the entire body of case law does not replace nor modify the traditional legal analysis—the craft of
28 discovering the DNA of the law through experienced and informed reading of persuasive sources.
29 Rather, the full landscape view bolsters the traditional approach with an added measure of
30 comprehensiveness and transparency. The traditional method of legal reasoning is reflected in the
31 black letter and explicated in the Comments to the Sections of this Restatement. The

1 comprehensive analysis of the entire case law is explained and reported in Reporters' Notes
2 accompanying the relevant Sections.

3 As explained above, this Restatement draws on common-law principles that have
4 antecedents in the Restatement of the Law Second, Contracts. The application of those principles
5 in the area of consumer contracts produced the rules that are restated here. In restating these rules
6 in the consumer context, the present document seeks to provide courts with more tailored guidance
7 in adjudicating consumer-contract disputes than the Restatement Second of Contracts offers,
8 reflecting developments in consumer-contract law since the completion of the Restatement Second
9 of Contracts. Importantly, this Restatement does not purport to cover all possible aspects of a
10 consumer-contracts case. The Restatement Second of Contracts continues to provide valuable
11 guidance on general contract-law questions in the consumer context that are not covered in this
12 Restatement.

13 This Restatement is organized as follows. Section 1 defines key terms. The first substantive
14 rule is the Adoption of Standard Contract Terms provision in § 2. The rule reflects an approach,
15 widely embraced by a large majority of courts, that enables businesses to design the terms of the
16 transaction, as long as they provide reasonable notice and meaningful opportunity to review the
17 terms and to avoid the transaction. This rule is complemented by a related provision in § 3,
18 extending similar principles to modifications of standard contract terms.

19 The remaining Sections comprise a set of rules that rely on ex post scrutiny by courts to
20 limit the risk of abuse. Section 4 addresses the problem of open-ended terms, which grant the
21 business unrestricted discretion to specify and adjust its obligations. Section 5 is the
22 unconscionability rule, providing the framework for invalidating terms that unreasonably favor the
23 business party and unfairly surprise the consumer. Section 6 deals with the problem of deception,
24 whereby the standard contract terms conflict with explicit affirmations or promises made to the
25 consumer. Section 7 includes the rules regarding precontractual affirmations and promises. Section
26 8 creates presumptions of integration for standard contract terms (under the Parol Evidence Rule)
27 and explains how such presumptions are rebutted by prior affirmations of fact or promises. And
28 § 9 completes this list of anti-abuse provisions by stipulating the effects of striking terms out of
29 contracts.

* * *

1 This Restatement includes the following provisions:

2 § 1. Definitions and Scope

3 § 2. Adoption of Standard Contract Terms

4 § 3. Modification of Standard Contract Terms

5 § 4. Discretionary Obligations

6 § 5. Unconscionability

7 § 6. Deception

8 § 7. Affirmations of Fact and Promises That Are Part of the Consumer Contract

9 § 8. Standard Contract Terms and the Parol Evidence Rule

10 § 9. Effects of Derogation from Mandatory Rules

11 **§ 1. Definitions and Scope**

12 **(a) Definitions:**

13 **(1) “Consumer” – An individual acting primarily for personal, family, or**
14 **household purposes.**

15 **(2) “Business” – An individual or entity other than a consumer that regularly**
16 **participates in or solicits, directly or indirectly, transactions with consumers.**

17 **(3) “Contract” – A promise or set of promises for the breach of which the law**
18 **gives a remedy, or the performance of which the law in some way recognizes as a duty.**

19 **(4) “Consumer contract” – A contract between a business and a consumer**
20 **other than an employment contract.**

21 **(5) “Standard contract term” – A term, relating to a consumer contract, that**
22 **has been drafted prior to the transaction for use in multiple transactions between the**
23 **business and consumer parties.**

24 **(6) “Affirmation of fact or promise” – Any statement about the transaction,**
25 **including but not limited to statements about quantity, quality, characteristics, utility,**
26 **price, discount, comparative cost, service, and remedy, intended to reach consumers,**
27 **including in negotiations, advertising, brochures, or labels, or in any record**

1 **accompanying the transaction, but excluding statements that would be reasonably**
2 **understood by consumers as “puffing” or statements of belief not founded on fact.**

3 **(7) “Good faith” – Honesty in fact and the observance of reasonable**
4 **commercial standards of fair dealing.**

5 **(b) Scope: This Restatement applies to consumer contracts, except to the extent that**
6 **a matter is governed by statute or regulation. It restates contract-law principles under state**
7 **law and takes no position on the proper relationship between statutory or regulatory**
8 **requirements and these principles.**

9 **Comment:**

10 1. *“Consumer” defined.* The definition of “consumer” follows UCC § 1-201(b)(11).

11 2. *“Business” defined.* An individual or any type of entity can be a “business” under this
12 Section. Compare UCC § 1-201(b)(27) (defining “Person”). A “business” is an individual or entity
13 that regularly participates in or solicits, directly or indirectly, transactions with consumers. The
14 definition of “business” is consistent with the definition of “merchant” in UCC § 2-104(1), subject
15 to two qualifications: (i) a “business” may deal in transactions other than those involving goods
16 (for example, it may deal in services, real estate, and information products); (ii) a “business” is
17 covered by this Restatement only to the extent that it deals with consumers, not with other
18 merchants.

19 3. *“Contract” defined.* The definition of “contract” follows Restatement of the Law
20 Second, Contracts § 1.

21 4. *“Standard contract terms” defined.* The definition of “standard contract term” focuses
22 on the pre-drafting factor, which captures a key feature of consumer contracts: their multi-
23 transaction application. Pre-drafting also implies that there is no negotiation between the business
24 and the consumer over the language of those terms. In some cases, negotiation of the standard
25 contract terms is present, as when the consumer may choose which version of the standard terms
26 applies, or choose to avoid a particular set of terms. In other cases, tailoring of the standard contract
27 terms is present, as when the terms are tailored per consumer based on personal information known
28 to the business. Such negotiated or tailored terms are considered “standard contract terms” despite
29 the absence of uniform content, because of the multi-transaction application.

1 Illustrations:

2 1. A credit-card issuer includes a pre-drafted arbitration clause in the terms that it
3 offers to all of its consumer customers. The arbitration clause is a standard contract term,
4 as defined in subsection (a)(5), even if the consumer can prevent it from becoming part of
5 the contract by a notice to the business.

6 2. An insurer offers different, non-negotiated premiums to different policyholders
7 based on a formula that rates each policyholder's risk. The premium is not negotiable. The
8 term setting the premium is a standard contract term, as defined in subsection (a)(5).

9 5. *Core deal terms versus boilerplate.* Standard contract terms may include both terms that
10 consumers readily identify as characterizing the transaction, or “core deal terms,” as well as terms
11 that are usually appended to the transaction in fine print, or “boilerplate.” The criteria for adoption
12 and legal enforceability may vary according to the classification of the standard contract term or
13 the circumstances in which the term is provided to the consumer, and thus some rules of this
14 Restatement may apply differently to core deal terms versus boilerplate (for example, rules relating
15 to adoption of terms under §§ 2 and 3, unconscionability under § 5, deception under § 6,
16 disclaimers under § 7(c), and integration under § 8).

17 Illustration:

18 3. A product is sold online for a fixed price. The listing of the product contains a
19 description of the product, the price, the delivery charge, and a “30-day money-back”
20 statement, as well as a link to the seller's website, where additional terms of sale are posted.
21 All are standard contract terms as defined in subsection (a)(5), even though only some of
22 them (the price, the description of the goods, the delivery charge, and the “30-day money-
23 back” statement) are core deal terms.

24 6. *“Affirmation of fact or promise” defined.* The definition of “affirmation of fact or
25 promise” includes express statements, as well as reasonable interpretations of express statements,
26 and implications that reasonably flow from express statements or acts. Affirmations and promises
27 can be found, for example, on a business's website, on packaging materials, and in advertisements.
28 The definition does not include statements that should be reasonably understood as “puffing” or
29 statements of belief not founded on fact. (Compare Restatement of the Law Second, Contracts

1 §§ 168-169; UCC § 2-313(2).) As explained in §§ 6 to 8, an affirmation or promise can result in
2 nonenforcement of inconsistent standard contract terms (§ 6), can create an obligation that
3 becomes part of the consumer contract (§ 7), and can rebut the presumption of partial or complete
4 integration of the standard contract terms (§ 8).

5 7. *“Good faith” defined.* The definition of “good faith” follows the Uniform Commercial
6 Code § 1-201(b)(20), which has evolved since the original version of the Uniform Commercial
7 Code. Although various formulations and explications of the duty of good faith have been adopted
8 in different sources of law, they all share the same ultimate goal. The duty of good faith is intended
9 to capture and weed out various forms of opportunistic behavior—including unfair advantage-
10 taking, hold up, and dishonesty—that reduce the value of contracting and require costly
11 precautions. Good-faith performance or enforcement of a contract emphasizes faithfulness to an
12 agreed common purpose and consistency with the justified expectations of the other party. The
13 element of “observance of reasonable commercial standards of fair dealing” is particularly
14 necessary when businesses operate through agents and deal with numerous consumers. In these
15 settings, unfair advantage-taking may occur even without dishonesty in fact. Compare Restatement
16 of the Law Second, Contracts § 205, Comment *a*. This definition does not intend to change the
17 meaning of the implied covenant of good faith and fair dealing.

18 8. *Scope.* The scope of this Restatement derives from the definition of “consumer contract”
19 (subsection (a)(4)). This Restatement contains contract-law rules that have distinct application to
20 contracts in which asymmetries in information, sophistication, and bargaining power are present,
21 of which consumer contracts are a prominent species. This Restatement does not purport to cover
22 all possible aspects of such contracts. The Restatement of the Law Second, Contracts, continues
23 to apply to general contract-law questions that are not covered here, particularly when the question
24 does not involve a standard contract term and is not otherwise covered by this Restatement.

25 9. *Contracts over data and privacy.* A “consumer contract” is defined by the type of parties
26 that enter it, not by the subject matter that it governs. Consumer contracts could govern a variety
27 of topics, including the business’s data and privacy policies. Indeed, consumer transactions often
28 involve attempts by the business to form agreements governing the business’s treatment of
29 consumers’ personal information, including the business’s collection, use, sharing, protection, or
30 other handling of personal information. Such matters have become an important economic
31 component of many consumer transactions. While some privacy notices are required by law and

1 some reflect obligations that are not contractual in their nature, and while the legal treatment of
2 such aspects of the agreement may be subject to additional area-specific rules (see, e.g., Principles
3 of the Law, Data Privacy, Introductory Note), the business’s rights and obligations could also be
4 governed by contract law and by the rules of this Restatement. Accordingly, this Restatement is
5 not intended to determine which data or privacy policies or terms constitute or become part of
6 contracts, but merely to provide principles of contract law for those that do. Specifically, if the
7 data and privacy terms are presented to consumers in a manner that satisfies the definitions of
8 “contract” and “consumer contract,” courts should apply the rules of this Restatement (as well as
9 other contract-law rules, but subject to specific rules of data-privacy law) to determine the
10 formation, scope, and consequences of an agreement over data.

11 **Illustration:**

12 4. A consumer uses a business’s website to order a product. Before the purchase is
13 complete, the website refers the consumer to two sets of standard contract terms that the
14 website says will apply to the transaction. The first set of terms is titled “Terms of Service”
15 and covers several issues including warranties, remedies, choice of law and forum, and
16 intellectual-property rights. The second set of terms is titled “Privacy Policy” and states
17 the agreements of the parties with respect to the scope of personal data collection, use,
18 sharing, and security. The provisions of § 2 of this Restatement that determine whether the
19 “Terms of Service” are adopted into the agreement also determine whether the Privacy
20 Policy is adopted into the agreement.

21 *10. Relation to the Uniform Commercial Code and other statutory law.* This Restatement
22 restates the rules of the common law of consumer contracts. A significant number of consumer
23 contracts are governed by statutes. Importantly, sales or leases of goods are governed extensively
24 (but not completely) by Articles 2 and 2A of the Uniform Commercial Code (UCC), and other
25 consumer contracts are within the scope of other UCC articles. Of course, the common-law rules
26 set out in this Restatement cannot override statutory provisions of the UCC, and this point is made
27 explicit in subsection (b), and explained here. But the UCC does not create complete legal systems
28 for contracts within its scope, and the common-law rules restated here apply to issues not addressed
29 by the particular provisions of the statute. Indeed, the UCC provides that common-law principles
30 supplement the UCC unless displaced by particular provisions of the UCC. (See UCC § 1-103(b)

1 and Comment 2 to that Section). In some cases, the UCC is silent as to an issue. In other cases,
2 even when there is a UCC rule generally applicable to a particular issue, the UCC rule does not
3 answer all the questions that may arise in connection with that issue. Thus, many of the common-
4 law rules set out in this Restatement, in addition to applying to non-UCC transactions, will have
5 application to contracts within the scope of the UCC when no particular provisions of the UCC
6 address or displace them. In addition, many of the common-law rules set out in this Restatement
7 are drawn directly from UCC provisions and from case law interpreting them that reflects a widely
8 shared view as to the meaning and application of the UCC.

9 Certain other subsets of consumer contracts, e.g., credit transactions, insurance contracts,
10 real-estate contracts, or contracts involving investments in securities, are governed by specific
11 federal or state statutes. Consumer contracts for the sale of goods are also governed by the
12 Magnuson–Moss Warranty Act. Many consumer contracts are covered by additional statutes and
13 regulations, including the Federal Trade Commission Act and state Unfair and Deceptive Acts and
14 Practices statutes. This Restatement provides common-law rules that supplement and implement
15 the provisions of these enactments, but in case of conflict or displacement by statute, the statutory
16 rules apply. The statutory rules take precedence also when the statute supplants the common law.
17 The existence of a statute, however, does not, in and of itself, supplant or displace the common-law
18 rules restated herein.

19 In addition, this Restatement takes no position on the proper application of the Federal
20 Arbitration Act or other statutory or regulatory requirements that may affect the enforceability of
21 or limits on arbitration provisions, and the way such requirements may affect application of the
22 stated contract principles. It includes some Illustrations and, in the Reporters' Notes, some case
23 citations, that reference arbitration clauses in consumer contracts. Those references are intended to
24 clarify the principles that guide the application of the doctrine of unconscionability or other contract
25 principles. They are not intended to address the question how these principles align vis-à-vis the
26 law of arbitration.

27 Parties to a consumer contract are also subject to additional common-law rules. See, for
28 example, the Restatement of the Law Third, Torts: Liability for Economic Harm, and the
29 Restatement of the Law, Liability Insurance. In case of conflict, sector-specific common-law rules
30 may take precedence over the general common-law rules of consumer contracts that are restated
31 herein.

REPORTERS' NOTES

1 The purpose of this Restatement is to identify a class of contracts that has presented
2 separate challenges and concerns and has received special treatment. The definition of “consumer
3 contracts” identifies this class of contracts.

4 The selection principle is consistent with the definition of “consumer contracts” in the
5 common law, under the Uniform Commercial Code, and under state consumer-protection statutes.
6 “Consumers” are defined as parties who enter the transaction primarily for personal, family, or
7 household purposes. They are acting for purposes outside their profession or trade. The distinction
8 between personal and professional is based on a notion of expertise. (Compare UCC § 2-104 (AM.
9 LAW INST. & UNIF. LAW COMM’N) (defining “Merchant”).) Professional transactors accumulate
10 experience and expertise, which help them recognize the various aspects of the transaction,
11 including the nonnegotiated standard contract terms. Consumers, in contrast, do not have the same
12 experience and expertise to draw on. The same is true for parties in markets that share similar
13 qualities of asymmetry, such as the relationships between firms and less-experienced independent
14 contractors that have become characteristic in online platforms and the sharing economy. The
15 principles of this Restatement could apply to such transactions, to the extent that they are not
16 governed by more specific bodies of law.

17 The definition of “standard contract terms” identifies two elements: pre-drafting and
18 application to multiple consumer transactions. This definition includes terms that appear
19 nonstandard because they are personalized across consumers, as long as the formula (“the
20 algorithm”) for the personalization is predetermined and applied generally across multiple
21 consumer transactions. While such personalization has existed in some sectors for a while (e.g., in
22 pricing insurance policies), it is emerging as a common feature in the design of consumer
23 transactions in a data-driven economy.

24 A question that has risen to the fore in recent times is whether privacy policies posted by
25 businesses, which govern the businesses’ data collection, use, and protection practices, are
26 contracts. While a business’s general statements of policy (in any area, including privacy) should
27 not be viewed as contracts, a notice that purports to create consent-based rights and obligations
28 should generally be viewed as the subject matter of a consumer contract, in the same way that
29 notices regarding the scope of warranty, remedies, or dispute resolution do. Comment 9 provides
30 a clear answer: Privacy policies that attempt to create consent-based rights and obligations are
31 treated as attempts to form consumer contracts, and the Restatement’s rules apply to them. Such
32 data-privacy provisions may be included in the standard contract terms, or they may be posted on
33 websites, appended to mobile applications, or provided to consumers at retail locations where
34 consumers complete their transactions. See *In re JetBlue Airways Corp. Privacy Litigation*, 379 F.
35 Supp. 2d 299, 325-326 (E.D.N.Y. 2005) (indicating that JetBlue’s privacy policy constituted a
36 term in the contract of carriage, but ultimately determining that the plaintiffs failed to meet their
37 pleading requirement with respect to damages, so the breach-of-contract claim should be

1 dismissed); *In re Am. Airlines, Inc., Privacy Litigation*, 370 F. Supp. 2d 552, 556 (N.D. Tex. 2005)
2 (stating as a matter of fact that the privacy policy on American Airlines’ website was part of the
3 contract of carriage); *In re Sony Gaming Networks & Customer Data Security Breach Litigation*,
4 996 F. Supp. 2d 942, 954 (S.D. Cal. 2014) (granting a motion to dismiss against plaintiffs that
5 entered into a Terms of Service User Agreement with Sony and agreed to Sony’s Privacy Policy).
6 Some of the terms in those notices merely inform consumers of rights and obligations that
7 businesses have with respect to the consumers’ personal information, including rights and
8 obligations that do not depend on or require mutual assent. However, other terms in privacy notices
9 grant the business rights that, in the absence of contractual agreement, it would not otherwise have
10 in the consumers’ personal information, or make explicit promises regarding the handling of
11 consumer personal information beyond those required by law (e.g., the business may promise that
12 it will employ heightened data-security protections and allow only qualified employees to have
13 access to the information). It is in those situations that the classification of privacy policies as
14 contracts has significant legal consequences.

15 Indeed, agreements over the business’s use of consumers’ information are increasingly at
16 the core of many consumer products and services. Consumers “pay” for services by allowing
17 businesses to collect and use their personal information that may not be collected and used without
18 such permission, and it is therefore appropriate to regard the personal-information provisions as
19 part of the contract. This is the approach taken in the case law. It is the position taken by the court
20 in the one published state appellate case on this topic, *Gwinnett Community Bank v. Arlington*
21 *Capital, LLC*, 757 S.E.2d 239 (Ga. Ct. App. 2014). In that case, the court found that privacy notices
22 may give rise to contractual obligations. The same approach also emerges from a comprehensive
23 survey of lower-court decisions, as detailed below.

24 *Identifying data and privacy policies as contracts.* The potential inclusion of privacy
25 notices in the definition of “consumer contracts” reflects a basic and longstanding principle of
26 contract law—that the rules do not vary with the subject matter of the purported agreement. A
27 qualitative and quantitative analysis of recent cases confirms that this principle is generally
28 applied. A database of all published state decisions and federal decisions applying state law, as
29 well as unpublished decisions reported in Westlaw® and LexisNexis®, was collected and
30 analyzed. Each decision was categorized on dozens of dimensions, including court and litigant
31 characteristics, as well as causes of action brought, facts, court reasoning—both in holdings and
32 in dicta—and outcomes.

33 Consumer actions for breach of contract against businesses for violations of privacy notices
34 are relatively recent, and the case law is evolving. An early case, in which a consumer attempted
35 to enforce a protective promise made in a privacy notice, held that the privacy notice on a website
36 was not a contract. “[G]eneral statements of policy are not contractual” and “absent an allegation
37 that Plaintiffs actually read the privacy policy, not merely the general allegation that Plaintiffs
38 ‘relied on’ the policy, Plaintiffs have failed to allege an essential element of a contract claim: that
39 the alleged ‘offer’ was accepted by Plaintiffs.” See *In re Northwest Airlines Privacy Litigation*,
40 No. Civ. 04-126(PAM/JSM), 2004 WL 1278459, at *6 (D. Minn. June 6, 2004). That case,

1 however, was not consistent with a large body of case law that was ready to attribute contractual
2 consequences to general statements of policy posted on websites and, accordingly, it did not
3 influence subsequent jurisprudence. Instead, a great majority of courts follow two other cases
4 decided a year later, which held that terms in privacy notices give rise to contractual obligations
5 as long as all the necessary elements for contract formation are met. See, e.g., *In re JetBlue Airways*
6 *Corp. Privacy Litigation*, 379 F. Supp. 2d 299 (E.D.N.Y. 2005) (indicating that JetBlue’s privacy
7 policy constituted a term in the contract of carriage, but ultimately determining that the plaintiffs
8 failed to meet their pleading requirement with respect to damages, so the breach of contract claim
9 should be dismissed); *In re Am. Airlines, Inc., Privacy Litigation*, 370 F. Supp. 2d 552 (N.D. Tex.
10 2005) (stating as a matter of fact that the privacy policy on American Airlines’ website was part
11 of the contract of carriage).

12 The logic of the latter decisions is compelling. Indeed, the decision in *Northwest Airlines*
13 is inconsistent with the majority rule of what constitutes contractual assent (see § 2), and therefore
14 it does not squarely address the question whether terms and conditions relating to data and
15 privacy—if presented in a manner consistent with the assent rules—are to be regarded as contracts.
16 To confirm this Restatement’s position following the holding and rationale of the *JetBlue* and
17 *American Airlines* decisions, an empirical methodology was implemented and all published and
18 readily available unpublished cases involving claims for breach of contract for business violations
19 of privacy policies were examined. The conclusion was that the *JetBlue* approach, which held that
20 privacy notices can create contractual obligations, is indeed the dominant jurisprudence in this
21 area.

22 Starting with *Northwest Airlines* in 2004 and concluding in 2015 with *Austin–Spearman*
23 *v. AARP*, 119 F. Supp. 3d 1 (D.D.C. 2015), there have been 45 cases in which consumers brought
24 breach-of-contract claims for violations of privacy notices, in which courts analyzed the
25 contractual enforceability of privacy notices applicable to consumers, or in which firms, as
26 defendants, sought to enforce their own policies, arguing that they constitute contracts and that
27 consumers’ assent to them operates as a defense against the alleged privacy violations. In 11 cases,
28 courts failed to find a valid claim for breach of contract for reasons internal to contract claims,
29 including failure of consideration or lack of mutuality, insufficient notice to constitute mutual
30 assent, and failure to ascertain damages for breach of contract. Because the holding in those cases
31 did not turn, wholly or in part, on the classification of privacy notices as contracts, or the courts
32 did not explicitly address the contractual enforceability of privacy notices, this Restatement
33 focuses on the remaining 34 cases. (Note, however, that even in those 11 cases, courts applied
34 contract-law doctrines to evaluate whether the privacy notices created enforceable obligations).
35 Within the remaining pool of 34 cases in which the courts addressed the classification of privacy
36 notices as contracts directly, *though, in some cases, only in dicta*, in 30, courts concluded that
37 privacy notices could give rise to contractual obligations. Only in four cases, which include the
38 original *Northwest Airlines* decision, courts decided otherwise, concluding or implying that
39 privacy notices are not attempts to form contracts. The three additional cases are *Dyer v. Nw.*
40 *Airlines Corps.*, 334 F. Supp. 2d 1196 (D.N.D. 2004), *Starkey v. Staples, Inc.*, No. 3:13-0433,

1 2013 WL 5936898 (M.D. Tenn. Nov. 5, 2013), and *Lucky v. Ky. Bank* (In re *Lucky*), Nos. 05-
2 54625, 10-5085 (Bankr. E.D. Ky. Mar. 21, 2011).

3 An analysis of citations indicates that cases embracing privacy notices as contracts are not
4 only more numerous, but more influential. A standard measure of influence used in case-citation
5 analysis focuses on citations by out-of-state and out-of-circuit courts. (For the application of this
6 methodology, see, e.g., Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of*
7 *State Supreme Courts*, THE AMERICAN POLITICAL SCIENCE REVIEW Vol. 79, No. 1 (Mar. 1985);
8 William M. Landes, Lawrence Lessig & Michael Solimine, *Judicial Influence: A Citation Analysis*
9 *of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271 (1998); DAVID E. KLEIN, MAKING
10 LAW IN THE UNITED STATES COURTS OF APPEALS (Cambridge Univ. Press 2002); Eric Posner,
11 Stephen J. Choi & G. Mitu Gulati, *Judicial Evaluations and Information Forcing: Ranking State*
12 *High Courts and Their Judges*, 58 DUKE L.J. 1313 (2009).) Such courts are not bound by the cited
13 out-of-state cases under stare decisis principles; such citations are thus more discretionary and the
14 cited cases are likely to be particularly helpful when internal precedent is unclear or missing.

15 The dominant precedent, as measured by both total number of out-of-state citations as well
16 as citation rate (to account for the fact that some cases have simply been around longer), is *Jet*
17 *Blue*, with a total of 39 out-of-state citations and an average of four citations per year, through
18 September 2015. The cases with the second and third highest number of yearly citations, *In Re*
19 *Sony Gaming Networks* (with an average of three citations per year) and *Perkins v. LinkedIn*, 53
20 F. Supp. 3d 1222 (N.D. Cal. 2014) (with an average of two citations per year), also recognize
21 notices as contracts and follow the *Jet Blue* approach. In total, there are 13 cases that recognize
22 privacy notices as contracts and have at least one out-of-state citation per year. Among the cases
23 not recognizing privacy notices as contracts, the most influential case, *Northwest Airlines* (2004),
24 has only 16 total out-of-state citations, for an average of just over one per year. While often
25 informative, these measures, even when constructed narrowly, can be noisy when cases are cited
26 for multiple reasons. An overview of the case law after 2015 offers further evidence of courts'
27 willingness to consider contractual enforcement of statements regarding information privacy. See,
28 e.g., *Kuhns v. Scotttrade, Inc.*, 868 F.3d 711 (8th Cir. 2017) (recognizing a breach-of-contract claim
29 for violation of information-privacy terms); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*,
30 2017 WL 3727318 (N.D. Cal. Aug. 30, 2017) (finding that business may have breached terms
31 related to protecting the personally identifiable information of consumers); *Fero v. Excellus Health*
32 *Plan, Inc.*, 236 F. Supp. 3d 735 (W.D.N.Y. 2017) (finding that privacy notices incorporated by
33 reference in the contracts between the business and consumers could give rise to breach-of-contract
34 claims).

35 The conclusion that privacy notices can give rise to contractual obligations does not
36 preclude the application of specific rules arising from privacy law. It suggests, however, that unless
37 a clear overriding reason exists, the general rules and principles of this Restatement ought to apply.
38 This coexistence between the Restatement and area-specific rules applies also in other contexts.
39 The Restatement is a complementary source to statutory law operating in the area of consumer
40 contracts (e.g., the Uniform Commercial Code, The Magnuson–Moss Warranty Act, the Federal

1 Trade Commission Act, the Dodd–Frank Wall Street Reform and Consumer Protection Act, the
2 Federal Arbitration Act, and state Unfair and Deceptive Acts and Practices statutes). Courts
3 adjudicating contract disputes that invoke these statutes have relied on, and developed, principles
4 of consumer-contract law that extend beyond the statutory framework. These principles inform the
5 rules restated herein.

6 Finally, this Restatement’s rules may be suitable for, and indeed reflect, rules being applied
7 by courts in transactions other than consumer contracts. The primary criterion that requires specific
8 attention to consumer contracts—the asymmetry of knowledge, sophistication, and drafting
9 prowess—may similarly be present when one of the parties to the contract is not a consumer. For
10 example, it may be present in dealings between a small business and a large corporation.

11 § 2. Adoption of Standard Contract Terms

12 (a) A standard contract term is adopted as part of a consumer contract if the
13 consumer manifests assent to the transaction after receiving:

14 (1) a reasonable notice of the standard contract term and of the intent to
15 include the term as part of the consumer contract, and

16 (2) a reasonable opportunity to review the standard contract term.

17 (b) When a standard contract term is available for review only after the consumer
18 manifests assent to the transaction, the standard contract term is adopted as part of the
19 consumer contract if:

20 (1) before manifesting assent to the transaction, the consumer receives a
21 reasonable notice regarding the existence of the standard contract term intended to
22 be provided later and to be part of the consumer contract, informing the consumer
23 about the opportunity to review and terminate the contract, and explaining that the
24 failure to terminate would result in the adoption of the standard contract term;

25 (2) after manifesting assent to the transaction, the consumer receives a
26 reasonable opportunity to review the standard contract term; and

27 (3) after the standard contract term is made available for review, the consumer
28 has a reasonable opportunity to terminate the transaction without unreasonable cost,
29 loss of value, or personal burden, and does not exercise that power.

30 (c) If the consumer manifests assent to the transaction, a contract exists even if some
31 of the standard contract terms are not adopted. In such case, the terms of the contract are

1 **those adopted under subsections (a) and (b), and, if the consumer elects, the unadopted**
2 **standard terms, along with any terms supplied by law.**

3 **Comment:**

4 *1. General.* This Section describes the procedures for adoption of standard contract terms
5 into consumer contracts. It operates in a reality in which consumers are fully aware of some “core”
6 aspects of the transaction but are unlikely to read and exercise meaningful informed consent to the
7 non-core standard contract terms. The adoption rules seek to preserve the convenience of
8 streamlined contracting while providing consumers reasonable opportunity to scrutinize the
9 standard contract terms and avoid unwanted transactions. Accordingly, this Section identifies
10 minimum requirements for contracting procedures that result in the adoption of standard contract
11 terms. Recognizing, however, that despite these procedures, consumers often enter into contracts
12 without appreciating the effect of the standard contract terms, other Sections of this Restatement
13 provide additional layers of protection against surprising and unfair outcomes.

14 *2. Adoption of standard terms may be separate from manifestation of assent to the*
15 *transaction.* A consumer contract is not formed unless the consumer manifests assent to the
16 transaction. A consumer may manifest assent to the transaction proposed by the business in any
17 manner and by any medium reasonable in the circumstances. Once the transaction is formed, this
18 Section determines which standard contract terms are adopted. While in many instances, the
19 manifestation of assent to the transaction and the adoption of standard contract terms happen at
20 the same time, in other instances they may be done separately. Because the review of the entire
21 body of standard contract terms is an uncommon practice for the great majority of consumers, and
22 because convenience in the method of delivery of the terms benefits consumers and businesses
23 alike, the adoption of standard contract terms can be made either together with or separate from
24 the act of manifesting assent to the transaction. Standard contract terms may be presented to the
25 consumer before the consumer manifests assent to the transaction, at the same time that the
26 consumer manifests assent to the transaction but before the product is delivered or the service is
27 rendered, or when the product is delivered or the service commences. Standard contract terms may
28 also be presented in some combination of the foregoing. Accordingly, a single consumer contract
29 may contain several “packets” of standard contract terms, each adopted in a different manner and
30 at a different time (see Comment 7). Manifesting assent to the transaction as a whole generally
31 involves adoption of at least some standard contract terms—the core deal terms (see § 1, Comment

1 5; see also Comment 3 to this Section); other standard contract terms may then be adopted
2 separately from those that are adopted concurrently with the manifestation of assent.

3 **Illustration:**

4 1. A consumer rents a car at an airport counter and concludes the transaction by
5 signing a printed sheet titled “Rental Contract.” The price and description of the vehicle
6 are prominently displayed on the front of the sheet. The consumer’s signature manifests
7 assent to the transaction and constitutes the adoption of the core deal terms (which, in car-
8 rental contracts, typically include the price, the description of the vehicle, and the type of
9 insurance provided). Additional standard contract terms are presented on the back of the
10 sheet, and a statement referring to their inclusion is posted adjacent to the signature line in
11 a prominent fashion. Those terms are adopted concurrently with the manifestation of assent
12 to the transaction via the signature. If, in addition, other standard contract terms are
13 presented to the consumer after the time of signature—for example, in an email sent to the
14 consumer some time later—those terms may be adopted under subsection (b) separately
15 from the manifestation of assent to the transaction (see Comment 5), but only if the
16 requirements of subsection (b) are met.

17 3. *Manifesting assent to the transaction.* A consumer may manifest assent to the transaction
18 proposed by the business in any manner and by any medium reasonable in the circumstances. In
19 inviting the consumer to enter a transaction, the business may establish how the assent may be
20 manifested, as long as the manner and medium are reasonable in the circumstances and reasonably
21 communicated to the consumer as manifesting assent. (Compare Restatement of the Law Second,
22 Contracts §§ 30, 50.) Most often, assent to the transaction is manifested by signing an agreement,
23 paying, or clicking “Purchase Now” or “I Agree” after the consumer has been put on reasonable
24 notice that such actions would result in the formation of a legal obligation. Absent such effective
25 communication—for example, when the consumer may reasonably think that proceeding with the
26 activity does not create a set of legally binding obligations—the consumer does not manifest assent
27 to a consumer contract. When manifesting assent, the consumer is usually aware only of the core
28 deal terms. Such core deal terms often include price and payment methods, a shorthand description
29 of the product, key delivery arrangements, and a few successfully communicated legal limitations
30 (for example, the nonrefundable classification of some airline fares or the duration commitment in

1 some service contracts). In assenting to the transaction, the consumer simultaneously adopts those
2 core deal terms—many of which are standard contract terms under the definition in § 1(a)(5), but
3 some may be nonstandard—as part of the contract.

4 *4. Adoption of terms reasonably available for review prior to manifesting assent to the*
5 *transaction.* When the consumer manifests assent to the transaction, a consumer contract is
6 formed. The consumer contract includes the core deal terms (those which, from the perspective of
7 the consumer, characterize the bargain), as well as other standard and nonstandard contract terms
8 reasonably available for review prior to manifesting assent. Some of these standard contract terms
9 may be explicitly acknowledged by the consumer in the course of manifesting assent to the
10 transaction (see Illustrations 2-4). Other standard contract terms may not be explicitly
11 acknowledged, but as long as the consumer receives reasonable notice of them, including
12 reasonable notice that they are intended to be part of the transaction and that manifesting assent
13 would constitute a legally binding adoption of those terms, and has a reasonable opportunity to
14 review them, they are adopted when the consumer manifests assent to the transaction (see
15 Illustrations 5-6). The standards for reasonable notice and opportunity to review that apply to terms
16 that are not explicitly acknowledged in the course of affirmatively manifesting assent may be more
17 exacting (see Comment 9).

18 **Illustrations:**

19 2. A consumer uses a business’s website to purchase a product. To complete the
20 transaction, the website asks the consumer to read the Terms and Conditions that are
21 provided in a scroll-down text box and to click “I Agree.” The website does not allow the
22 consumer to complete the purchase without clicking “I Agree.” The consumer manifests
23 assent to the transaction by clicking the button. The terms in the scroll-down box are
24 adopted as part of the contract under subsection (a).

25 3. Same facts as in Illustration 2, but the Terms and Conditions incorporate by
26 reference a separate list of Privacy Policy terms. The following statement appears in clear
27 type in the first paragraph of the Terms and Conditions: “Additional binding terms related
28 to our Privacy Policy are available here,” linking to another webpage with the Privacy
29 Policy terms. The consumer’s manifestation of assent to the transaction (by clicking “I
30 Agree”) encompasses the additional Privacy Policy terms, and those terms are adopted as
31 part of the contract under subsection (a).

1 4. A consumer opens an account with a web retailer and clicks an “I Agree” button
2 immediately below the Terms of Service but does not make any purchase. The Terms of
3 Service appear in a text box in the middle of the page and state prominently that they apply
4 to all subsequent purchases made by the consumer using the account. Later, the consumer
5 makes a purchase on this website using the account, without assenting to any terms other
6 than the description of the goods, the price, and the delivery method. The Terms of Service
7 are part of the contract formed under subsection (a) at the time of the purchase because
8 they were available for review in a reasonable manner before the consumer manifested
9 assent to the transaction (see Comment 9).

10 5. A consumer uses a website to order a product. During the checkout process, the
11 consumer is presented with the core deal terms—the description of the product, the price,
12 and the shipping arrangement. The consumer manifests assent to the transaction by entering
13 payment information and clicking “Purchase Now.” Located immediately in the vicinity of
14 the “Purchase Now” button is an underlined link, in large font and contrasting color, titled
15 “Additional Terms of Sale Applying to Your Purchase.” If clicked, the link opens a new
16 webpage containing additional standard contract terms. When the consumer clicks
17 “Purchase Now,” the linked terms are adopted as part of the contract under subsection (a)
18 because reasonable notice of the terms and the intent to include them in the consumer
19 contract, as well as a reasonable opportunity to read them, have been given.

20 6. A consumer enters a dry-cleaner’s store. At the entrance, a large sign is posted
21 in such a way that any consumer entering the store will see it and be able to read its terms.
22 The sign states that the store is not responsible for damage to items occurring in the
23 ordinary course of the cleaning process. When the consumer manifests assent to the
24 transaction by completing the drop-off process and receiving an acknowledgment of the
25 order, the standard contract term posted on the sign is adopted as part of the contract under
26 subsection (a).

27 5. *Adoption of terms after manifesting assent to the transaction.* Subsection (b) identifies
28 an alternative process for the adoption of standard contract terms, under which terms may be made
29 available for review for the first time after the consumer manifests assent to the transaction. The
30 process of replacing the opportunity to read prior to assent with a reasonable post-assent review
31 period and termination right allows the parties to enter transactions with greater ease and without

1 sacrificing any meaningful protection that advance reading of the contract bestows. Subsection (b)
2 validates this process, under which terms are adopted if the consumer receives: (1) reasonable
3 notice before manifesting assent to the transaction that additional standard contract terms will be
4 presented after manifesting assent to the transaction, including reasonable notice that such terms
5 are intended to be part of the transaction; (2) reasonable opportunity to review the terms upon their
6 arrival; and (3) the opportunity to terminate the entire transaction without unreasonable cost, risk,
7 or personal burden. The majority of courts do not require all the notices listed in subsection (b)(1),
8 focusing instead on the opportunity to review and terminate in subsections (b)(2) and (3). To avoid
9 surprising the consumer with unexpected terms, this Restatement endorses the more restrictive
10 approach, adopted by a minority of courts, requiring that before manifesting assent to the
11 transaction, the consumer must be reasonably notified about the opportunity to review the newly
12 available standard contract terms and to terminate the transaction, and that failure to terminate
13 would result in the adoption of the standard contract terms.

14 **Illustration:**

15 7. A consumer orders a product from a business by signing an agreement that
16 contains the core deal terms and making a payment. On the form, a clearly visible statement
17 immediately above the signature line informs the consumer that additional standard
18 contract terms will be arriving with the product and will become part of the contract if the
19 consumer does not return the product. Later, along with the delivered product, the
20 consumer receives the additional standard contract terms that include an express warranty
21 statement and limitations on remedies. The terms appear inside an envelope labeled “Terms
22 and Conditions” and are affixed to the product. They contain a clear, upfront statement that
23 the consumer has a right to return the product within 30 days if she does not agree with the
24 terms, and that reasonable return shipping costs will be paid by the business. The standard
25 terms are adopted as part of the contract under subsection (b). The same result applies if
26 the Terms and Conditions arrive separately from the product, e.g., with a welcome letter
27 delivered by mail, as long as such letter provides reasonable notice that it is related to the
28 purchase of the product and that it contains terms that govern that transaction, as well as a
29 reasonable notice of the opportunity to terminate the transaction.

1 6. *Adoption of terms by entry to, or use of, a proprietary environment of the business.*
2 Standard contract terms governing the proprietary environment of the business—whether physical
3 or digital—may be adopted as part of a consumer contract upon entry to, or continued use of, that
4 environment, even if no purchase is concluded while in the environment. The deliberate act of
5 entering the business’s proprietary environment and remaining in it long enough to gain access to
6 the content and benefits it confers constitutes a manifestation of assent by the consumer to a
7 transaction. The transaction consists of the right to use the proprietary environment and receive
8 the benefits it is reasonably expected to confer, under the terms specified by the business, including
9 terms that specify the rights of the business and the obligations of the consumer, as long as the
10 consumer has reason to know that the use of the proprietary environment was offered subject to
11 those terms. The consumer has a reason to know if a reasonable notice is provided that use of the
12 proprietary environment (including the use upon recurring entries) is governed by legally binding
13 standard contract terms, which the consumer then has a reasonable opportunity to review (see
14 Comment 9). If such notice and opportunity to review are provided to the consumer prior to entry,
15 the standard contract terms are adopted upon entry. If, instead, the notice and opportunity to review
16 are provided only after entry (for example, when the consumer enters the business’s website and
17 only then is able to access a link governing the use of the website), the manifestation of assent to
18 the transaction and the adoption of the terms occur upon the continued use of the proprietary
19 environment and the receipt of its benefits. In such case, the consumer must receive a reasonable
20 notice that continued use will constitute adoption of the terms, a reasonable opportunity to review
21 the terms, and a reasonable opportunity to exit without being bound to the terms. In some contexts,
22 market norms and course of dealings may provide sufficient notice to the consumer that additional
23 standard contract terms are intended to apply to the transaction (see Comment 9). Compare
24 Restatement of the Law Second, Contracts § 69(1)(a), in which the taking of the benefit of offered
25 services can serve as a manifestation of assent by the recipient. Assent to the transaction and
26 adoption of the standard contract terms are effective only if the consumer has a reasonable
27 opportunity to terminate the transaction without being bound (thereby satisfying the “reasonable
28 opportunity to reject” requirement of § 69(1)(a)).

29 **Illustrations:**

30 8. A consumer parks her car in a private parking lot. A prominent sign at the
31 entrance to the lot states that a \$10 per hour charge will be collected upon exit from the lot

1 and that the business is not responsible for damage to the vehicle while parked in the lot.
2 By entering the lot, the consumer manifests assent to the transaction concerning the use of
3 the parking lot, and the terms posted on the sign are adopted under subsection (a).

4 9. A consumer visits a department store. A prominent sign posted at the entrance to
5 the store's parking lot states that parking is free while visiting the store, and that the store
6 is not responsible for damage to the vehicle while parked in the lot. The consumer parks
7 the car in the lot and browses the store's aisles but does not make any purchase. Upon exit,
8 the consumer discovers that the car was damaged. By entering the lot, the consumer
9 manifests assent to the transaction concerning the use of the parking lot and the terms
10 posted on the sign are adopted under subsection (a).

11 10. A consumer enters an information-service website's homepage for the purpose
12 of gaining access to its information content, without creating an account or making a
13 purchase, and without checking a box or clicking a link evidencing assent to any
14 agreement. At the top of the homepage, a notice is posted in large font, underlined, and in
15 contrasting color: "By continuing past this page, you agree to abide by the Terms of Use
16 for this site." The phrase "Terms of Use" is underlined and highlighted. If clicked, it directs
17 the consumer to a page that contains the full Terms of Use. By continuing past the
18 homepage, the consumer manifests assent to the transaction concerning the use of the
19 website and the Terms of Use are adopted under subsection (a).

20 11. A consumer is directed from Website A, a search platform where users can
21 search and access information from numerous sources, to linked content appearing on
22 Website B, a separate information-service website. Initially, when clicking on the link that
23 appears on Website A, only the first paragraph of the content on Website B's page is
24 visible, with a "Read More" button obscuring the remainder of the content. A notice
25 prominently appearing near the "Read More" button states that the use of Website B is
26 governed by standard contract terms. Clicking on the "Read More" button allows the
27 consumer to enter and to access the full content of Website B's page. By clicking "Read
28 More" the consumer manifests assent to the transaction with Website B governing the
29 access to the content posted on the page. If the consumer can view the terms prior to
30 clicking "Read More" (for example, if a link to the terms appears within the notice), the
31 standard contract terms are adopted under subsection (a). If, instead, the consumer can only

1 view the terms after clicking “Read More” (for example, a prominent link to them appears
2 at the bottom of the full-content page), the terms may be adopted under subsection (b), but
3 only if the consumer has an opportunity to reject the application of the terms by exiting the
4 full page of Website B, and does not do so.

5 *7. The possibility of multiple contracts.* A single manifestation of assent could result in
6 multiple contracts, if the requirements of this Section are satisfied for each of those contracts. The
7 additional contract is formed only if it conforms to the reasonable expectations of the consumer,
8 so as to avoid imposing on the consumer an unwanted additional contractual relationship. The
9 consumer must be specifically notified, and thus must reasonably expect, that by manifesting
10 assent to the transaction an additional contract with this or another party will be created.

11 In particular, in connection with a purchase at a retail store, it is possible and convenient
12 for the consumer to enter, by one act of manifesting assent, into two contracts—one contract with
13 the retailer and a second contract with the manufacturer of the purchased product (and thus avoid
14 the inconvenience of multiple affirmative acts of manifesting assent). At times, the terms
15 governing the second contract, offered by the manufacturer of the product, are available for review
16 prior to the manifestation of assent, for example, when they are presented to the consumer as part
17 of the description of the product before checkout and payment to a retailer. In such cases,
18 subsection (a) determines whether the terms are adopted. Other times, the terms provided by the
19 manufacturer are available to review for the first time only after the consumer manifests assent to
20 the transaction. In such cases, subsection (b) determines whether the terms are adopted. Under
21 either case, the terms offered by the manufacturer are adopted if the consumer receives reasonable
22 notice, before manifesting assent to the transaction, that a separate contract with the manufacturer
23 will be formed and that the manifestation of assent to the transaction will apply also to this
24 additional contract. And, under either case, the requirements of either subsection (a) or subsection
25 (b) must also be met in order for the standard contract terms offered by the manufacturer to be
26 adopted. An attempt to impose on the consumer a contractual relationship with a third party, if that
27 contractual relationship does not satisfy the requirements of this Section and conflicts with the
28 consumer’s reasonable expectations, may also be deceptive under § 6.

1 Illustrations:

2 12. A consumer purchases a product at an online store and, at the checkout screen,
3 manifests assent to a list of standard contract terms governing the transaction with the
4 retailer, which are prominently offered for review prior to the transaction. In addition, a
5 notice on the screen titled “Additional Terms of Sale” appears in a manner reasonably
6 visible to the consumer, instructing that by clicking “Purchase Now” the consumer is
7 accepting terms stipulated by the manufacturer, which are available in a printed booklet
8 inside the box. In the booklet, at the top of the first page, the consumer is informed of her
9 right to return the product within 30 days at no cost if she does not agree with the terms. In
10 this scenario, two consumer contracts are formed by manifesting assent to the purchase at
11 the retail outlet. The first contract is with the retailer, and contains the core deal terms as
12 well as the standard contract terms that the retailer has specified, in accordance with
13 subsection (a). The second contract is with the manufacturer, assent to which is also
14 manifested at the time of purchase. It contains the standard contract terms specified by the
15 manufacturer, and they are adopted at the end of the 30-day return period, in accordance
16 with subsection (b).

17 13. A consumer purchases from a dealer a new car, which is delivered with a three-
18 month trial subscription for satellite radio. When the consumer manifests assent to the
19 purchase, no reference is made concerning a separate contract with a satellite-radio service
20 and the intent to adopt terms governing that service. A month after the purchase, the
21 consumer receives a Service Agreement by mail from the satellite-radio business, notifying
22 the consumer about the standard contract terms governing the service. Since the customer
23 had no notice prior to the manifestation of assent to the transaction with the dealer that such
24 manifestation of assent would apply also to a separate contract governing the satellite-radio
25 service and that the standard contract terms governing this service would be mailed, no
26 contract is formed between the consumer and the satellite-radio business. The standard
27 contract terms mailed to the consumer concerning the satellite-radio service are not
28 adopted.

29 8. *Combined use of different adoption processes.* A business might use different adoption
30 processes for different sets of terms within a single consumer contract. For instance, the business
31 may present some standard contract terms in advance and ask the consumer to explicitly

1 acknowledge them in the course of manifesting assent to the transaction (e.g., by clicking “I
2 Agree”), and may present other standard contract terms in a separate format, which the consumer
3 is not asked to affirmatively acknowledge (e.g., the other terms may be posted on a website, or
4 packaged with the product). Thus, it is possible to adopt some standard contract terms under
5 subsection (a) and others under subsection (b). The combined adoption of different sets of terms
6 occurs if the requirements for adoption under either subsection (a) or (b) are fully satisfied for each
7 set of terms.

8 **Illustration:**

9 14. A consumer in State A uses a website to create a service account. The consumer
10 is asked to click “I Agree” at the bottom of a scroll box titled “Terms of Service” in which
11 some standard contract terms are presented. Immediately adjacent to the “I Agree” button
12 appears a clearly labeled, easily identifiable statement: “Additional terms relating to
13 subscribers in State A will be sent to you within 72 hours. They will become part of your
14 contract with us unless you notify us within 14 days of your decision to cancel your
15 account.” By clicking “I Agree” the consumer manifests assent to the transaction and
16 adopts the terms presented in the scroll box under subsection (a). The additional terms are
17 adopted under subsection (b) if the consumer does not cancel the account within 14 days
18 of their presentation.

19 9. *Notice and opportunity to review.* The consumer must receive reasonable notice of the
20 existence of the standard contract terms, including reasonable indication that they are intended to
21 be part of a legally binding transaction to which the consumer is manifesting assent, and a
22 reasonable opportunity to review the terms. In some contexts, market norms, or course of dealing,
23 may provide sufficient notice to the consumer that additional standard contract terms are intended
24 to apply to the transaction. The characteristics of the contracting parties may also be taken into
25 account when evaluating the reasonableness of the notice (e.g., when a product or service is offered
26 to a small segment of especially sophisticated consumers). These requirements of notice and
27 opportunity to review apply when the terms are available for review prior to the manifestation of
28 assent to the transaction and are adopted under subsection (a), as well as when the terms are
29 available for review only after the manifestation of assent to the transaction under subsection (b).
30 (Compare UCC § 1-202 (defining “Notice”).)

Illustrations:

15. A consumer visits a business’s website to purchase a product. During the checkout process, the consumer enters her credit-card information and shipping address, and is then required to click “I agree to purchase.” The business places a link to Terms and Conditions at the bottom of every one of its webpages, including at the bottom of the checkout page. The link is in a font smaller than the one used in the rest of the website, and on the checkout page the link can only be seen and accessed by scrolling down the page, otherwise it is not visible when the consumer clicks “I agree to purchase.” The link does not provide reasonable notice, and therefore the linked terms are not adopted as part of the contract. If, instead, there is a prominent, stand-alone notice in a central portion of the checkout page, in contrasting, large font, not blended with other notices, stating that the transaction is subject to Terms and Conditions that are noticeably linked for the consumer to access, all visible when the consumer clicks “I agree to purchase,” then the terms are adopted as part of the contract under subsection (a).

16. A purchase agreement is drafted by the business to be presented to consumers on the business’s website, but is sometimes presented to consumers as a paper printout at the business’s service desk in a department store. On the online version, the consumer is asked to click “I Agree” at the bottom, and on the paper-printout version the consumer is asked to affix a signature next to the “I Agree” box. Immediately above the location of the “I Agree” click, there is a phrase stating “Additional Terms.” In the online version, the phrase “Additional Terms” appears as a link, in distinct color font, which, if clicked, opens a page with the additional terms. In the paper-printout version, the phrase “Additional Terms” appears in an underlined, pale font, and no other information is provided as to what this phrase implies or how to access the additional terms. The link appearance in the online version provides the consumer reasonable notice and opportunity to review, and the additional terms are adopted once the consumer manifests assent to the transaction, under subsection (a). The underlined phrase in the paper-printout version does not provide the consumer reasonable notice and opportunity to review, and the terms are not adopted under subsection (a). If, however, along with the printout version the consumer receives an explicit explanation that the Additional Terms apply to the transaction and could be

1 obtained by asking the sales clerk for a readily available copy for the consumer to review,
2 the terms are adopted under subsection (a).

3 17. A consumer purchases a product at a retail store. During checkout, the consumer
4 signs a form titled “Agreement” which includes the store’s General Terms and Conditions.
5 Later, upon unpacking the product, the consumer finds attached a brochure from the
6 manufacturer that contains the manufacturer’s standard contract terms, including an End
7 User License Agreement for the software installed on the product. No advance notice was
8 given to the consumer about these “terms in the box” either during the purchase process
9 with the retailer or on the box presented to the consumer prior to purchase. Because such
10 notice is lacking, the terms in the brochure are not adopted as part of the consumer contract.
11 If, instead, there was a prominent notice, either on the box or presented by the retailer, that
12 further terms were available for review once the consumer opened the box, the notice
13 requirement would be satisfied. In such case, the terms in the brochure would be adopted
14 under subsection (b) (subject to notice to the consumer of the consumer’s right to terminate
15 the transaction within a reasonable time after reviewing the terms; see also Comment 10.)

16 18. A consumer visits a business’s website to order a service. During the checkout
17 process, the consumer is presented with a scroll window with the heading “Service
18 Agreement” in which the first two lines of the agreement’s text are visible. Below the scroll
19 window, a paragraph in bold text explains that by clicking “Accept and Continue” the
20 consumer authorizes the business to obtain the consumer’s personal credit profile from a
21 third party. It does not state that by clicking “Accept and Continue” the consumer also
22 adopts the “Service Agreement.” The consumer manifests assent to the transaction by
23 clicking the “Accept and Continue” button. The terms in the “Service Agreement” are not
24 adopted as part of the contract because the consumer did not receive adequate notice that
25 assent applies to the “Service Agreement.”

26 19. A consumer purchases a product at a retail store. During checkout, the consumer
27 is presented with a 120-page brochure titled “Operation Manual.” The brochure contains
28 instructions from the manufacturer on how to use the product. It also contains, on page 97,
29 an arbitration agreement applying to the contract with the manufacturer. Because the
30 presentation of the brochure as a “Manual” does not include any language indicating that
31 standard contract terms affecting the consumer’s rights are included in the Manual, there

1 is no reasonable notice of the existence of the standard contract terms and they are not
2 adopted as part of the contract under subsection (a).

3 20. A consumer signs up for in-flight Wi-Fi service. On the “create account” page,
4 immediately below the boxes in which the consumer is instructed to enter personal
5 information, appears a prominent “NEXT” button that takes the consumer to a webpage on
6 which the consumer is instructed to enter credit-card information. Above the “NEXT”
7 button, the following statement appears in small font that is not distinguished—by size,
8 color, or typeface—from other text on the screen: “By clicking ‘NEXT’ I agree to the *terms*
9 *of use* and *privacy policy*.” The words “terms of use” and “privacy policy” are hyperlinks
10 and, if clicked, would take the consumer to webpages that include the business’s terms of
11 use and privacy policy, respectively. The consumer clicks “NEXT,” completes the
12 registration process, and proceeds to use the in-flight Wi-Fi service. There is no reasonable
13 notice of the existence of the standard contract terms and they are not adopted as part of
14 the contract under subsection (a). If instead the statement above the “NEXT” button was
15 made conspicuous through the use of large, different colored font (or large, bold-faced
16 font), the notice requirement would be satisfied and the terms of use would be adopted
17 under subsection (a).

18 21. A consumer installs an application on a smartphone and is prompted to enter
19 personal information in a sequence of screens. In the middle of the last screen, where the
20 consumer is asked to provide payment information, appears a conspicuous “Register”
21 button that the consumer must click to complete the installation. Immediately below that
22 button and in large, contrasting, and conspicuous font, against an otherwise uncluttered
23 background, there is a statement notifying the consumer that by clicking the “Register”
24 button the consumer is agreeing to the Terms of Service and Privacy Policy, both of which
25 are hyperlinked and underlined in contrasting colors. There is reasonable notice of the
26 Terms of Service and Privacy Policy under subsection (a) because their placement makes
27 them easy to find, and the design, placement, and language of the adjacent text make it
28 clear that the standard terms are intended to be part of the transaction when the consumer
29 chooses to register with the website.

30 10. *Opportunity to terminate.* Under subsection (b), the consumer must be given a
31 reasonable opportunity to terminate the transaction and a reasonable notice of the right to

1 terminate. The duration of the review-and-terminate period has to be reasonable, providing
2 sufficient time for the consumer who is interested in reviewing the terms to complete a meaningful
3 review. In addition, the consumer's opportunity to terminate the transaction after receiving the
4 terms must not place unreasonable cost, loss of value, or personal burden on the consumer. If a
5 reasonable right to terminate is granted, the consumer's choice not to terminate constitutes the
6 adoption of the standard contract terms. Effective termination by the consumer discharges the
7 contract to which the consumer manifested assent.

8 **Illustrations:**

9 22. A consumer visits a store to purchase a product. Upon payment at the cash
10 register, the consumer is handed a receipt prominently referencing additional terms and
11 noting that these additional terms can be readily obtained on site at the customer-service
12 desk. If the service desk is nearby and readily accessible without undue delay or hardship,
13 and if the store allows the consumer to terminate the transaction after receiving the
14 additional terms (and reasonably notifies the consumer of the right to terminate), then they
15 are adopted under subsection (b). If, however, the additional terms are not readily available
16 upon the consumer's request, or if the consumer is not allowed to reasonably terminate the
17 transaction after payment, or allowed but not reasonably notified about the right to
18 terminate, the additional terms are not adopted as part of the consumer contract.

19 23. A consumer purchases a computer online for \$500. Prior to the purchase, a
20 notice that satisfies the requirements of subsection (b)(1) is provided. When the computer
21 is installed, a set of standard contract terms is displayed on-screen. The terms, which are
22 lengthy and complex, allow the consumer five days to return the computer and avoid being
23 bound by the terms. The standard contract terms are not adopted as part of the contract
24 because five days is not a reasonable time to perform the logistics required in the return of
25 a computer.

26 24. Same facts as in Illustration 23, but the consumer has 30 days to return the
27 computer. The terms further specify that, if the consumer returns the computer, the refund
28 will be only partial, as the business reserves the right to charge a 15 percent restocking fee.
29 While a restocking fee may be reasonable from the seller's standpoint in light of the
30 handling and depreciation costs, it nevertheless restricts the opportunity of the consumer

1 to terminate the contract upon review of the terms. Accordingly, the standard contract terms
2 are not adopted as part of the contract.

3 25. Same facts as in Illustration 23, but the consumer has 30 days to return the
4 computer and there is no restocking fee. The terms further specify that, if the consumer
5 returns the computer, the consumer will bear the return shipping cost. The shipping cost
6 may be reasonable, but it nevertheless restricts the opportunity of the consumer to terminate
7 the contract upon review of the terms. Accordingly, the standard contract terms are not
8 adopted as part of the contract.

9 26. Same facts as in Illustration 23, but the consumer purchases the computer at the
10 business's local retail store (rather than online) and the terms specify that the consumer
11 may return the computer to the local retail store for a full refund within 60 days. Even
12 though driving back to the retail store imposes some cost or burden on the consumer, this
13 cost or burden is not unreasonable. In such case, the "opportunity to terminate" requirement
14 of subsection (b)(3) is satisfied. If, however, the store only accepts returns during limited
15 hours, or only when the box is unopened, the opportunity to terminate is unreasonably
16 restrictive and the standard contract terms are not adopted as part of the contract.

17 *11. Legal consequences of nonadopted terms.* Standard terms that fail to conform to the
18 adoption-process requirements of subsections (a) or (b) do not become part of the consumer
19 contract. In such a case, under subsection (c), there is a contract that contains the terms—standard
20 and nonstandard—that were effectively adopted, supplemented by gap-fillers supplied by law. A
21 consumer, however, has no obligation to assert that standard contract terms were not adopted.
22 Because the requirements of this Section are intended to provide consumers a reasonable
23 opportunity to review the terms, a consumer may waive these protections and may choose to get
24 the benefit of the standard contract terms. If the consumer so chooses, the business may not assert
25 that its standard contract terms were not adopted. (Compare § 7 for the consumer's right to enforce
26 as part of the consumer contract an affirmation of fact or promise that does not appear in the
27 standard contract terms.)

28 **Illustrations:**

29 27. Same facts as in Illustration 23, but the standard contract terms include a statement by
30 the business that information about the transaction will not be provided to any other third

1 party. The business, in violation of that statement, provides information about the
2 transaction to a third party, to the detriment of the consumer. While the standard contract
3 terms are not adopted as part of the contract, the consumer may assert a claim for breach
4 of a contractual promise as embodied in the nonadopted statement.

5 *12. Mandatory rule.* The rules restated in this Section specify mandatory requirements of
6 assent, notice, and opportunity to terminate, and cannot be excluded or derogated from by
7 agreement. A business is free to specify the precise manner or medium that the manifestation of
8 assent, notice, and termination take, as long as they are reasonable in the circumstances. If the
9 business specifies a process for adopting standard terms that does not meet these mandatory
10 requirements, that process is not effective and the standard terms it purports to adopt are not
11 adopted as part of the contract. (Compare § 9.)

12 *13. Relation to other Sections.* The adoption rules in this Section reflect the reality in which
13 the consumer's consent to the standard contract terms is rarely informed. In classic contract law,
14 the requirement of assent was regarded as a meaningful mechanism that protects the contracting
15 party, under the premise that this party, with full knowledge of the terms and with sufficient
16 understanding of their impact, would manifest assent only to a contract that promotes his or her
17 interests. The length and complexity of standard-form contracts, and the large number of such
18 contracts consumers enter into, have diluted the effectiveness and plausibility of such front-end
19 self-protection. Accordingly, it is widely recognized that adoption procedures designed to achieve
20 informed consent would yield relatively little value to, and might even impose burdensome
21 transaction costs upon, the typical consumer. Courts have thus recognized the importance of
22 safeguards in consumer-contract law. Primary among these are the rules that strike down
23 unconscionable terms and other standard contract terms that undermine consumers' benefit of the
24 bargain (§ 5). Adding to the protection afforded by the unconscionability doctrine are the good-
25 faith duties that govern contract modification and open discretionary terms (§§ 3 and 4) and rules
26 that police deception and enforce precontractual affirmations and promises (§§ 6 to 8). If, despite
27 reasonably communicated disclosures, consumers are not expected to scrutinize the legal terms up
28 front, courts should scrutinize them ex post. The ex post scrutiny is intended to uproot terms that
29 are so extreme that they would be unlikely to survive in an environment of meaningful assent, or
30 that peel off the value that consumers bargained for.

1 14. *Relation to the Uniform Commercial Code and to the Restatement of the Law Second,*
2 *Contracts.* The common-law rules restated herein are consistent with, and elaborate on, the general
3 principles of contract formation, as articulated in Restatement of the Law Second, Contracts,
4 Chapter 3, and how a majority of courts have interpreted UCC § 2-204 in this context. With respect
5 to adoption of terms after manifesting assent to the transaction (subsection (b)), some courts have
6 interpreted UCC § 2-207 to bar adoption of those terms as part of the consumer contract. Most
7 courts, however, reject that interpretation of UCC § 2-207 and, as those courts have determined
8 that no other provisions of Article 2 address the question of which post-purchase terms become
9 part of the contract, apply instead UCC § 2-204 and—through the gateway provided by UCC § 1-
10 103(b)—general common-law principles. With respect to the adoption of standard contract terms
11 by entry to or continued use of a proprietary environment, the rule of this Section is consistent
12 with Restatement of the Law Second, Contracts § 69(1)(a), which allows silence to operate as an
13 acceptance when the offeree “takes the benefit of offered services with reasonable opportunity to
14 reject them and reason to know that they were offered with the expectation of compensation.” See
15 Comment 6 to this Section.

REPORTERS’ NOTES

16 *General.* This Section is based on legal precedents that reflect three fundamental
17 observations. First, credible empirical evidence, as well as common sense and experience, suggests
18 that consumers rarely read standard contract terms no matter how those terms are disclosed. (See,
19 e.g., Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine*
20 *Print? Consumer Attention to Standard Form Contracts*, 43(1) J. LEGAL STUD. 1 (2014); OMRI
21 BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF*
22 *MANDATED DISCLOSURE*, Ch. 2 (2014).) Informed consent to the standard contract terms is, by and
23 large, absent in the typical consumer contract.

24 Second, the use of standardization in the production of contract terms is, like
25 standardization in the production of goods and services, a source of potential benefits to consumers
26 and businesses alike. Standardization supports efficient production and distribution, resulting in
27 lower prices and lower transaction costs, and the introduction of new forms of products and
28 services.

29 Third, courts routinely enforce standard terms, even in the absence of informed consent to
30 those terms, if several basic requirements are met. In particular, the consumer must manifest assent
31 to the underlying transaction, must receive reasonable notice of the standard contract terms that
32 are meant to be adopted as part of the contract, and must be provided a meaningful opportunity to
33 review the terms. When the standard terms are provided only after the consumer manifests assent
34 to the transaction (known as “Pay Now, Terms Later” (PNTL) or “shrinkwrap” contracts), courts

1 demand that the consumer have, instead of a reasonable opportunity to review the terms in
2 advance, a reasonable opportunity to review the terms after manifesting assent to the transaction
3 and a reasonable opportunity to avoid or terminate the transaction after the standard contract terms
4 are made available for review. Some courts also require that a reasonable notice be provided prior
5 to manifesting assent, explaining that further terms will be presented later, that the consumer has
6 an opportunity to terminate the transaction after reviewing the terms, and that failure to terminate
7 would lead to the adoption of the terms.

8 The adoption of standard contract terms after manifesting assent to the transaction, as
9 restated in this Section, has long been recognized as an effective adoption procedure in many areas
10 of standard-form contracting. Most consumer goods, for example, arrive with a warranty statement
11 in the box, binding despite its late arrival after the consumer manifested assent to the transaction.
12 Most services ordered over the phone or directly from sales personnel, such as insurance or
13 telecommunications services, are accompanied by standard contract terms that arrive after the
14 consumer manifested the intent to enter into the transaction. The insurance context is particularly
15 relevant, because it is exceedingly common for the insurance policy to be mailed to the consumer
16 only after the consumer manifested assent; indeed, it would be entirely useless for the consumer
17 to try to review the complex terms of the insurance policy in advance, and any practice prompting
18 consumers to do so should be discouraged because it would yield little or no value and would
19 merely agitate consumers.

20 In sales-of-goods cases, some controversy has emerged whether the provisions of Article
21 2 of the Uniform Commercial Code permit such post-assent adoption of terms. A small minority
22 of courts have read § 2-207 to deny enforcement of those terms. Analysis of case law, presented
23 below, suggests that a large majority of courts have declined to use § 2-207 to limit the binding
24 effect of terms in a merchant's form that is sent to a consumer after the manifestation of assent.
25 Courts have often found the consumer to be bound by terms on the merchant's form by relying on
26 § 2-204 and common-law rules of offer and acceptance not explicitly overturned by the UCC,
27 reasoning that, as long as proper notices are provided to the consumer in advance and a reasonable
28 opportunity to review and terminate the contract is provided after the delivery of the terms, no
29 burden is imposed on the consumer by the post-assent delivery of the terms. Courts have also
30 recognized that adoption of such terms reduces contracting costs and does not significantly reduce
31 contract readership (also, as explained below, consumers must be provided the right to exit the
32 transaction without undue burden after receiving the terms).

33 Even in the presence of adequate notices concerning the adoption of standard contract
34 terms, and regardless of how timely and prominent is the presentation of the terms, consumers
35 rarely become meaningfully informed about the content and the effect of such terms. Accordingly,
36 the prudent approach—reflected in this Restatement and in case law—is to protect consumers
37 against terms that either overreach or undermine express promises made by the business. Those
38 protections are presented in §§ 5 to 8 of this Restatement. Viewed in tandem, the provisions in this
39 Restatement implement both the spirit and the practice of Karl Llewellyn's vision of "blanket
40 assent" to consumer contracts. Under this view, the "boilerplate" is part of the contract despite the

1 absence of informed consent to it, as long as it does not undermine the “dickered terms” and is not
2 otherwise unfair to the consumer. (KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (New York: Little, Brown, 1960).) In explaining assent to unknown terms,
3 Comment *b* of Restatement Second of Contracts § 211 states that “[a] party who makes regular
4 use of a standardized form of agreement does not ordinarily expect his customers to understand or
5 even to read the standard terms They trust to the good faith of the party using the form and to
6 the tacit representation that like terms are being accepted regularly by others similarly situated.
7 But they understand that they are assenting to the terms not read or not understood, subject to such
8 limitations as the law may impose.” RESTATEMENT OF THE LAW SECOND, CONTRACTS § 211,
9 Comment *b* (AM. LAW INST. 1981). Those limitations are embodied in the scrutiny of terms
10 performed by courts under various doctrines, including those in this Restatement.

11
12 *Terms governing proprietary environments.* Standard contract terms governing the
13 proprietary environment of a business may be adopted as part of a consumer contract upon entry
14 to, or continued use of, that environment. In the physical world, the terms are often posted and
15 reviewable before entry into the proprietary environment, e.g., a sign near the entrance to a parking
16 lot that stipulates the per-hour price for parking as well as the allocation of any risk of loss. In
17 those cases, the act of entering the environment is a manifestation of assent to the transaction and
18 adoption of the terms under subsection (a). In the online world, if the notice of the standard contract
19 terms is provided to the consumer prior to entry into an online site, the terms are adopted if, after
20 entry, the consumer can review the terms and avoid their effect by discontinuing use. A
21 straightforward manner in which pre-entry notice can be provided in the online world is through a
22 pop-up statement alerting the consumer to the presence of standard contract terms. In reality, such
23 pop-up statements pose some disruption and annoyance to the great majority of consumers, and
24 since most consumers who are interested in reviewing the standard contract terms governing the
25 use of the website expect them to be posted on the website and be viewable upon entry, such
26 advance notices are not likely to secure any meaningful informational benefit. Accordingly, the
27 presence of demonstrated market norms that inform consumers’ expectations regarding the
28 existence and availability of standard contract terms may substitute an explicit advance notice.
29 Alternatively, a prominent link—to a separate webpage containing the standard contract terms—
30 may provide the requisite notice, and the continued use of the website, rather than mere entry to
31 the online environment, is the manifestation of assent to the transaction and adoption of the terms
32 under subsection (a).

33 Manifesting assent by entry to and continued use of a proprietary environment allows for
34 silence or inaction, along with continued usage and the taking of the benefits, to substitute for an
35 affirmative acceptance act in operating as manifestation of assent and adoption of the terms that
36 apply to the use of the proprietary environment. This approach serves particularly well the
37 convenience consumers and businesses value in the course of digital transactions. Users of digital
38 environments often interact with multiple businesses in a short period of time, many of which
39 provide them with useful services or information without charging money and without requiring a
40 cumbersome sign-up ritual. The application of the assent and adoption rules to the context of entry

1 to and continued use of a proprietary environment is likely to promote the interest of the great
2 majority of consumers who use digital environments and prefer to avoid the repeated formalities.
3 Compare Restatement of the Law Second, Contracts § 69(1)(a) (Am. Law Inst. 1981), which
4 allows silence or inaction to operate as an acceptance when the offeree “takes the benefit of offered
5 services with reasonable opportunity to reject them and reason to know that they were offered with
6 the expectation of compensation.” The use of the proprietary environment is the taking of the
7 “benefit of offered services”; the notice provided by the business gives consumers a reason to
8 know of the business’s “expectation of compensation (namely, that the terms will become part of
9 the contract); and the reasonable opportunity to terminate the transaction under subsection (b)(3)
10 is a “reasonable opportunity to reject” under § 69(1)(a). This view is also reflected in the caselaw.
11 See, e.g., *Schnabel v. Trilegiant Corp.*, 697 F.3d 110 (2d Cir. 2012). In affirming silence as a viable
12 mode of acceptance, the court in *Schnabel* cited § 69(1)(a) and noted that “acceptance need not be
13 express, but where it is not, there must be evidence that the offeree knew or should have known of
14 the terms and understood that acceptance of the benefit would be construed by the offeror as an
15 agreement to be bound.” *Id.* at 128. See also *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d
16 Cir. 2004) (endorsing, in dicta, the approach articulated in Restatement of the Law Second,
17 Contracts § 69(1)(a) (Am. Law Inst. 1981) and stating that “[i]t is standard contract doctrine that
18 when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the
19 benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms,
20 which accordingly become binding on the offeree.” *Id.* at 403).

21 *Possibility of multiple contracts.* Consumer transactions often involve relationships with
22 more than one business. A purchase of hardware may lead to a contractual relationship with
23 software makers governing preinstalled software. A purchase at a retail store may likewise lead to
24 a contractual relationship with the manufacturer of the purchased product. If the requirements of
25 subsections (a) or (b) are satisfied, more than one consumer contract may result from a single act
26 of manifesting assent. For such multiple contracts to be formed by one act of assent, consumers
27 must receive an additional reasonable notice that their assent would form a contract with more than
28 one business.

29 Illustration 12 is based on *Norcia v. Samsung Telecomm. Am., LLC*, 845 F.3d 1279 (9th
30 Cir. 2017). While in that case the court refused to enforce the second contract (with the
31 manufacturer), it laid out the principle that by manifesting assent to the transaction the consumer
32 can enter into two separate contracts—one with the retailer and one with the manufacturer. As
33 explained by the court in *Norcia*: “This prediction of how California courts would rule is not
34 untenable: Where a notice on a package states that the user agrees to certain terms by opening the
35 package, a court could reasonably conclude, consistent with California contract law, that the user
36 has a duty to act in order to negate the conclusion that the consumer had accepted the terms in the
37 notice.” *Id.* at 1287. Such a duty to “negate” could be discharged by returning the product to the
38 retailer, as (in that case) expressly permitted by the manufacturer’s in-the-box terms. In *Norcia*, a
39 second contract with the manufacturer was not concluded, because the consumer did not receive
40 adequate notice of the second contract. *Id.* at 1289. See also *In re Samsung Galaxy Smartphone*

1 Marketing & Sales Practices Litig., 298 F. Supp. 3d 1285 (N.D. Cal. 2018) (enforcing the
2 arbitration clause in the second contract after concluding that consumer purchasers of certain
3 models of Samsung phones were given sufficient notice of the manufacturer’s standard terms when
4 the boxes containing the phones included a clear and conspicuous legend stating: “Device purchase
5 subject to additional Samsung terms and conditions,” and posted a conspicuous notice of the terms
6 on the user manual, where the terms were presented. *Id.* at 1298.).

7 Illustration 13 is based on *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 568 (9th Cir.
8 2014). Here, too, a second contract was not formed because the necessary notice was lacking. But,
9 as stated by the court explicitly, with appropriate notice, a second contract with the third-party
10 service provider could be formed: “The Toyota purchase agreement could clearly state that Toyota
11 has a relationship with Sirius XM to provide Toyota customers with a trial service, and that
12 therefore the Toyota customer is entering into a contractual relationship with Sirius XM. Toyota
13 could also provide its customers with literature that similarly explains the agreement between
14 Sirius XM and the Toyota customer and ask for assent to such agreement.” *Id.* The court concluded
15 that without such notice a second contract is not formed: “Because Sirius XM’s offer was not
16 effectively communicated, there was no knowing consent to the Customer Agreement, including
17 the arbitration clause within it.” *Id.*

18 The critical elements of the assent doctrine restated in this Section require that in addition
19 to the manifestation of assent by the consumer to the transaction as a whole, the consumer would
20 receive adequate notices and a meaningful opportunity to avoid unwanted terms, as explained
21 below.

22 *Notice.* The rules restated in this Section require reasonable notice. The notice must alert
23 the consumers to the existence of the standard contract terms and the intent to include them as part
24 of the transaction formed by the manifestation of assent. If terms are adopted under subsection (b),
25 the pre-assent notice must also alert the consumers to their post-assent arrival and to the
26 consumer’s right to terminate the transaction after their review (and to the consequences of non-
27 termination). See *In re Zappo’s Litigation*, 893 F. Supp. 2d 1058 (D. Nev. 2012) (holding that
28 because the terms of use were inconspicuously “buried in the middle to bottom of every
29 Zappos.com webpage among many other links, and the website never directs a user to the terms
30 of use,” there was not sufficient notice for acceptance); *Roller v. TV Guide Online Holdings, LLC*,
31 2013 Ark. 285, 2013 WL 3322348 (Ark. Jun 27, 2013) (determining that TV Guide failed to meet
32 its burden to show that an enforceable agreement existed between it and the appellants because it
33 could not demonstrate that the appellants had constructive or actual knowledge of the terms of the
34 agreement); *Tompkins v. 23andMe, Inc.*, 2014 WL 2903752, at *6 (N.D. Cal. June 25, 2014)
35 (deciding that 23andMe provided insufficient notice to customers and website visitors because the
36 “only way for a customer to see the TOS . . . was to scroll to the very bottom of the page and click
37 a link under the heading ‘LEGAL’”); *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 401, 404
38 (E.D.N.Y. 2015) (holding that Gogo failed to provide sufficient notice because “[t]he design and
39 content of the website, including the homepage, did not make the ‘terms of use’ readily and
40 obviously available to [the consumer]”); *Salameno v. Gogo Inc.*, 2016 WL 4005783 (E.D.N.Y.

1 July 25, 2016) (holding that Gogo’s revised disclosure provided reasonable notice because
2 consumers “were notified of the link to terms and conditions each time they signed in to use the
3 service, and they then received an e-mail containing a link to the terms and conditions of the
4 particular purchase.”); *Selden v. Airbnb, Inc.*, 2016 WL 6476934 (D.C. Cir. Nov. 1, 2016) (finding
5 that Airbnb provided sufficient notice of its Terms of Service when it placed a sign-up box with
6 the text “By signing up, I agree to Airbnb’s Terms of Service,” in the middle of the page, in
7 contrasting, appropriately sized font, “unobscured by other visual elements”); *Meyer v. Uber*
8 *Technologies*, 868 F.3d 66 (2d Cir. 2017) (concluding that the Uber App satisfied the test of
9 providing reasonably conspicuous notice of the Terms of Service as a matter of California law).

10 Several Illustrations in this Section are based on leading cases that examined the
11 reasonableness of the notice provided to consumers. Illustrations 10 and 11 are based on *Specht v.*
12 *Netscape*, 306 F.3d 17 (2d Cir. 2002). Illustration 16 is based on *Holdbrook Pediatric Dental, LLC*
13 *v. Pro Computer Service, LLC*, Civil No. 14–6115 (NLH/JS), 2015 WL 4476017 (D.N.J. July 21,
14 2015) (finding that the “existence of the hyperlink in the document [from PCS], without any
15 statement to draw attention to the link, is insufficient to demonstrate that Holdbrook had
16 ‘reasonable notice’ that the ‘Terms and Conditions’ were part of the contract”). It embodies the
17 principle that incorporation by reference of a separate document must include a clear reference to
18 a specific document that can be accessed without undue burden. When agreements are delivered
19 in electronic form, a separate document may be incorporated through a prominent hyperlink,
20 accompanied by a statement drawing the consumer’s attention to the fact that clicking the button
21 constitutes acceptance of the hyperlinked terms. But when the agreement is delivered in a printed-
22 paper form, the printed appearance of the hyperlink does not afford consumers sufficient notice
23 and opportunity to review. In such case, it is necessary to provide a clear statement as to where the
24 additional terms may be found, and place them in a location that is easy for the consumer to access.
25 Similarly, merely referring to “additional terms of sale” does not sufficiently alert the consumer.
26 The reference needs to be specific, so that “the identity of the separate document may be
27 ascertained beyond doubt.” *Walker v. Builddirect.Com Technologies Inc.*, 349 P.3d 549, 554
28 (Okla. 2015). The business can accomplish successful reference “by drafting the Contract
29 employing words of express incorporation or clearly referencing, identifying and directing the
30 [consumers] to the document to be incorporated.” See *id.* (refusing to recognize a vague attempt
31 at incorporation by reference under Oklahoma Law).

32 Illustration 18 is based on *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1033-1034 (7th
33 Cir. 2016). It embodies the principle that “the layout and language of the site [must] give the user
34 reasonable notice that a click will manifest assent to an agreement.” This case emphasizes that an
35 “I Agree” click, in and of itself, is not sufficient to manifest assent. The consumer must have
36 reasonable notice of what he or she is agreeing to. In particular, an “I Agree” click will not manifest
37 assent to standard terms when the layout and language of the site allow for a reasonable inference
38 that, by clicking “I Agree,” the consumer is consenting to something else (in *Sgouros* that
39 “something else” was authorization for TransUnion to obtain consumers’ personal information
40 from a third party).

1 Illustration 19 is based on *Noble v. Samsung Electronics America Inc.*, 2016 WL 1029790
2 (D.N.J. Mar. 15, 2016). It provides additional guidance as to what must appear in a notice to put
3 consumers on alert that a document contains standard contract terms, and emphasizes that terms
4 printed in a booklet or instruction manual may, in the circumstance, be insufficient to satisfy the
5 notice-and-opportunity-to-review requirement, when reference to them was not given during the
6 manifestation of assent. See also *Jones v. Samsung Elecs. Am., Inc.*, No. 2:17-cv-00571-MAP,
7 2018 WL 2298670 (W.D. Pa. May 21, 2018) (refusing to enforce an arbitration agreement tucked
8 in the middle of an extensive “Important Information” booklet under a section entitled
9 “Manufacturer’s Warranty,” when the product’s box only included a sticker listing the items
10 included in the box and not making reference to the terms, because it failed the constructive-notice
11 requirement). Similarly, an arbitration clause or other standard term printed on the wrapper of
12 bundles of shingles to be installed by a roofer would not constitute reasonable notice under this
13 Section. *Hobbs v. Tamko Building Products, Inc.*, 479 S.W.3d 147 (Mo. Ct. App. 2015). Nor
14 would an arbitration clause included in a sample contract on a checkout webpage that can only be
15 accessed after having to click through two optional links placed far away from a “BUY NOW”
16 button. *Savetsky v. Pre-Paid Legal Servs.*, No. 14-03514 SC, 2015 WL 604767 (N.D. Cal. Feb.
17 12, 2015).

18 Illustration 20 is based on *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359 (E.D.N.Y. 2015). It
19 demonstrates that courts will engage in fact-specific inquiries regarding elements of website
20 design, such as text placement, size, color, and context, as well as the particular language of the
21 notice in determining whether the consumer received reasonable notice. See also *Nguyen v. Barnes*
22 *& Noble*, 763 F.3d 1171 (9th Cir. 2015) (in which the court focused on the design of the page
23 where the standard terms were placed to determine that notice was insufficient); *Meyer v. Kalanik*,
24 291 F. Supp. 3d 526 (S.D.N.Y. 2018) (considering non-static elements of website design such the
25 role of a pop-up keypad in possibly obscuring notice); *Cullinane v. Uber Technologies, Inc.*, 893
26 F.3d 53 (1st Cir. 2018) (considering elements of website design, including graphics, in determining
27 the reasonableness of notice); *Bekele v. Lyft, Inc.*, 918 F.3d 181 (1st Cir. 2019) (generalizing the
28 holding in *Cullinane* and stating that “[t]he reasonable notice standard has governed online
29 contracts across jurisdictions since the early days of the internet, and the inquiry has always been
30 context- and fact-specific”).

31 Illustration 21 is based on *Meyer v. Uber Technologies*, 868 F.3d 66 (2d Cir. 2017). It
32 demonstrates that courts will consider the totality of the circumstances, including the context of
33 the placement and language, in determining whether notice is reasonable. See also *Bernardino v.*
34 *Barnes & Noble Booksellers, Inc.*, No. 17-CV-04570 (LAK) (KHP), 2017 WL 7309893 (S.D.N.Y.
35 Nov. 20, 2017) (evaluating the language and placement of notices on the entire webpage and
36 holding that notice was reasonable because “Barnes & Noble’s arbitration provision met the key
37 aspects of being reasonably conspicuous by virtue of the format and design of the ‘Submit Order’
38 page and the fact that customers could easily learn of the existence of, and access and read, the
39 TOU before deciding to purchase a DVD.”); *Applebaum v. Lyft, Inc.*, 263 F. Supp. 3d 454
40 (S.D.N.Y. 2017) (concluding notice was not reasonable because, among other factors, the

1 registration process design was not formatted in a way that alerted consumers that clicking a pink
2 box titled “Next” at the bottom of a screen constituted acceptance of the standard terms, and the
3 design discouraged recognition of the existence of the terms.

4 Courts also evaluate the reasonableness of a notice by considering whether the
5 presentation of the standard terms comports with established market norms and the consumer
6 expectations that such norms create. For example, the court in *Cullinane v. Uber Technologies,*
7 *Inc.*, 893 F.3d 53 (1st Cir. 2018), held that notice was not reasonable because Uber did not employ
8 the typical method of presenting hyperlinks (which are usually in contrasting color and
9 underlined), thus failing to inform consumers of the existence and location of standard terms.
10 Courts also take into account whether a business’s revisions to the format by which the terms are
11 presented provide reasonable notice in light of its own prior format of presentation. See, e.g.,
12 *Applebaum v. Lyft, Inc.*, 263 F. Supp. 3d 454 (S.D.N.Y. 2017) (concluding notice was not
13 reasonable because notice and terms were not as conspicuously presented to consumers as in
14 previous registration processes).

15 In addition, courts are evaluating whether the consumer received reasonable notice that the
16 standard contract terms are intended to be adopted as part of the transaction. For example, within
17 the context of a mobile platform, the court in *Meyer* concluded that “[a] reasonable user would
18 know that by clicking the registration button, he was agreeing to the terms and conditions
19 accessible via the hyperlink, whether he clicked on the hyperlink or not.” *Meyer*, 868 F.3d at 79-
20 80. Similar analyses can be seen in other contexts, in which courts consider the expectations and
21 understanding of similarly situated consumers in determining whether consumers understood the
22 offeror’s intent. In *Applebaum v. Lyft, Inc.*, 263 F. Supp. 3d 454 (S.D.N.Y. 2017), the court refused
23 to enforce a contract after holding that the company’s current mode of giving notice of the terms
24 differed from a previous one that consumers had become accustomed to and that, partly as a result
25 of this, the newer mode “discouraged recognition of the existence of lengthier contractual terms
26 that should be reviewed.” See also *Wickberg v. Lyft, Inc.*, 356 F. Supp. 3d 179 (D. Mass. 2018)
27 (concluding that terms were communicated with reasonable notice when the business required the
28 user to click on a box stating “agree to Lyft’s terms of services” before the user could continue
29 with the registration process; in that case, the notice appeared toward the bottom of a screen, and
30 it was written in smaller font and without the typical blue-colored hyperlink, but appeared in
31 contrasting color and was distinguishable on the screen).

32 *Reasonable opportunity to terminate.* Under subsection (b), terms presented to the
33 consumer after the manifestation of assent are adopted only if the consumer has a reasonable
34 opportunity to terminate the transaction after reviewing the terms. Whether such termination is
35 viewed as nonacceptance of the offer (that is otherwise accepted by non-rejection), revocation of
36 a previous acceptance, or withdrawal from a fully formed contract, it is an alternative template for
37 granting consumers a reasonable opportunity to exercise meaningful assent. Such termination
38 rights protect consumers by permitting them to avoid harmful terms.

39 A right to terminate the transaction guarantees that consumers are only bound to terms they
40 have a reasonable opportunity to review. In effect, the business’s prerogative to present the terms

1 post assent comes at a cost: the contract is not finalized until the termination period expires, and
2 consumers have the option during that period to undo an undesirable transaction. The right to
3 termination must be practical: consumers must be made aware of the right to terminate and be
4 provided with a reasonable time to exercise this right at a cost that does not render the opportunity
5 to terminate impractical. Most cases addressing the enforceability of delayed terms cite the
6 importance of effectively communicating the right to terminate by returning the goods or
7 cancelling the service. When a reasonable right to terminate is effectively communicated, the
8 standard terms are enforced. See, e.g., *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)
9 (confirming that because “ProCD extended an opportunity to reject if a buyer should find the
10 license terms unsatisfactory,” the contract was enforceable); *Bischoff v. DirectTV, Inc.*, 180 F.
11 Supp. 2d 1097, 1101 (C.D. Cal. 2002) (enforcing a DirecTV agreement that clearly communicated
12 to the customer that if they did not accept the terms, the service would be cancelled upon immediate
13 notification); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (N.Y. App. Div. 1998)
14 (refusing to find a clause unenforceable as a contract of adhesion, because the consumer could
15 easily reject Gateway’s terms by returning the merchandise and buying competitor’s product);
16 *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 308-313 (Wash. 2000) (finding
17 acceptance of additional terms when the customer was notified of the right to return the product
18 for a refund). And when the right to terminate is not effectively communicated, the standard terms
19 are not enforced. See, e.g., *Defontes v. Dell, Inc.*, 984 A.2d 1061, 1072 (R.I. 2009) (holding that
20 because it could not be said that it was reasonably apparent to the plaintiffs that they could reject
21 the terms simply by returning the goods, the terms and conditions were not binding). Of course,
22 notice of a right to terminate is not sufficient in and of itself. The consumer must be afforded a
23 reasonable opportunity to exercise that right. Specifically, the consumer must be granted sufficient
24 time to exercise the right to terminate, and the cost, loss of value, or burden involved in exercising
25 the right must not be so large that it deters the exercise of the right. Cf. *Lima v. Gateway*, 886 F.
26 Supp. 2d 1170, 1186 (C.D. Cal. 2012) (determining that a 15-day window and 15 percent
27 restocking fee made the affirmative duty to reject so oppressive as to contribute to procedural
28 unconscionability).

29 A right to terminate is a condition for adopting the standard terms as part of the contract
30 only when the terms are adopted under subsection (b). If the terms are reasonably available to the
31 consumer before or at the time of manifesting assent to the transaction, a right to terminate is not
32 required. See subsection (a).

33 The rules regarding the adoption of terms that satisfy the requirements of notice and
34 opportunity to review under subsections (a) and (b) and a right to terminate the transaction under
35 subsection (b) are the result of relatively recent doctrinal evolution. These requirements were
36 identified using the traditional approach that relies on reasoning articulated by courts, both in dicta
37 and in holdings, in published appellate cases only. The traditional approach was then supplemented
38 by a more comprehensive empirical analysis, as described in the Reporters’ Notes to § 1.

39 This Restatement describes the results of both the traditional analysis and the
40 comprehensive empirical analysis for three different types of relatively recent standard-term

1 adoption procedures: clickwrap, browsewrap, and “Pay Now, Terms Later” (PNTL). To be sure,
2 consumer contracts often take other, more traditional forms, including acceptance by signature, by
3 conduct, or by taking of benefit; and the requirements of notice and opportunity to review apply
4 also to those traditional forms of assent. This Restatement nevertheless addresses the three-way
5 classification below, as shorthand for three common procedures for the adoption of standard
6 contract terms. The clickwrap analysis looks at procedures that adopt terms in the course of an
7 affirmative manifestation of assent, such as a click on “I agree”; the browsewrap analysis looks at
8 procedures that adopt terms in the course of entering a proprietary environment, without an
9 affirmative and separate manifestation of assent; and the PNTL (or “shrinkwrap”) analysis looks
10 at procedures that adopt terms after the manifestation of assent. (It is worth noting that, in
11 electronic commerce, while the archetypal adoption procedures have often been classified as
12 clickwrap, browsewrap, and PNTL, several hybrid forms are often used, and these labels are not
13 dispositive. Of course, all procedures of adoption must conform to the rules of this Section. In
14 deciding how to classify them, this Restatement looked to the component of the agreement that
15 was the focus of the dispute.)

16 *Clickwrap.* In electronic and web-based transactions, assent is often manifested by clicking
17 an “I Agree” button. That procedure is the digital equivalent of a signature at the bottom of a
18 printed form. (See UNIFORM ELECTRONIC TRANSACTIONS ACT § 7 (UNIF. LAW COMM’N 1999).
19 The “I Agree” button commonly appears below a scroll-down window that contains the standard
20 terms. See, e.g., *Caspi v. Microsoft Network, LLC*, 732 A.2d 528, 532 (N.J. Super. Ct. App. Div.
21 1999) (finding no violation of the public policy of New Jersey in enforcing the membership
22 agreement for an online computer service in which prospective subscribers were required to click
23 either “I agree” or “I don’t agree” to terms); *Forrest v. Verizon Communications, Inc.*, 805 A.2d
24 1007, 1010 (D.C. App. 2002) (enforcing a forum-selection clause in a contract that the subscriber
25 entered by clicking an “Accept” button below the scroll box); *Moore v. Microsoft Corp.*, 741
26 N.Y.S.2d 91, 92 (N.Y. App. Div. 2002) (ruling that a validly binding contract was formed when
27 the user indicated assent to the end-user license agreement by clicking on an icon before
28 proceeding with the download of the software). In some cases, the “I Agree” button appears next
29 to a link that would take the consumer to another page with the standard terms. See, e.g., *Comb v.*
30 *PayPal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002) (classifying the PayPal user agreement, in
31 which a link to the text of the terms is at the bottom of the application, as a clickwrap contract);
32 *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904 (N.D. Cal. 2011) (granting a motion to
33 compel arbitration when a clickwrap presentation with hyperlinked terms provided the user notice
34 and an opportunity to review the terms of service prior to acceptance); *Fteja v. Facebook*, 841 F.
35 Supp. 2d 829 (S.D.N.Y. 2012) (ruling that a user assented to Facebook’s terms of use even though
36 they were only available through a hyperlink). Those “clickwrap,” or “scrollwrap” (when the terms
37 appear in a box above the “I agree” button) contracts are routinely enforced by courts, as long as
38 the manner in which terms and notice of terms are presented satisfy the constructive-notice
39 requirements that focus on language, placement, and conspicuousness of the terms. See, e.g.,
40 *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359; *Corwin v. NYC Bike Share, LLC*, 238 F. Supp. 3d

1 475 (S.D.N.Y. 2017) (explaining how various forms of presenting terms online, regardless of the
2 particular details, must meet the constructive-notice requirement). They are enforceable under
3 subsection (a) of this Section.

4 At times, the clickwrap text refers to additional terms, available on a different website.
5 These referenced terms are also enforceable, as long as they are reasonably accessible by the
6 consumer. See *DeJohn v. TV Corp. Int'l*, 245 F. Supp. 2d 913 (C.D. Ill. 2003) (finding that DeJohn
7 was bound by the terms of an agreement, part of which were incorporated by reference).
8 Importantly, the additional terms must be accessible by the consumer before he or she clicks
9 “I Agree.” See *State ex rel. U-Haul Co. v. Zakaib*, 752 S.E.2d 586 (W. Va. 2013) (holding that U-
10 Haul was unsuccessful in its attempts to incorporate the Addendum because it was only provided
11 to customers after the rental agreement was executed).

12 A traditional analysis focusing exclusively on all the decisions by state supreme and
13 appellate courts through 2014 reveals that courts routinely enforce clickwraps, absent fraud,
14 unconscionability, or other intervening factors. (For instance, as noted above, the court in *Sgouros*
15 refused to enforce the clickwrap because it concluded that consumers had no reasonable notice of
16 what they were agreeing to.) In the 11 states in which there is a supreme-court or appellate-court
17 decision on point, clickwraps were deemed to be enforceable absent an intervening factor. The
18 supreme courts of two states, Washington and West Virginia, have ruled on the enforceability of
19 clickwraps. In the remaining nine states, the opinions were written by state appellate courts. In the
20 absence of decisions by state supreme or appellate courts, other Restatements have consulted
21 opinions written by federal circuit courts interpreting state law. That approach is followed
22 throughout this Restatement.

23 The 10 state-court decisions (including one from the District of Columbia) are *Forrest v.*
24 *Verizon Communications*, 805 A.2d 1007, 1010 (D.C. App. 2002) (District of Columbia:
25 enforcing a forum-selection clause in a contract the subscriber entered by clicking an “Accept”
26 button below the scroll box); *Durrett v. ACT, Inc.*, 310 P.3d 1047 (Haw. Ct. App. 2011) (Hawaii:
27 concluding that an agreement with an arbitration provision was binding because the plaintiff
28 provided explicit assent by electronically checking the box); *Swanson v. U-Haul Int'l, Inc.*, 2014
29 IL App (2d) 140227-U, 2014 WL 1673115 (Ill. App. Ct. Apr. 23, 2014) (Illinois: affirming the
30 defendants’ motion to compel arbitration, when plaintiffs clicked to accept the terms and
31 conditions of rental contract with a valid arbitration provision); *Jallali v. Nat’l Bd. of Osteopathic*
32 *Med. Exam’rs, Inc.*, 908 N.E.2d 1168 (Ind. Ct. App. 2009) (Indiana: finding the forum-selection
33 clause and confidentiality clauses in a clickwrap agreement enforceable); *Bonck v. White*, 115 So.
34 3d 651 (La. Ct. App. 2013) (Louisiana: reversing summary judgment because of the existence of
35 genuine issues of material fact, but finding that electronic signatures are acceptable under
36 Louisiana law on a UMBI form); *Caspi v. Microsoft Networks LLC*, 732 A.2d 528, 532 (N.J.
37 Super. Ct. App. Div. 1999) (New Jersey: finding no violation of the public policy of New Jersey
38 in enforcing the membership agreement for an online computer service in which prospective
39 subscribers were required to click either “I agree” or “I don’t agree” to terms); *Moore v. Microsoft*
40 *Corp.*, 741 N.Y.S.2d 91, 92 (N.Y. App. Div. 2002) (New York: ruling that a validly binding

1 contract was formed when the user indicated assent to the end-user license agreement by clicking
2 on an icon before proceeding with the download of the software); *Barnett v. Network Solutions,*
3 *Inc.*, 38 S.W.3d 200 (Tex. App. 2001) (Texas: enforcing the forum-selection clause in an
4 agreement in which the plaintiff had to electronically scroll through the contract in order to accept
5 its provisions); *Minnik v. Clearwire U.S. LLC*, 275 P.3d 1127 (Wash. 2012) (Washington:
6 determining that a fee was an alternative-performance provision and not a liquidated-damages
7 provision in a clickwrap agreement); and *State ex rel. U-Haul Co. v. Zakaib*, 752 S.E.2d 586 (W.
8 Va. 2013) (West Virginia: recognizing the legitimacy of clickwrap and other electronic contracts,
9 but holding that U-Haul was unsuccessful in its attempts to incorporate the Addendum because it
10 was only provided to customers after the rental agreement was executed). An additional decision
11 by the Tenth Circuit, enforcing a clickwrap contract under Oklahoma law, is included here,
12 *Hancock v. American Tel. and Tel. Co., Inc.*, 701 F.3d 1248 (10th Cir. 2012) (seeing no reason
13 that clickwrap agreements would not be valid and enforceable under Oklahoma law).

14 A similar outcome is obtained from a comprehensive empirical study of all cases that are
15 available through legal search engines and secondary sources (starting with *Caspi* in 1999), from
16 state and federal courts, addressing, explicitly or implicitly, the enforceability of clickwraps in
17 consumer transactions. Out of a total of 92 cases, courts have enforced clickwraps in every case,
18 absent fraud, unconscionability, or other intervening factors, such as insufficient notice.
19 Clickwraps have been enforced in 27 states and across all federal circuits. They were enforced
20 when the terms were conspicuously and clearly presented above or next to an “I Agree” box, when
21 they were available via hyperlink next to a box containing “I Agree” or similar language, and when
22 they were incorporated by reference in a clickwrap. There is not a single reported case in which
23 clickwrap, when the consumer was required to click on “I agree,” was deemed a priori an
24 ineffective mode for adoption of terms.

25 *Browsewrap.* Another common procedure in electronic and web-based transactions
26 dispenses with the “I Agree” click. The website includes a link to another page with the standard
27 terms, and consumers, by proceeding with the purchase or simply by continuing to use the website,
28 are deemed to have adopted the standard terms as part of the contract. Browsewraps reduce the
29 costs and hassle of explicit clickwrap contracting, especially in casual web browsing. See, e.g.,
30 Alan L. Montgomery, Shibo Li, Kannan Srinivasan & John C. Liechty, *Modeling Online Browsing*
31 *and Path Analysis Using Clickstream Data*, *MARKETING SCIENCE* 23.4 at 585 (2004) (examining
32 online browsing behavior by consumers and finding that reducing the number of clicks from the
33 home page of a product to the purchase icon increases the probability that a purchase will be
34 finalized). Every time consumers visit one of the many websites on which they browse for
35 information without opening an account or making a purchase, the terms governing this use of the
36 website (including data collection, warranty disclaimers, choice of law and forum, and many
37 others) are listed on a separate page accessible through a link on the webhost’s main page. For
38 those consumers, it would be a distraction to have to click “I Agree” to the term, and they would
39 likely view the process of “closing the pop-up box” alerting them to the existence of such linked
40 terms as redundant and annoying. Accordingly, courts have allowed businesses to create binding

1 contracts without explicit manifestation of assent, utilizing instead the doctrine of constructive
2 assent.

3 Courts generally enforce browsewraps as long as reasonable notice is provided, i.e., as long
4 as the hyperlink to the standard terms is sufficiently conspicuous and/or a conspicuous statement
5 alerting the consumers to the presence and location of the posted terms is provided. Such notice
6 must also alert the consumers to the intent to include the terms as part of the consumer contract.
7 In other words, consumers have to be put on notice that terms are being adopted, either by posting
8 the terms in a prominent location or by including a prominent statement referring the consumers
9 to the terms. While most courts have required that one of these two conditions be satisfied
10 (prominent posting or prominent notice), some courts have required both. This approach has been
11 the most prominent in recent decisions. See *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th
12 Cir. 2014) (holding that “the proximity or conspicuousness of the hyperlink alone is not enough to
13 give rise to constructive notice”). Hyperlinks or references to terms that are not prominently
14 displayed and that require a consumer to actively look for them fail to provide reasonable notice
15 of their existence. Failure to provide this notice will result in nonenforcement. See, e.g., *Specht v.*
16 *Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002) (denying defendants’ motion to
17 compel arbitration because defendants did not provide reasonable notice of license agreements that
18 were located on a submerged screen); *Hines v. Overstock*, 668 F. Supp. 2d 362, 366 (E.D.N.Y.
19 2009) (ruling that the plaintiff had no actual notice of the Terms and Conditions of Use, the link
20 to which was not visible without scrolling down to the bottom of the screen); *Hoffman v.*
21 *Supplements Togo Mgmt., LLC*, 18 A.3d 210 (N.J. Super. Ct. App. Div. 2011) (determining that
22 a forum-selection clause was unreasonably masked from the view of the prospective purchasers
23 because of its circuitous mode of presentation, and was therefore unenforceable). But see
24 *Bernardino v. Barnes & Noble Booksellers, Inc.*, No. 17-CV-04570 (LAK) (KHP), 2017 WL
25 7309893, at *11 (S.D.N.Y. Nov. 20, 2017) (holding that Barnes & Noble’s revisions to its checkout
26 page, which included a prominent notice over the purchase button stating that “[b]y making this
27 purchase you are agreeing to our TOU,” which were conspicuously hyperlinked, satisfied the
28 constructive notice requirement). Some courts include, within the notice requirement, an additional
29 requirement that the terms be easily accessible. See, e.g., *Hubbert v. Dell Corp.*, 835 N.E.2d 113,
30 122 (Ill. App. Ct. 2005) (“The statement that the sales were subject to the defendant’s ‘Terms and
31 Conditions of Sale,’ combined with making the ‘Terms and Conditions of Sale’ accessible online
32 by blue hyperlinks, was sufficient notice to the plaintiffs that purchasing the computers online
33 would make the ‘Terms and Conditions of Sale’ binding on them.”); *Van Tessell v. United*
34 *Marketing Grp.*, 795 F. Supp. 2d 770, 793 (N.D. Ill. 2011) (“[T]he absence of any reference to the
35 Conditions of Use coupled with the multi-step process to locate the Conditions of Use means that,
36 like the plaintiffs in *Specht*, users of the *ChefsCatalog.com* website could complete their purchases
37 without ever having notice that their purchases are subject to the website’s Conditions of Use.”)
38 This notice-and-opportunity-to-review doctrine is restated in subsection (a).

39 Focusing only on the most recent state-supreme-court and appellate-court decisions
40 through 2019 further supports the notice-and-opportunity-to-review doctrine. Those cases include

1 one from the Supreme Court of Arkansas, one each from the appellate courts of California, Florida,
2 New Jersey, and Missouri, and one each from the U.S. Court of Appeals for the First Circuit
3 applying Massachusetts law, the U.S. Court of Appeals for the Second Circuit applying
4 Washington law, the U.S. Court of Appeals for the Third Circuit applying New Jersey law, and
5 the U.S. Court of Appeals for the Ninth Circuit applying California law. In the only case in which
6 notice of the terms was given and the hyperlinks to the terms were conspicuous, *Major v.*
7 *McCalister*, 302 S.W.3d 227 (Mo. Ct. App. 2009), the browsewrap was enforced. The browsewrap
8 terms were not enforced in the other cases because the court concluded that the notice was not
9 sufficient to inform consumers about the terms. Those cases are: *Roller v. TV Guide Online*
10 *Holdings, LLC*, 2013 Ark. 285, 2013 WL 3322348 (Ark. June 27, 2013); *Long v. Provide*
11 *Commerce, Inc.*, 200 Cal. Rptr. 3d 117 (Cal. Ct. App. 2016); *Vitacost.com, Inc. v. McCants*, 210
12 So. 3d 761 (Fla. Dist. Ct. App. 2017); *Hoffman v. Supplements Togo Mgmt., LLC*, 419 N.J. Super.
13 596, 18 A.3d 210 (Super. Ct. App. Div. 2011); *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407
14 F.3d 546 (1st Cir. 2005); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016); *James v.*
15 *Glob. Tel.*Link Corp.*, 852 F.3d 262 (3d Cir. 2017); and *Nguyen v. Barnes & Noble Inc.*, 763 F.3d
16 1171 (9th Cir. 2014).

17 Similar results are obtained from a comprehensive empirical analysis of all state and federal
18 cases addressing the enforceability of browsewraps in consumer transactions, starting with *Specht*
19 in 2002, and ending with *Resorb Networks, Inc. v. YouNow.com*, 30 N.Y.S.3d 506 (N.Y. Sup. Ct.
20 2016) in April 2016. This resulted in a total of 32 cases from one state supreme court, six state
21 appellate courts, one state trial court, four federal circuit courts, and 20 federal district courts. The
22 cases include nine unpublished opinions.

23 The examination reveals that browsewraps were enforced in all 13 cases in which the
24 website included both a prominent statement of notice and conspicuous hyperlinks to the terms.
25 Conversely, in 12 out of 13 cases in which the website lacked both a prominent statement of notice
26 and conspicuous hyperlinks to the terms, courts refused to enforce the browsewraps on the basis
27 of failure to provide sufficient notice. In five cases, courts refused to enforce the browsewrap when
28 either the hyperlink was not reasonably accessible or the notice was not sufficiently prominent. In
29 one case, the court enforced the browsewrap when only the notice of the terms, but not the
30 hyperlink, was conspicuous. In another case, the court enforced the browsewrap when neither the
31 notice nor the hyperlink were accessible and conspicuous. Browsewraps were enforced in 15 of
32 the 32 cases, or slightly less than half of the time.

33 Of the two cases of casual browsing, when the consumer was visiting the website without
34 entering into a transaction, one court held that either notice of the terms or a conspicuously placed
35 hyperlink with the terms, properly labeled, constitutes sufficient notice, and thus continued use of
36 the website constitutes acceptance of the browsewrap's terms. The other court held that both notice
37 of the terms and a conspicuously placed hyperlink are required. When the consumer enters into a
38 transaction with the seller, only three out of 18 cases required both elements, holding that merely
39 including prominent hyperlinks without a statement explicitly referring to them did not constitute
40 reasonable notice. (Cases in which the consumer downloads software free of charge are counted

1 in this Restatement as cases in which the consumer entered into a transaction with the seller. Under
2 the “casual browsing” category, the only cases included are ones in which the consumer was just
3 visiting a webpage, without any other interaction with the seller (i.e., without purchasing or
4 downloading anything.)

5 *Pay Now, Terms Later (PNTL)*. Many consumer transactions begin with an agreement
6 between the business and the consumer on the core terms of the transaction (e.g., the description
7 of the purchased model or service, price, method of payment, or time of delivery). This agreement
8 may be reached in a telephone conversation or through an in-person exchange in a brick-and-
9 mortar store. The standard terms arrive later, when the purchased item is delivered and opened.
10 Even when a product is purchased online from a retailer with whom the consumer had a clickwrap
11 agreement, the standard contract terms with the manufacturer may be first viewed only after
12 delivery and installation.

13 Initially, courts failed to reach a uniform resolution of the question whether the “terms in
14 the box” become part of the consumer contract. In general, courts followed one of two approaches.
15 The first approach enforces such terms as long as consumers received them after the purchase
16 (with notice in advance of the purchase that they are forthcoming) and had an opportunity to review
17 the terms and terminate the transaction once the terms arrived, if the consumers found the terms
18 undesirable. See, e.g., *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (note that *ProCD*, while
19 cited in many subsequent consumer-contracts cases, was not itself a consumer-contract case); *Hill*
20 *v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997). The second approach does not enforce such
21 late-arriving terms, regarding them as offers for additional terms that need to be accepted
22 affirmatively (the continued use of the product does not qualify as such affirmative acceptance
23 under this approach). See, e.g., *Bowdoin v. Showell Growers*, 817 F.2d 1543 (11th Cir. 1987)
24 (deciding that unless a disclaimer of implied warranties is conspicuously given prior to the
25 purchase, it is ineffective); *Sanco, Inc. v. Ford Motor Co.*, 771 F.2d 1081, 1086 (7th Cir. 1985)
26 (enforcing a warranty disclaimer delivered to a customer after a sale had been consummated only
27 because the parties understood beforehand that the warranty, and any disclaimers or limitations,
28 were part of their deal); *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000)
29 (finding that “the act of keeping the computer past five days was not sufficient to demonstrate that
30 plaintiff expressly agreed to the Standard Terms”). In sales-of-goods cases, the first approach,
31 enforcing PNTL contracts, has relied on UCC § 2-204 (Am. Law Inst. & Unif. Law Comm’n); the
32 second approach, refusing to enforce PNTL contracts, has relied on UCC § 2-207 (the second
33 approach has been applied only in sales-of-goods cases). Academic scholarship on that question
34 has, by and large, endorsed the second approach.

35 Consistent with the courts’ overall tendencies in enforcing clickwraps and browsewraps in
36 which the requirements of constructive notice have been satisfied, state high courts have leaned
37 toward enforcement. A traditional analysis focusing on the most recent supreme- and appellate-
38 court cases from each state indicates that the first approach, which enforces late-arriving terms, is
39 the dominant jurisprudence in consumer-contract law. As long as reasonable notice and
40 meaningful opportunity to review and reject are offered, assent mechanisms such as those

1 embodied in PNTLs facilitate commerce without undue burden, such as additional clicking or
2 multistep signing, that are unlikely to further inform consumers. The policing of “unseen” terms
3 is achieved by courts through other doctrines.

4 As of 2019, the higher courts of 12 states, including seven supreme courts, have addressed
5 the enforceability of PNTL contracts. Five additional states have decisions by circuit courts
6 applying the law of their respective states, resulting in a total of 17 states with rulings on the
7 enforceability of PNTLs. The most recent decisions by those courts reveal that PNTL contracts
8 have been enforced in a majority, 13 out of 17, of states. PNTL contracts have been enforced in
9 four out of six state supreme courts and four out of five state appellate courts. While all those
10 courts embraced the doctrine that, in principle, renders PNTL contracts enforceable, in some cases,
11 the court refused to enforce the contract because it found that either notice or opportunity to reject
12 were inadequate, or because the terms at issue were unconscionable. For example, the court in
13 *Brower* ruled that PNTL contracts are enforceable in principle (“We agree with the rationale that,
14 in such transactions, there is no agreement or contract upon the placement of the order or even
15 upon the receipt of the goods. By the terms of the Agreement at issue, it is only after the consumer
16 has affirmatively retained the merchandise for more than 30 days—within which the consumer has
17 presumably examined and even used the product(s) and read the agreement—that the contract has
18 been effectuated”) but refused to enforce the arbitration clause at issue because it held it was
19 unconscionable. This Restatement considers all cases in which courts embrace the PNTL logic
20 either in dicta or in their holdings to be in support of such a form of contracting.

21 Cases in which courts accepted the proposition that PNTL contracts are enforceable when
22 the conditions of notice and termination are met are: *Tiger Motor Co. v. McMurtry*, 224 So. 2d
23 638 (Ala. 1969) (finding that a disclaimer provision in the vehicle’s owner’s manual could not
24 defeat the express oral warranty made by respondent dealer to complainant, and that the
25 consumer’s revocation of acceptance occurred within a reasonable time); *Marion Power Shovel*
26 *Co. v. Huntsman*, 437 S.W.2d 784 (Ark. 1969) (holding that a written warranty was defective and
27 so the award of damages was erroneous); *Schnabel v. Trilegiant Corp.*, 697 F.3d 110 (2d Cir. 2012)
28 (agreeing that in shrinkwrap cases, licenses become enforceable contracts upon the customer’s
29 purchase and receipt of the package and the failure to return the product, but distinguishing the
30 current case because of a lack of notice); *James v. McDonald’s Corp.*, 417 F.3d 672 (7th Cir. 2005)
31 (finding that arbitration was required because the customer, by participating in the game, agreed
32 to follow its rules); *Rico v. Cappaert Manufactured Hous., Inc.*, 903 So. 2d 1284
33 (La. Ct. App. 2005) (recognizing the legitimacy of PNTL contracts, but distinguishing the current
34 case because the homeowner’s manual was not an “accept or return” offer, but contemplated
35 signed acceptance of terms); *Brower v. Gateway 2000*, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998)
36 (ruling that a buyer assented to an arbitration clause shipped inside the box with computer and
37 software by retaining items beyond a date specified by license terms); *Defontes v. Dell, Inc.*, 984
38 A.2d 1061, 1072 (R.I. 2009) (agreeing with the *ProCD* line of shrinkwrap agreements it thought
39 constituted the “better reasoned” and “majority view”); *1-A Equip. Co. v. ICode, Inc.*, 2003 Mass.
40 App. Div. 30 (2003) (adopting the rationale that a “cash now, terms later” contract was formed not

1 when the order was placed, but only with the retention of the merchandise beyond the time limit);
2 *Goode v. Franklin Welding & Equip. Co., Inc.*, 50 Va. Cir. 441 (Cir. Ct. 1999) (the preexisting
3 contract of sale was modified by mutual assent when the warranty disclaimers were delivered with
4 the good); *Hobbs v. Tamko Bldg. Prods.*, 479 S.W.3d 147 (Mo. Ct. App. 2015) (refusing to enforce
5 the terms at issue by noting that, unlike the consumers in *Hill*, Hobbs had neither notice of the
6 terms nor an opportunity to reject by returning the goods); *M.A. Mortenson Co. v. Timberline*
7 *Software Corp.*, 998 P.2d 305, 308 (Wash. 2000) (concluding that Washington allows the
8 formation of “layered contracts” similar to those envisioned by *ProCD*, *Hill*, and *Brower*); *Noble*
9 *v. Samsung Elecs. Am., Inc.*, 682 F. App’x 113 (3d Cir. 2017) (finding that, unlike in *Hill* and
10 *ProCD*, the consumers were not given reasonable notice that additional terms were included in the
11 box); and *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (overturning a refusal to
12 compel arbitration because the customers were bound by the arbitration clause contained in the
13 materials shipped to and accepted by them).

14 The cases in which courts refused to enforce late-arriving terms are: *Deering, Milliken &*
15 *Co. v. Drexler*, 216 F.2d 116 (5th Cir. 1954) (ruling that the invoice accompanying shipment did
16 not operate to modify the original contract by including the arbitration provision); *A.B.C. Home*
17 *& Real Estate Inspection, Inc. v. Plummer*, 500 N.E.2d 1257 (Ind. Ct. App. 1986) (determining
18 that the inspector’s exculpatory clause in the inspection report delivered to the buyers after the
19 inspection was ineffective to modify the inspector’s warranty); *Whitaker v. Farmhand, Inc.*, 567
20 P.2d 916 (Mont. 1977) (finding that the disclaimer, which was received by the farm owners
21 subsequent to the sale, did not limit the plaintiff’s recovery for the warranties); and *Rogers v. Dell*
22 *Comput. Corp.*, 138 P.3d 826 (Okla. 2005) (deciding that, in a case in which the seller sought to
23 enforce an arbitration provision allegedly sent with an invoice with the purchased computer, the
24 record was insufficient to allow the state supreme court to determine whether the arbitration
25 provision was part of the contract and enforceable).

26 Considering time trends further bolsters the conclusion that enforcement of PNTLs is the
27 dominant approach. In five states, the decision predates *ProCD* (from 1954 to 1996), and in 10
28 states, the decision came after *ProCD* (from 1998 until 2016). Among the former cases, only two
29 enforced the PNTL contract. Among the latter group, however, *all but one* case enforced PNTL
30 contracts. The post-*ProCD* decisions of the state-supreme and appellate courts point to a
31 convergence and to the emerging dominance of the *ProCD* approach.

32 Even clearer trends emerge from a comprehensive empirical study of all published and
33 unpublished PNTL cases involving consumer contracts in federal and state courts. Beginning in
34 1954 (with *Deering, Milliken & Co. v. Drexler*, 216 F.2d 116 (5th Cir. 1954)), there have been 67
35 cases addressing the enforceability of such contracts across 29 states and all federal circuits. Courts
36 have endorsed the PNTL framework in 55 out of 67 cases and enforced such contracts as long as
37 the requirements of notice, and opportunity to review and reject, were met, and as long as there
38 were no other problems with the transaction (e.g., unconscionability or fraud).

39 A closer look at the evolution of the doctrine over time reveals a clear trend toward
40 increased enforcement of PNTL contracts and an increased influence of the landmark cases,

1 *ProCD* and *Hill*, that pioneered their enforcement. Through 1995, the year before *ProCD* was
2 decided, PNTL contracts were enforced in half the cases (five out of 10). After *ProCD*, however,
3 the trend shifted dramatically. From 1996 through 2016, courts enforced PNTL contracts in 50 out
4 of 57 cases. In fact, the last time a PNTL contract was not enforced in this sample, simply because
5 of the PNTL formation procedure, was 2005. This analysis reveals that the landmark case denying
6 enforcement of PNTL contracts, *Klocek*, decided in 2000, has not generated nearly as much of a
7 following as *ProCD*.

8 An analysis of citations through January 2015 also indicates that cases enforcing PNTL
9 contracts have been more influential. The most influential cases in this area, according to citations
10 per year by out-of-state and out-of-federal-circuit courts, are those that enforce PNTL contracts.
11 Cases enforcing the PNTL formation procedure, headed by *ProCD* (with a total of 169 out-of-state
12 citations and an average of nine out-of-state citations per year) and followed by *Hill* (with five of
13 such citations per year) and *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y. App. Div.
14 1998) (with three out-of-state citations per year), are considerably more likely to get cited out of
15 state in a given year. The dominance of *ProCD* is apparent, and, cumulatively, all six cases
16 enforcing PNTLs that have at least two out-of-state citations per year are cited an average of 25
17 times per year. The only reasonably influential case that did not enforce PNTL contracts, *Klocek*,
18 is cited an average of twice per year and a total of 27 times.

19 A number of cases brought between 2015 and 2019 presented courts with the opportunity
20 to address the enforceability of novel forms of online contracting that blurred the lines between
21 what are typically regarded as clickwraps, browsewraps, and shrinkwraps. Those included
22 contracting for services through mobile-platform applications, where the process of securing
23 assent typically involves guiding the consumer through a series of screens (e.g., *Meyer v. Uber*
24 *Technologies*, 868 F.3d 66 (2d Cir. 2017)), or requiring consumers to signify assent by
25 unambiguously clicking on a “buy now” button, while also presenting the standard contract terms
26 alongside such buttons (e.g., *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 401, 404 (E.D.N.Y. 2015);
27 *Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53 (1st Cir. 2018)); *Bekele v. Lyft, Inc.*, 918 F.3d
28 181 (1st Cir. 2019) (requiring consumers to agree to Lyft’s terms during a registration process
29 interacting with three different screens on a mobile platform), among others. Some of those forms
30 are exemplified in Illustrations 20 and 21.

31 In those cases, courts rejected the need to fit the various modes of presentation into rigid
32 categories, noting that, as the *Meyer* court aptly summarized: “there are infinite ways to design a
33 website or smartphone application, and not all interfaces fit neatly into the clickwrap or
34 browsewrap categories.” Instead, courts have focused on whether the manner in which standard
35 terms were presented and the way in which the consumer was invited to manifest assent, provided
36 reasonable notice of the standard terms, informed the consumer of the seller’s intent to make the
37 standard terms part of the transaction, and gave the consumer a reasonable opportunity to review
38 them, and (if the terms were disclosed after the purchase) a reasonable opportunity to reject them.
39 The focus on reasonable notice and opportunity to review and reject is not new; it traces back to
40 the foundational inquiry laid out in early cases involving online transactions, such as *Specht*, in

1 which the court stressed that “[c]larity and conspicuousness of [. . .] terms are important in securing
2 informed assent.”

3 This Section captures that approach and the entire arc of the case law by distilling the set
4 of conditions that must be met, regardless of the contracting medium and the format of
5 manifestation of assent, for standard contract terms to be adopted. Cases in which courts refused
6 to enforce the allegedly adopted standard contract terms are ones in which the conditions stipulated
7 in this Section were not met.

8 **§ 3. Modification of Standard Contract Terms**

9 **(a) A standard contract term in a consumer contract governing an ongoing**
10 **relationship is modified if:**

11 **(1) the consumer receives a reasonable notice of the proposed modified term**
12 **and a reasonable opportunity to review it;**

13 **(2) the consumer receives a reasonable opportunity to reject the proposed**
14 **modified term and continue the contractual relationship under the existing term,**
15 **and a reasonable notice of this opportunity; and**

16 **(3) the consumer either:**

17 **(A) manifests assent to the modified term or**

18 **(B) does not reject the proposed modified term and continues the**
19 **contractual relationship after the expiration of the rejection period provided**
20 **in the proposal.**

21 **(b) A consumer contract governing an ongoing relationship may provide for a**
22 **reasonable procedure under which the business may propose a modification of the standard**
23 **contract terms, but may not, to the detriment of the consumer, exclude the application of**
24 **subsection (a), except that the established procedure may replace the reasonable opportunity**
25 **to reject the proposed modified term with a reasonable opportunity to terminate the**
26 **transaction without unreasonable cost, loss of value, or personal burden.**

27 **(c) A modification of a standard contract term in a consumer contract is enforceable**
28 **only if it is proposed in good faith and if it does not have the effect of undermining an**
29 **affirmation or promise made by the business that was made part of the basis of the original**
30 **bargain between the business and the consumer.**

1 Comment:

2 1. *General.* Standard contract terms in consumer contracts governing ongoing
3 relationships, like other species of contracts, are often modified. This Section focuses on the
4 adoption of modifications to the standard contract terms. Similar principles may apply to the
5 modification of nonstandard terms. Many modifications may be justified by changes in the
6 economic or legal environment, by revisions in the service itself, or by the realization of other
7 unexpected contingencies. There is a concern, however, that businesses will make self-serving,
8 opportunistic modifications in standard contract terms once consumers are already locked into the
9 service. Accordingly, for a modification to be adopted, it is not enough that consumers have
10 manifested their assent to the modified standard terms after the terms have been presented to them.
11 Consumers may manifest such assent reluctantly, if termination of the contract would squander
12 some acquired value, would unreasonably undermine their reliance investments, or would be
13 practically infeasible. Thus, this Section provides two necessary safeguards, procedural and
14 substantive. First, procedurally, under subsection (a), the process of adoption of a modification
15 must satisfy requirements of assent analogous to those in § 2 (including the requirement, analogous
16 to that in § 2(b), that the consumer receive a reasonable opportunity to reject the modification and
17 continue the contract on the original terms). Subsection (b) allows the parties, usually at the
18 instance of the business, to establish in the initial contract a reasonable modification procedure
19 that implements these assent requirements, although it may replace the opportunity to reject with
20 a reasonable opportunity to terminate the transaction entirely (see Comment 6). Second,
21 substantively, under subsection (c), the modification may not undermine the benefit of the bargain
22 secured in the pre-modification contract.

23 2. *Modification versus independent contract.* New terms proposed by the business are,
24 depending on the circumstances, either an attempt to modify the terms of an existing contract
25 within an ongoing relationship (governed by this Section) or an attempt to form a new,
26 independent, contract, alongside or in succession to the original contract (governed by § 2).

27 Illustrations:

28 1. A consumer uses a website without creating an account or making a purchase.
29 The website has a link to Terms of Use in large, contrasting font on the lower portion of
30 the site, which the consumer can see immediately upon opening the page and without
31 scrolling down the page. The consumer can review the terms by clicking on the link and

1 there is a clear notice that the terms are intended to become part of the contract governing
2 the current use of the website. The consumer visits the website regularly. The business
3 changes the Terms of Use from time to time. The current standard terms may be adopted
4 as a new contract each time the consumer visits the website, if the requirements of § 2 are
5 satisfied each time, and do not constitute a modification of a prior contract.

6 2. A consumer opens a checking account with a bank and signs a user agreement.
7 The bank seeks to change the terms of the agreement occasionally and sends notices to the
8 consumer in advance of each such change. Each change of terms is a proposed modification
9 under this Section, not a new contract. This is so even if the original agreement allows the
10 bank to terminate the contract at any time, as long as the bank did not effectively terminate
11 the original contract.

12 3. A consumer signs up for an ongoing web-based service, creating an account and
13 manifesting assent to the transaction by agreeing to pay the monthly service fee and
14 providing credit-card information. The website displays links to Terms of Use, which are
15 referred to during the sign-up process and are adopted as part of the consumer contract
16 upon the initial formation of the contract under § 2(a). The consumer can review the terms
17 by clicking on the links. The business changes the Terms of Use from time to time and
18 sends the consumer notices upon each such change. Each change is a proposed
19 modification governed by this Section.

20 4. A consumer signs up for a one-year service period with a business. If the contract
21 requires fresh assent to renew the service at the end of the year, new terms sent upon
22 renewal are not a modification; their adoption is governed by § 2. If, instead, the contract
23 provides for auto-renewal for a second year, unless the consumer explicitly terminates the
24 service, the original contract continues to govern during the second year, and any different
25 or additional terms sent upon the renewal or during the second year are a proposed
26 modification of the original contract and are governed by this Section.

27 3. *Notice and opportunity to review.* As with the adoption of original terms under § 2,
28 modified standard contract terms may be adopted only if the consumer receives reasonable notice
29 of the new terms and a reasonable opportunity to review them. In addition, the consumer must
30 receive reasonable notice of the opportunity to reject the modified terms, along with a reasonable
31 notice that continuing the contractual relationship without rejecting the modified terms will result

1 in the modifications becoming legally binding. The appearance, placement, and timing of the
2 notice are factors that determine whether the notice and opportunity to review are reasonable.

3 **Illustrations:**

4 5. A consumer entered into a two-year service contract online. At the time of the
5 original contract formation, standard contract terms were adopted by satisfying all the
6 requirements of § 2(a), including reasonable notice of the Terms and Conditions. The
7 business later posts a modified version of the Terms and Conditions on its website, revising
8 the heading in the page on which the terms are posted and entitling it “Revised Terms and
9 Conditions.” If the business does not provide the consumer with a distinct or separate notice
10 of the modification, describing specific changes to the agreement and the effective date of
11 those changes, the new terms are not adopted as a binding modification. It is not reasonable
12 to expect consumers to revisit and check the Terms and Conditions webpage regularly,
13 and, in the absence of an affirmative, reasonable alert, the consumer does not have a
14 reasonable opportunity to review the proposed modification as required by subsection
15 (a)(1).

16 6. A consumer opens a checking account with a bank and signs a 20-page user
17 agreement. The bank seeks to change the terms of the agreement occasionally and sends
18 notices to the consumer in advance of each change. Each such notice arrives with a monthly
19 statement sent to the consumer, on a separate sheet titled “Change of Terms” describing
20 specific changes to the agreement and the effective date of those changes. The presentation
21 of the proposed modification in this manner satisfies the requirement of subsection (a)(1).

22 7. Same facts as in Illustration 6, but the bank seeks to change the terms by attaching
23 to the monthly statement the revised version of the 20-page agreement entitled “Revised
24 Agreement,” which includes most of the terms in the original agreement as well as some
25 additional or different ones. There is no explanation as to which terms are being changed
26 or added. The presentation of the proposed modification in this manner does not satisfy the
27 requirement of subsection (a)(1), because consumers cannot meaningfully compare and
28 analyze two such lengthy and technical documents and thus cannot effectively review the
29 proposed modification.

1 4. *Opportunity to reject the modification.* A modification is binding only if the consumer
2 has a meaningful opportunity to reject it. Subsection (a)(2) requires that modified terms not be
3 adopted unless the business gives the consumer a reasonable opportunity (with reasonable notice)
4 to reject the modification and continue the relationship without the new terms. There is a close
5 conceptual relationship between adoption of standard terms after the consumer manifests assent to
6 the transaction under § 2(b) and modification of standard terms under this Section—in both
7 settings, the standard contract terms are presented to the consumer after a decision to enter into the
8 transaction was already made. Accordingly, the adoption of the standard contract terms in both
9 settings has to satisfy a similar requirement—the existence of a reasonable opportunity to reject
10 (which, in turn, requires affording the consumer a reasonable time period in which to exercise such
11 rejection).

12 **Illustrations:**

13 8. A consumer attempts to log in to an online web service that the consumer joined
14 as a member at an earlier time. The consumer is unable to log in without first clicking “I
15 Accept” to a list of new terms that are presented as a modification of the original contract.
16 Since the consumer is not given an opportunity to reject the modification, the terms are not
17 adopted.

18 9. A consumer receives a clearly labeled notice by mail regarding a change of the
19 data-privacy terms governing an ongoing service. The notice informs the consumer that
20 continued use of the service would constitute acceptance of the terms and a modification
21 of the agreement. It also explains that the change of terms will not apply and the original
22 terms will remain in place if the consumer requests an opt-out within 30 days, by signing
23 and submitting a pre-addressed opt-out form provided in the notice. The specified
24 procedure for rejection of the modification is reasonable and the requirement of subsection
25 (a)(2) is satisfied.

26 5. *Adoption of the modified standard contract terms.* With the receipt of a reasonable notice
27 of the proposed modification and a reasonable opportunity to reject it, the modification is effective
28 if the consumer either affirmatively manifests assent to it or continues to take the benefit of the
29 relationship (without rejecting the proposed modification). Subsection (a)(3) thus recognizes that
30 the consumer can adopt the modified terms by conduct that can fairly be treated as constituting

1 acceptance. It maintains the dual adoption framework of § 2, under which terms may be adopted
2 either by an affirmative act of acceptance or by continuation of the relationship once the terms are
3 presented. In some cases, the conduct that adopts the modification is the consumer’s continued
4 participation in the contractual relationship, e.g., in a credit-card contract when the consumer
5 makes new purchases using the credit card. In such cases, the modification is adopted through
6 acceptance by performance. See Restatement of the Law Second, Contracts §§ 30, 62.

7 **Illustration:**

8 10. A consumer enters a pay-as-you-go agreement with a fitness club. Months later,
9 the business sends the consumer a notice by mail titled “Change of Terms of Service”
10 describing particular changes to the agreement and giving the consumer 30 days to opt out
11 of the modified terms (and retain the original terms). If the consumer does not exercise the
12 opt-out option, the new terms are adopted as a modification as soon as the 30-day, opt-out
13 period elapses.

14 6. *Agreed procedures for modification.* Businesses often include in consumer contracts
15 “modification clauses” that specify procedures for subsequent modifications. Such clauses may
16 give concrete effect to the requirements of subsection (a), but cannot derogate from them, except
17 that the agreed procedure for modification may replace the opportunity to reject in subsection
18 (a)(2) with a reasonable opportunity to terminate the transaction entirely. An opportunity to
19 terminate is reasonable if it does not impose unreasonable cost, loss of value, or personal burden
20 on the consumer. If termination of the contractual relationship by the consumer is not feasible or
21 practicable—for example, because such termination would impose a significant loss of value
22 acquired by the consumer prior to the proposed modification; would force the consumer to incur a
23 significant financial or other burden to enter a substitute contract; would squander a substantial
24 investment in the relationship; or would undermine the consumer’s reasonable, forward-looking
25 expectation from the relationship—then the consumer does not have a reasonable opportunity to
26 terminate. In such a case, the modified standard terms are usually not adopted, even if the consumer
27 manifested assent to the modification. In evaluating whether the costs imposed on the consumer
28 by the modification are reasonable, courts may take into account the circumstances that prompted
29 the business to propose the modification, including an increase in the business’s costs; changes in
30 market, technology, or regulatory environments; and improvements to the service provided by the

1 business. If the modified terms confer substantial benefits, as in the example of new terms that are
2 needed to accommodate an upgrade to the business’s computer systems, the evaluation of the
3 reasonableness of the opportunity to terminate must consider those benefits in relation to any cost,
4 loss of value, or personal burden that a termination would impose on those consumers who prefer
5 the original terms.

6 Modification clauses that grant the business power to modify standard terms without
7 meeting the mandatory requirements of this Section are ineffective, and any modification
8 attempted under such clauses is unenforceable by the business. See § 9.

9 **Illustrations:**

10 11. A consumer attempts to log in to an online web service that the consumer joined
11 as a member at an earlier time. The original contract includes a modification procedure.
12 The consumer is unable to log in without first clicking “I Accept” to a list of new terms
13 that are presented as a modification of the original contract. Since the consumer is not given
14 an opportunity to reject the modification, the terms are not adopted unless the consumer is
15 provided a meaningful opportunity to cancel the membership (for example, by clicking on
16 a separate hyperlink that takes the consumer to a “Service Cancellation” page), and unless
17 such termination can be done without the consumer incurring unreasonable cost, loss of
18 value, or personal burden.

19 12. Same facts as in Illustration 8, but the cancellation options—although clearly
20 posted and processed without delay—trigger an early-termination fee (adopted as part of
21 the original contract). Because of the imposition of such termination fee, the consumer is
22 not offered a reasonable opportunity to terminate the transaction, and so the new terms are
23 not adopted.

24 13. A consumer purchases a home-surveillance-camera system. At the same time,
25 the consumer enters a one-year service agreement that allows the consumer to stream the
26 images recorded by the camera to a handheld device through an integrated streaming
27 service separately provided by the business. The agreements include a modification
28 procedure. A few months later, the business sends the consumer a notice explaining that
29 the Terms of Service for the service agreement will be modified in 30 days, that continuing
30 the service will constitute acceptance of the new terms, and that the terms may be rejected
31 by cancelling the service before the end of the 30 days. Despite the reasonable notice and

1 cancellation method, the opportunity to terminate the contractual relationship is not
2 reasonable under subsection (b) because termination of the service agreement would
3 impose a significant loss of value of the camera equipment.

4 14. A consumer entered a six-month service agreement with a snow-removal
5 company to plow the consumer's driveway after each snowfall for a fixed price of \$100.
6 The agreement includes a modification procedure. Two months into the contract, the
7 consumer receives a letter stating "Due to the high demand for plowing services, we are
8 modifying the contract with you by raising the price for plowing your driveway after each
9 snowfall to \$150. If you do not want to pay us \$150, you may terminate our relationship
10 by sending us an email to that effect within 14 days." Because termination of the transaction
11 would entail a loss of value, the opportunity to terminate is not reasonable under subsection
12 (b), and thus the consumer's failure to terminate the transaction within 14 days does not
13 create an enforceable modification. In addition, the modification is separately
14 unenforceable under subsection (c) because modification would have the effect of
15 undermining the promise to plow for \$100, which is part of the basis of the original bargain.
16 Agreements incorporating a flexible price formula may be enforceable. See § 9.

17 15. Same facts as in Illustration 14, except that the agreement does not include a
18 modification procedure. The modification would be unenforceable under subsection (a)
19 because the consumer is not provided with a reasonable opportunity to reject the
20 modification. In addition, the modification is separately unenforceable under subsection
21 (c) because modification would have the effect of undermining the promise to plow for
22 \$100, which is part of the basis of the original bargain.

23 16. A consumer subscribes to a web-based service that provides a no-charge, ad-
24 free platform for posting and sharing photographs. The original agreement includes a
25 clause stating that the ad-free feature of the service may be revised in the future. It also
26 includes a modification clause that permits the business to change the terms of service any
27 time in the future, subject to providing the consumers an opportunity to terminate the
28 subscription upon such change. Later, in order to ensure its commercial viability, the
29 business decides to switch to a personalized-advertisement model that uses subscribers'
30 personal data. It proposes a modification explaining the change and the type of data that
31 will be collected. The offer to modify gives the consumer an option to accept the new terms

1 or terminate the contract by deleting the account. The opportunity to terminate is
2 reasonable despite imposing inconvenience on consumers who choose to delete the
3 account.

4 7. *Good faith.* Modifications must be made in good faith. See Restatement of the Law
5 Second, Contracts § 89 (adopting the related “fair and equitable” test) and UCC § 2-209. A
6 modification affects the performance of the contract, and it is thus governed by the general
7 obligation to perform contracts in good faith. See Restatement of the Law Second, Contracts
8 § 205 and UCC § 1-304. It is restated in subsection (c) because of the heightened role that it plays
9 in policing modifications of consumer contracts. Subsection (c) is intended to ensure that the
10 modification does not unduly disadvantage the consumer, even if the requirements of subsections
11 (a) and (b) have been met. It seeks, in particular, to prevent opportunistic modifications that purport
12 to take advantage of locked-in consumers who have already invested in the contractual
13 relationship. Thus, a modification of a standard contract term is not enforceable if it undermines
14 the benefit of the bargain guaranteed by the original contract, as when it contradicts an affirmation
15 of fact or promise by the business that has been made part of the basis of the original bargain
16 between the business and the consumer. Such contradiction may occur, for example, when the
17 business has promised in the original agreement or in a precontractual representation (see
18 Comment 8) that the standard contract term will not change for a fixed period of time. See also
19 Illustrations 17 and 18. Even if the consumer is afforded the opportunity to terminate the
20 relationship without unreasonable cost, loss of value, or personal burden (in line with an agreed-
21 upon modification procedure under subsection (b)), the modification is not enforceable if the
22 termination undermines the benefit of the bargain guaranteed by the original contract. In general,
23 a modification is more likely to satisfy subsection (c) if the modified standard terms are
24 simultaneously being offered, as original terms, to new customers. Then, there is less concern that
25 the modification intends to take advantage of consumers who are locked in by the cost of changing
26 the deal. Nevertheless, because the same term may affect entrenched consumers differently than
27 new ones, it may be enforceable as part of the contract with new consumers but not as a
28 modification. Thus, an important implication of subsection (c) is that some standard terms that
29 may be acceptable if presented as part of the original contract may not be enforceable if presented
30 as part of a proposed modification. Further, subsection (c) will generally bar the modification of
31 contracts fully performed, or of short-term contracts such as a one-shot purchase-of-product

1 contract, unless circumstances are present that were not anticipated by the parties when the contract
2 was made.

3 **Illustrations:**

4 17. A consumer opens a checking account with a bank and signs a standard-form
5 checking agreement. The agreement specifies a fixed fee to be charged whenever a
6 consumer draws a check from an account with insufficient funds. Later, the bank proposes
7 a modification that would raise this fee, prospectively. The consumer manifested assent to
8 the modified term, or the agreement provided an appropriate procedure for the proposal of
9 modifications, such that the requirements of subsection (a)(3)(A) or of subsection (b) are
10 satisfied. The amount by which the bank may propose to increase the processing fee is
11 limited by subsection (c).

12 18. A consumer purchases and downloads hundreds of song tracks from an online
13 music store, along with software that is necessary to play the tracks. The initial contract
14 adopted as part of the purchase of the tracks states that the consumer may load the tracks
15 to seven different devices. Later, together with a mandatory software update, the business
16 proposes a modification that allows the consumer to load the tracks only to five devices. If
17 the new, five-device clause applies only to prospective track purchases by the consumer, it
18 does not violate subsection (c). If, instead, the new clause applies also to tracks already
19 paid for, it violates subsection (c) because it retroactively reduces the consumer's benefit
20 from the bargain and partially squanders the consumer's investment in previously
21 purchased tracks.

22 8. *Modification adopted using a more passive process.* It is not uncommon for the standard
23 terms to be adopted, initially, through one adoption process, such as requiring the consumer to
24 click "I Agree" to the terms, and then modified through a different process that does not require a
25 similar affirmative action by the consumer. Terms modified in such a way can be adopted as part
26 of the contract as long as the requirements of subsection (a) are met. There is concern, however,
27 that when the initial terms are adopted through a particular active process, the consumer would
28 expect the same or a similar process for modifications of the standard terms. Similarly, if the
29 business employed a particular process for prior modifications, the consumer would expect the

1 same or a similar process for future modifications. A shift to a more passive process triggers a
2 heightened notice requirement.

3 9. *Legal consequences of nonadopted terms.* A consumer has no obligation to assert that
4 terms offered by the business as modifications were not adopted and may instead choose to get the
5 benefit of the modified terms. If the consumer so chooses, the business may not assert that its
6 modified contract terms were not adopted. (Compare § 2, Comment 11.)

7 **Illustration:**

8 19. A business posts a “New Privacy Policy” on its website, without giving
9 consumers a notice that the standard contract terms in this new policy purport to modify
10 the existing contract. The New Privacy Policy is not adopted as a modification. As part of
11 the New Privacy Policy, the business states that none of the consumers’ personal
12 information collected by the business will be shared with the government. A consumer may
13 enforce the business’s statement as a binding contractual promise, despite the fact that the
14 New Privacy Policy is not adopted as an enforceable modification of the original contract.

15 10. *Relation to the Uniform Commercial Code and to the Restatement of the Law Second,*
16 *Contracts.* The rule of subsection (c), that modifications of standard terms are enforceable only if
17 they are made in good faith and if they do not undermine an affirmation or promise made by the
18 business that has been made part of the basis of the bargain, is consistent with a principal element
19 of UCC § 2-209 and with Restatement of the Law Second, Contracts § 89 (see also Comment 7).
20 UCC § 2-309 provides that a contract of indefinite duration is valid for a reasonable time and can
21 be terminated on reasonable notice.

REPORTERS’ NOTES

22 The standard contract terms are invisible to most consumers at both the formation and the
23 modification phases. There is a concern, however, that the process of modification can be even
24 more passive, from the consumer side, than the initial formation of the contract. Despite this
25 concern, modified standard terms are adopted prospectively to govern the contractual relationship,
26 as long as the consumer is provided with reasonable notice (and opportunity to review), and a
27 reasonable opportunity to reject the modification (or, when applicable, to terminate it); and as long
28 as the consumer manifests assent to the modified terms or does not reject the modified terms and
29 continues the contractual relationship after the expiration of the rejection or termination period.

1 The modification must also satisfy the general, good-faith requirement and must not deprive the
2 consumer of the benefit from the original bargain.

3 Businesses often specify, in their original standard contract terms, a procedure for contract
4 modification. Moreover, the specified modification procedures are often passive, requiring no
5 affirmative acceptance by the consumer. Such procedures, however, cannot derogate from the
6 requirements of this Section, although they can give concrete effects to these requirements. The
7 business may specify a modification procedure that replaces the opportunity to reject the modified
8 terms (and continue the relationship under the original terms) with an opportunity to terminate the
9 transaction entirely without unreasonable cost, loss of value, or personal burden. This exception,
10 restated in subsection (b), is supported by cases, cited below, in which only a termination option
11 was offered and yet the courts enforced the modifications (as long as the other requirements of this
12 Section were met).

13 The requirements of notice and an opportunity to reject imply that continued use of the
14 product or service, without more, is insufficient for the adoption of the modified terms as part of
15 the contract. Courts review the adequacy of the notice and the meaningfulness of the opportunity
16 to reject on a case-by-case basis, and tend to focus on those factors that ensure that the proposed
17 modification is reasonably communicated to consumers and that the opportunity to reject is
18 reasonable under the circumstances.

19 When evaluating the reasonableness of the notice of modification, courts have focused on
20 a number of factors related to placement, language, and salience of the notice, among other things,
21 on a case-by-case-basis. Illustration 5 is based on *Rodman v. Safeway, Inc.*, 2015 WL 604985
22 (N.D. Cal. Feb. 12, 2015), in which the court held that posting the modified standard terms alone,
23 without any distinct or separate notice, fails to meet the notice requirement. To be effective, notice
24 must reasonably inform consumers of the proposed modification. Illustration 6 is based on *Badie*
25 *v. Bank of America*, 79 Cal. Rptr. 2d 273 (Cal. Ct. App. 1998) and exemplifies the principle that
26 notices, when present, need to be reasonably communicated to be effective. Illustration 7 is based
27 on *Ozormoor v. T-Mobile USA, Inc.*, 2008 WL 2518549 (E.D. Mich. June 19, 2008), and reflects
28 courts' attention to both the appearance and the location of the notice in determining its
29 reasonableness. See also *Plazza v. Airbnb, Inc.*, 289 F. Supp. 3d 537 (S.D.N.Y. 2018) (holding
30 that consumers had received sufficient notice of the modified terms when the seller presented the
31 modified terms in a clickwrap format with a clear legend explaining that, to continue to use the
32 services, the consumers had to assent to the modified terms, in addition to sending subsequent
33 communications with notices regarding the changed agreement).

34 Courts have also articulated a number of factors in determining the reasonableness of the
35 opportunity to reject or terminate. See, e.g., *Torres v. S.G.E. Management, L.L.C.*, 397 F. App'x
36 63 (5th Cir. 2010) (according to the initial contract, the business may modify the arbitration
37 contract without providing the consumer with a meaningful opportunity to terminate; the original
38 arbitration contract is illusory and thus unenforceable); *Ackerberg v. Citicorp USA, Inc.*, 898 F.
39 Supp. 2d 1172, 1176 (N.D. Cal. 2012) (consumer had a meaningful opportunity to terminate; the
40 modified arbitration clause is enforceable); *In re Zappos.com, Inc., Customer Data Sec. Breach*

1 Litig., 893 F. Supp. 2d 1058 (D. Nev. 2012) (according to the initial contract, the business may
2 modify the arbitration contract without providing the consumer with reasonable notice or a
3 meaningful opportunity to terminate; the original arbitration contract is illusory and thus
4 unenforceable); *Grosvenor v. Quest Corp.*, 854 F. Supp. 2d 1021 (D. Colo. 2012) (same). In
5 particular, the opportunity to reject or terminate must be meaningful and not deprive consumers of
6 value acquired prior to the modification. See, e.g., *Ackerberg v. Citicorp USA, Inc.*, 898 F. Supp.
7 2d 1172, 1176 (N.D. Cal. 2012) (compelling arbitration because the cardholder was provided with
8 a realistic opportunity to exit the account when the new terms were added); *Cayanan v. Citi*
9 *Holdings, Inc.*, 928 F. Supp. 2d 1182, 1199-1200 (S.D. Cal. 2013) (confirming that a plaintiff's
10 failure to opt out after receiving change-of-terms notices constitutes acceptance of an arbitration
11 clause); *Rodriguez v. Instagram, LLC*, No. CGC-13-532875, 2014 WL 895438 (Cal. Super. Ct.
12 Feb. 28, 2014) (sustaining demurrer when plaintiff did not have to agree to new terms, but
13 continued use of Instagram constituted acceptance); *Bischoff v. DirectTV, Inc.*, 180 F. Supp. 2d
14 1097 (C.D. Cal. 2002) (concluding that a valid and enforceable arbitration agreement existed
15 between the parties because the individual had accepted the terms of the agreement, including the
16 arbitration clause, when he accepted the services); *Lowman v. Citibank (South Dakota), N.A.*, No.
17 CV 05-8097-RGK (FMOx), 2006 WL 6108680 (C.D. Cal. Mar. 24, 2006).

18 In many cases, a business may use one adoption process for the initial standard terms, a
19 clickwrap, say, and another, more passive adoption process for the modified terms. Courts have
20 generally allowed for this disparity in adoption processes. As long as the requirements established
21 in § 2 and in this Section—reasonable notice (and opportunity to review) and a right to reject or
22 terminate—are met, the modifications have been enforced. Switching to a different adoption
23 process, however, raises a concern that consumers accustomed to the original process might fail
24 to notice the modification. Accordingly, a heightened notice requirement may be imposed in such
25 cases. When sufficient notice is absent, the modified terms will not be enforced. See, e.g., *Douglas*
26 *v. United States Dist. Court*, 495 F.3d 1062 (9th Cir. 2007) (refusing to find a customer bound by
27 contract modifications, because, although the provider posted the revised contract on its website,
28 it never notified the customer that the contract had changed); *Martin v. Comcast*, 146 P.3d 380,
29 389 (Or. Ct. App. 2006) (determining that despite the “bill stuffers” Comcast reportedly sent,
30 subscribers could easily have continued using Comcast’s service without ever being aware of the
31 arbitration clause, and so were not provided sufficient notice). Businesses commonly post
32 modifications on their websites. Courts have generally found that such posting, without more, does
33 not satisfy the notice requirement. See *In re Zappos.com, Inc., Customer Data Sec. Breach Litig.*,
34 893 F. Supp. 2d 1058, 1066 (D. Nev. 2012) (deciding that a highly inconspicuous hyperlink buried
35 among a sea of links does not provide proper notice); *Grosvenor v. Qwest Corp.*, 854 F. Supp. 2d
36 1021 (D. Colo. 2012) (dismissing as insufficient the fact that Qwest posted the changes it made to
37 its agreement to a remote webpage).

38 The rule of subsection (a) provides some procedural protection against opportunistic
39 modifications. The rule of subsection (c) provides stronger protection by targeting the substance
40 of the modified terms, rather than the modification process. In *Badie*, the court found that good

1 faith limits the business to making modifications that were within the reasonable contemplation of
2 the parties at the time of the initial contract. 79 Cal. Rptr. 2d at 284. *Badie* is one of the leading
3 cases in this area, having been highly influential in the Ninth Circuit and California courts as well
4 as having been favorably cited in 92 subsequent cases by out-of-state courts (only one other case
5 addressing non-employment-related consumer modifications, *Kristian v. Comcast Corp.*, 446 F.3d
6 25 (1st Cir. 2006), has more out-of-state citations). *Badie* has been cited in numerous cases for its
7 articulation of the good-faith doctrine in the context of consumer-contract modifications. The
8 good-faith requirement in subsection (c) is further bolstered by the requirement that the
9 modification (or termination under subsection (a)(2)) not undermine the benefit of the bargain
10 guaranteed by the original contract, as when it contradicts an affirmation or promise made by the
11 business that has been made part of the basis of the original bargain between the business and the
12 consumer.

13 The unconscionability doctrine, which is restated in § 5, can also be used to police
14 modifications of standard terms. A modification procedure that presents the new terms in a
15 nonsalient manner, as exemplified by Illustrations 5 and 6, would satisfy the standard for
16 procedural unconscionability with relative ease. Accordingly, the reasonableness of the modified
17 terms would be adjudicated under the substantive-unconscionability standard. See, e.g., *Powertel,*
18 *Inc. v. Bexley*, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999) (holding that the revised telephone-
19 service contract, sent as an insert with the bill, was procedurally and substantively unconscionable
20 and therefore unenforceable); *Perdue v. Crocker Nat'l Bank*, 702 P.2d 503 (Cal. 1985) (reversing
21 a denial of a motion to amend so as to allow parties an opportunity to present evidence regarding
22 whether an “NSF charge” (a handling charge for checks drawn on accounts without sufficient
23 funds) was an unconscionable element of the contract). The discretionary-obligation doctrine,
24 restated in § 4, provides additional protection against modification clauses that give the business
25 explicit, unfettered discretion to modify the standard contract terms.

26 The restated rules pertaining to the modification of standard contract terms are supported
27 by an empirical study of all cases in state and federal courts through 2015 addressing the
28 enforceability of modifications in consumer transactions or consumer contracts, both in holdings
29 and in dicta (excluding employment cases), starting with *Panorama Residential Protective Ass'n*
30 *v. Panorama Corp.*, 627 P.2d 121 (Wash. Ct. App. 1981). The study includes 86 cases, including
31 37 unpublished cases.

32 Courts have developed a fairly consistent approach to determining the enforceability of
33 modifications. In particular, the requirements of notice and opportunity to reject or terminate figure
34 prominently in courts’ reasoning. In 45 out of the 46 cases in which modifications were enforced
35 and that involve the questions of notice as well as opportunity to reject or terminate, courts made
36 explicit determinations that both the requirements of sufficient notice and opportunity to reject or
37 terminate were satisfied. In the remaining case, the court made an explicit determination that
38 sufficient notice was provided. (Modifications were enforced in eight additional cases, but at least
39 one of those questions was not an issue in those cases.) Of the 32 cases in which modifications
40 were not enforced, in 22 cases the courts found that either notice or an opportunity to reject or

1 terminate was absent. In the remaining 10 cases, the courts refused to enforce the modifications
2 because they were unconscionable, because they violated the duty of good faith, or for some other
3 reason.

4 Those findings from all courts also hold for state supreme courts and state appellate courts
5 (hereinafter “high state courts”). In cases in which both notice and the opportunity to reject or
6 terminate were at issue, high state courts enforced modifications when both the requirements of
7 sufficient notice and opportunity to reject or terminate were satisfied, except in one case in which
8 the modification was held to be unconscionable. Among the cases in which enforcement was
9 denied, in all but one the high state courts explained their refusal to enforce the modification by
10 the absence of either notice or an opportunity to reject or terminate (or both), or by finding that the
11 modification was unconscionable.

12 The good-faith requirement of subsection (c) also figures prominently in the case law. In
13 23 cases, courts have explicitly discussed the requirement of good faith. Courts enforced the
14 modification in 15 of 16 cases in which the requirement was found to be satisfied, and denied the
15 modification in all seven cases in which it was found to be violated.

16 There is also support for the proposition that courts are comfortable accepting
17 modifications presented by means different than the original terms, as long as the notice
18 requirement is met. The manner in which the contract is originally presented as well as the mode
19 of presentation of the modification are described in 78 opinions. In 61 of those cases, the business
20 presented the modification in a manner different from the original. For example, courts have
21 enforced modifications when the original contract was presented to the consumer in paper format
22 and the modification was presented as a bill stuffer, a browsewrap, or an email, as long as the
23 notice requirement was satisfied. See, e.g., *Herrington v. Union Planters Bank, N.A.*, 113 F. Supp.
24 2d 1026 (S.D. Miss. 2000) (finding that a cover letter accompanying the revised agreement was
25 enough to sufficiently notify the plaintiffs that the terms and conditions of their accounts would
26 change).

27 § 4. Discretionary Obligations

28 **(a) A contract or any term that grants the business discretion to determine its rights**
29 **and obligations must be interpreted, when reasonably susceptible to such interpretation, to**
30 **provide that such discretion will be exercised in good faith.**

31 **(b) A term in a contract that purports to grant the business absolute and unlimited**
32 **discretion to determine its contractual rights and obligations unconstrained by the good-**
33 **faith obligation is unenforceable by the business.**

1 Comment:

2 1. *Discretionary terms.* A consumer contract may include provisions that grant the business
3 discretion to specify or adjust its contractual obligations. There are two types of discretion-granting
4 terms: (1) terms that grant the business discretion to resolve an issue that was left open in the initial
5 contract, e.g., when the initial contract states that any dispute will be settled by arbitration, does
6 not specify the arbitration forum, and grants the business discretion to choose the arbitration forum;
7 and (2) terms that grant the business discretion to adjust or change obligations that were specified
8 in the initial contract, e.g., when the initial contract states that any dispute will be settled by
9 arbitration in Arbitration Forum A and grants the business discretion to replace Arbitration Forum
10 A with another arbitration forum. This Section applies to both types of discretion-granting terms.
11 Discretion-granting terms of type (2) are modification clauses and thus governed also by § 3 (see
12 Comment 4).

13 2. *Discretionary terms restricted by good faith.* When a consumer contract includes a
14 provision that grants the business absolute and unlimited discretion to specify or adjust its
15 contractual obligations, the contract lacks consideration because it fails the basic requirement of
16 mutuality—that each party make a commitment to the other (Restatement of the Law Second,
17 Contracts § 77). But, following a long tradition in contract law, subsection (a) establishes that such
18 open-ended language does not ordinarily lead to nonenforcement if it can reasonably be read not
19 to exclude the implied limitation that the business is required to exercise its discretion in good
20 faith. Such implied limitation is consistent with the approach taken by the Uniform Commercial
21 Code (for example, in §§ 2-305 and 2-306)—to supplement discretionary terms by an obligation
22 to exercise the discretion in good faith. The implied duty of good faith applies more broadly in
23 shaping the performance obligation of both parties (see Restatement of the Law Second, Contracts
24 § 205 and UCC § 1-304). It is emphasized here because of the central role that it plays in policing
25 otherwise facially unlimited discretionary terms in consumer contracts and rendering contracts that
26 contain them enforceable.

27 Illustrations:

28 1. A contract contains a clause requiring disputes between a business and a
29 consumer to be resolved in a particular forum. It grants the business the power to set a
30 forum and procedures at its own discretion, and does not contain any express limitation on
31 such discretion. The term is enforceable, but the business must exercise its discretion in

1 good faith, choosing a forum and procedures that conform to commercial standards of fair
2 dealing in the circumstances.

3 2. A contract contains a clause applying to the entire agreement, stating that the
4 business “reserves the right at any time to modify, revoke, suspend, terminate, or change
5 any or all terms of the contract, in whole or in part.” The clause is enforceable, but the
6 business must exercise its powers under this clause in good faith. Any subsequent
7 modifications of the contract attempted under this clause would be enforceable if consistent
8 with § 3.

9 3. *Discretionary terms in violation of the good-faith restriction.* When a term in the contract
10 purports to grant the business absolute and unlimited discretion to specify contractual obligations
11 in a way that cannot be reconciled with or that explicitly conflicts with the good-faith restriction,
12 the business’s promises as expressed in those terms are often labeled by courts as “illusory”
13 because by failing to constrain its discretion the business made no meaningful commitment to the
14 consumer with respect to the matters subject to the discretionary rights. Such a term, or—if it is
15 not severable—the entire contract, is an illusory promise and is not enforceable by the business
16 (but may be enforceable by the consumer; see Comment 7). The term or contract may also be
17 substantively unconscionable under § 5.

18 **Illustrations:**

19 3. A consumer enters into an agreement for a cruise service with a business that
20 operates cruise ships, pays a nonrefundable deposit to reserve a cabin on a specific cruise,
21 and agrees to pay the remainder of the price by a specified date. The standard contract
22 terms allow the business to cancel the reservation at any time and for any reason, without
23 prior notice and without providing any explanation or compensation. The contract is
24 unenforceable by the business because the business’s promise is illusory. This conclusion
25 does not change even if the business must return the deposit upon such termination.

26 4. A consumer purchases a hot tub along with a two-year service agreement. The
27 service component is priced separately, but marketed as an important complement to the
28 sale and as part of a single, unified transaction. The standard contract terms allow the
29 business to cancel the service component at any time and for any reason, by mailing back
30 the remaining balance of the prepaid service price. The entire contract is unenforceable by

1 the business, including the hot-tub sale, because a significant source of value can be
2 eliminated by the business without any limitation.

3 *4. Unilateral modification clauses.* Businesses sometimes include, in their standard terms,
4 a clause that purports to grant the business unrestricted discretion to modify the terms of service.
5 When reasonably susceptible of such an interpretation, such clauses should be interpreted to allow
6 only good-faith modification, in accordance with this Section and § 3. When the explicit language
7 of the modification clause precludes such an interpretation, the clause is not consistent with
8 subsection (a) and is thus unenforceable by the business under subsection (b). The clause may also
9 be substantively unconscionable under § 5. The effects of such an attempt to derogate from the
10 good-faith restriction are described in § 9.

11 **Illustration:**

12 5. A contract between an airline and a consumer allows the airline to modify the
13 frequent-flyer program at its discretion. The provision is enforceable, and any subsequent
14 modification is enforceable, if it is adopted in accordance with the requirements of § 3, as
15 long as it is done in good faith. A modification that unreasonably reduces the value of
16 previously acquired perks is inconsistent with the good-faith requirement of this Section,
17 and it may also violate the requirement of § 3(a) if the airline does not afford the consumer
18 a meaningful opportunity to reject it. But a modification that reduces the value of
19 prospectively acquired miles does not conflict with the good-faith requirement.

20 *5. Discretionary terms and course of performance.* A contract or a term that grants the
21 business wide discretion is unenforceable by the business if the business exhibits a pattern of
22 conduct under which the discretion is exercised in bad faith. Similarly, a modification clause that
23 grants the business wide discretion to modify the terms of the contract is unenforceable by the
24 business if the business attempts to modify the contract with retroactive effect or otherwise in bad
25 faith. Those results apply even if, in the absence of such courses of performance, the discretion or
26 modification terms would be enforceable under subsection (a) because it is subject to the implied
27 obligation of good faith. In effect, the ability to invoke the implied obligation of good faith to save
28 the term is negated when there is a course of performance that is inconsistent with a good-faith

1 exercise of the business's discretion, and in the absence of such an implied restriction the
2 discretionary term is unenforceable by the business.

3 **Illustration:**

4 6. A contract contains an arbitration clause that allows the business to select the
5 arbitration body and procedure at its discretion. Under subsection (a), the clause is
6 enforceable, because the discretion is subject to an obligation to exercise it in good faith.
7 Invoking this power, the business refers consumers' disputes to an arbitration body that is
8 inaccessible to most consumers, despite the existence of more readily accessible and more
9 reasonable alternatives. Such exercise of discretion by the business violates the good-faith
10 duty and is not enforceable. Depending on the circumstances, it may render the entire
11 arbitration clause unenforceable by the business. (See also § 9.)

12 6. *No requirement of symmetry.* Discretionary terms, by their nature, allocate contractual
13 rights in an asymmetric manner. Such allocations are a regular feature of contracting and require
14 no special justification. Thus, asymmetry alone does not make a contract unenforceable. As long
15 as the discretionary power is bounded by the requirement of good faith (and by other equivalent
16 contractual restrictions), it does not pose a problem of mutuality.

17 **Illustration:**

18 7. A consumer contract contains a choice-of-forum clause that requires all
19 consumer complaints to be resolved in a specified forum, but gives the business discretion
20 to pursue its own complaints in a different forum. The asymmetry alone does not render
21 the clause unenforceable by the business.

22 7. *Legal consequences of unenforceable discretionary terms.* Terms that provide for the
23 exercise of discretion without good faith are inconsistent with subsection (a) and are unenforceable
24 by the business under subsection (b). If such terms can be severed from the rest of the agreement,
25 they are replaced with gap-fillers, as described in § 9. If severance or restriction of the terms cannot
26 be accomplished by reformation or augmentation of the contract without undue burden (for
27 example, when the unenforceable term is the price or the quantity), the entire contract is
28 unenforceable by the business. Discretionary terms in explicit violation of the good-faith
29 restriction may also render the contract substantively unconscionable under § 5. Discretionary

1 terms intended to provide value to the consumer may be enforced by the consumer, replacing the
2 business's discretion with gap-fillers, as described in § 9.

3 **Illustration:**

4 8. A contract for installation of a home-alarm system provides for one-year, on-site
5 service in the event that the system malfunctions, at no additional charge. The service term
6 in the contract grants the business unlimited discretion to schedule any requested service
7 at its own convenience. It specifies that delayed scheduling of the repair would not give
8 rise to any claim against the business. Such unlimited discretion is not consistent with this
9 Section. The consumer may enforce the on-site service promise, stripped of the business's
10 unlimited scheduling discretion. The consumer's contractual right under the severed
11 agreement is to receive on-site service within a reasonable time.

12 8. *Relation to the Uniform Commercial Code and to the Restatement of the Law Second,*
13 *Contracts.* The rule of this Section is consistent with Restatement of the Law Second, Contracts
14 § 77, which deems discretionary terms illusory when the discretion is not limited (by the doctrine
15 of good faith or otherwise). It is also consistent with the approach of UCC §§ 2-305, 2-306,
16 2-309, and 2-311(1), which impose good-faith limitations on discretionary terms. UCC § 1-302(b)
17 specifies that the duty of good faith may not be disclaimed by agreement, but that the parties may
18 agree on “the standards by which the performance of [the good-faith obligation] is to be measured
19 if those standards are not manifestly unreasonable.”

REPORTERS' NOTES

20 Many consumer contracts include terms that give the business powers to modify, add, or
21 negate its contractual obligations, and to set the precise details and scope of various obligations.
22 Often those powers are stated explicitly in modification clauses or discretionary terms. But they
23 may also arise out of vague drafting of the business's obligations. If the business can derogate,
24 without any limitation, from rights and obligations that were stated when the original assent was
25 manifested, or if the business awards itself unfettered discretion to specify its obligations under
26 the original contract, such that the promise the business made to consumers is lacking any
27 meaningful commitment, the business's promise is illusory and the contract fails for lack of
28 consideration. In such cases, all the provisions in the agreement that contained the unlimited
29 discretion may be unenforceable against the consumer, as they were never part of a contract with
30 a bargained-for return promise. Compare RESTATEMENT OF THE LAW SECOND, CONTRACTS § 77
31 (AM. LAW INST. 1981).

1 This nonenforceability outcome is obtained only when the contractual language clearly
2 grants the business unfettered discretion. In other cases, when a term in the contract grants the
3 business wide discretion but does not state explicitly the boundaries of this discretion, contract law
4 requires that the business exercise its discretion in good faith. For example, a business might
5 include a clause giving it the right to modify any term of the contract for any reason, including an
6 existing arbitration clause. Ordinarily, modifications done under such powers are enforced by
7 courts. The approach of this Section supports this result, by restricting discretionary clauses to
8 allow only reasonable modifications made in good faith. This approach thus dispenses with the
9 need to include explicit “savings clauses” that limit the modification power.

10 One of the primary concerns with unlimited discretionary terms is their retroactive
11 application. Discretionary terms are often silent on the issue of retroactive application, and some
12 courts have held that silence on this issue means that the discretion can be exercised with
13 retroactive application, which renders the agreement unenforceable. Those courts have held that,
14 to be valid, the discretionary terms must expressly state that they only apply prospectively. See,
15 e.g., *Morrison v. Amway Corp.*, 517 F.3d 248 (5th Cir. 2008) (determining that because there is
16 nothing to suggest that once published the amendment would be inapplicable to disputes
17 arising *before* such publication, it was unenforceable); *Torres v. S.G.E. Mgmt., LLC*, 397 F. App’x
18 63, 68 (5th Cir. 2010) (ruling that because no savings clause precluded application of amendments
19 to disputes arising before amendment, the arbitration clause was illusory and unenforceable);
20 *Harris v. Blockbuster, Inc.*, 622 F. Supp. 2d 396 (N.D. Tex. 2009) (denying the provider’s motion
21 to compel individual arbitration because there was nothing to suggest that once published the
22 amendment would be inapplicable to disputes arising out of events occurring before the
23 publication); *Phox v. Atriums Management Co., Inc.*, 230 F. Supp. 2d 1279 (D. Kan. 2002)
24 (finding an employee handbook to be an illusory contract because in the discretionary clauses the
25 defendant reserved the right to modify or cancel provisions at any time). Along this line, courts
26 examine whether the prospective application limit is expressly stated, and if it is, the discretionary
27 term is enforceable. See, e.g., *In Re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002) (holding that
28 language in the agreement effectively prevented Halliburton from avoiding its promise to arbitrate
29 by amending the provision or terminating it altogether).

30 The approach of this Section, which includes an implied limitation of good faith in the
31 exercise of unlimited-discretion clauses, instead follows the position adopted by provisions of
32 Article 2 of the Uniform Commercial Code, §§ 2-305, 2-306, and 2-309 (Am. Law Inst. & Unif.
33 Law Comm’n), which impose good-faith limitations on discretionary terms. It also follows courts
34 that have imposed limitations originating from the duties of good faith and fair dealing and from
35 the reasonable expectations of the parties to save otherwise unenforceable contracts—an approach
36 that has been applied in both consumer and nonconsumer contracts. See, e.g., *Padberg v. DISH*
37 *Network LLC*, 2012 WL 2120765 (W.D. Mo. June 11, 2012) (recognizing that although the
38 contract grants Dish Network the discretion to change Padberg’s programming, Dish Network’s
39 programming decisions are subject to an implied duty of good faith and fair dealing, and Dish
40 Network must exercise its discretion reasonably); *Lebowitz v. Dow Jones & Co.*, 508 F. App’x

1 83, 84 (2d Cir. 2013) (noting that, because of the implied duty of good faith, under New York law,
2 a contract is not illusory merely because its terms give discretion to one party to the contract); 24
3 Hour Fitness, Inc. v. Superior Court, 78 Cal. Rptr. 2d 533 (Cal. Ct. App. 1998) (determining that,
4 because a petitioner employer's power to modify the agreement included a duty of good faith, it
5 was not illusory); Cobb v. Ironwood Country Club, 183 Cal. Rptr. 3d 282 (Cal. Ct. App. 2015)
6 (constraining Ironwood's right to amend the agreement governing the parties' relationship by the
7 covenant of good faith and fair dealing, which precludes amendments that operate retroactively);
8 Serpa v. California Surety Investigations, Inc., 155 Cal. Rptr. 3d 506 (Cal. Ct. App. 2013) (finding
9 that the obligation to arbitrate was not rendered illusory by the employer's retention of a right to
10 modify the agreement, because it had to be exercised in accordance with the implied covenant of
11 good faith and fair dealing); Peleg v. Neiman Marcus Grp., Inc., 140 Cal. Rptr. 3d 38 (Cal. Ct.
12 App. 2012) (finding an agreement illusory because it was not restricted by express language or by
13 terms implied under the covenant of good faith and fair dealing); Martindell v. Lake Shore Nat'l
14 Bank, 154 N.E.2d 683, 691 (Ill. 1958) (holding that the duty of good faith and fair dealing implied
15 an interpretation that required the option period be left open for six months); Russ Berrie & Co. v.
16 Gantt, 998 S.W.2d 713 (Tex. App. 1999) (deciding that the employment contract was not illusory
17 under New Jersey law, because New Jersey law implied a duty of good faith and fair dealing in all
18 contracts); Carrico v. Delp, 490 N.E.2d 972, 976 (Ill. App. Ct. 1986) (concluding that, in
19 accordance with the implied duty of good faith, the agreement gave the bank reasonable, not
20 absolute, discretion); Casas v. Carmax Auto Superstores Cal., LLC, 169 Cal. Rptr. 3d 96 (Cal. Ct.
21 App. 2014) (ruling that under California law even a modification clause not providing for advance
22 notice does not render an agreement illusory, because the agreement also contains an implied
23 covenant of good faith and fair dealing). For example, the court in *Cobb* explained how a contract-
24 modification clause that was silent on whether contract changes apply to existing claims was
25 implicitly restricted by the duty of good faith:

26 When one party to a contract retains the unilateral right to amend the agreement
27 governing the parties' relationship, its exercise of that right is constrained by the
28 covenant of good faith and fair dealing which precludes amendments that operate
29 retroactively to impair accrued rights.

30 183 Cal. Rptr. 3d at 284.

31 But, if the term as written is explicitly unrestricted, it cannot be varied by the implied
32 covenant of good faith and fair dealing. That term, or the entire contract, becomes unenforceable.
33 The legal consequences are then determined by § 9. Returning to the example of a discretionary
34 arbitration agreement, if it expressly applies a contract change to preexisting claims, the implied
35 covenant of good faith cannot vary the plain language, and the agreement is unenforceable.
36 (Compare Restatement of the Law, Employment Law § 2.06 (Am. Law Inst. 2015), allowing only
37 prospective modifications of binding employer policy statements. Compare also *Cheek v. United*
38 *Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656 (Md. 2003); *Salazar v. Citadel Communications*
39 *Corp.*, 90 P.3d 466 (N.M. 2004), which found the language that grants a firm (in the employment

1 context) the right to modify terms of the contract at its “absolute discretion” or “for any reason”
2 sufficient to render the agreement illusory.)

3 The rule that unlimited-discretion promises are not enforceable, as restated in this Section,
4 does not require any symmetry of obligation. Consumer contracts do not fail for lack of
5 consideration if, for example, the arbitration clause applies only to actions brought by consumers
6 and not to actions brought by the business. Most of the rights and obligations in consumer contracts
7 are asymmetric—the business has to perform some actions and the consumer other actions—and
8 consideration exists as long as these asymmetric obligations are mutually exchanged. See *Oblivion v.*
9 *Winiecki*, 374 F.3d 488 (7th Cir. 2004) (finding that the arbitration clause was enforceable because
10 it was supported by consideration, the employee’s salary—one of the things it paid her to do was
11 agree to non-judicial dispute resolution). See also *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173
12 (3d Cir. 1999) (enforcing an agreement that bound only plaintiffs to submit to arbitration because
13 mutuality is not a requirement of a valid arbitration clause when consideration is present); *Lackey*
14 *v. Green Tree Fin. Corp.*, 498 S.E.2d 898, 904 (S.C. Ct. App. 1998) (holding that there is no
15 requirement that the consideration for one party’s obligation to arbitrate all issues under a contract
16 be the other party’s obligation to arbitrate all issues under that contract); *Randolph v. Green Tree*
17 *Fin. Corp.*, 991 F. Supp. 1410, 1421-1422 (M.D. Ala. 1997) (denying the individual’s motion for
18 reconsideration of the court’s decision to grant the corporation’s motion to compel arbitration).
19 Problems of asymmetric obligation have been dealt with by courts under the label of “illusory
20 promise” or “mutuality” but have addressed a different issue altogether—unconscionability.

21 § 5. Unconscionability

22 **(a) An unconscionable contract or term is unenforceable, to the extent stated in § 9.**

23 **(b) A contract or a term is unconscionable if at the time the contract is made it is:**

24 **(1) substantively unconscionable, namely fundamentally unfair or**
25 **unreasonably one-sided, and**

26 **(2) procedurally unconscionable, because it results in unfair surprise or results**
27 **from the absence of meaningful choice on the part of the consumer.**

28 **In determining that a contract or a term is unconscionable, a greater degree of one of the**
29 **elements in this subsection means that a lesser degree of the other element is sufficient to**
30 **establish unconscionability.**

31 **(c) Without limiting the scope of subsection (b)(1), a contract term is substantively**
32 **unconscionable if its effect is to:**

33 **(1) unreasonably exclude or limit the business’s liability or the consumer’s**
34 **remedies that would otherwise be applicable for:**

1 **(A) death or personal injury for which, in the absence of a contractual**
2 **provision in the consumer contract, the business would be liable, or**

3 **(B) any loss to the consumer caused by an intentional or negligent act**
4 **or omission of the business;**

5 **(2) unreasonably expand the consumer’s liability, the business’s remedies, or**
6 **the business’s enforcement powers that would otherwise be applicable in the event of**
7 **breach of contract by the consumer; or**

8 **(3) unreasonably limit the consumer’s ability to pursue or express a complaint**
9 **or seek reasonable redress for a violation of a legal right.**

10 **(d) In determining whether a contract or a term is unconscionable, the court should**
11 **afford the parties a reasonable opportunity to present evidence as to its commercial setting,**
12 **purpose, and effect.**

13 **Comment:**

14 1. *The two prongs of unconscionability.* The doctrine of unconscionability has the primary
15 goal of protecting contracting parties against fundamentally unfair and unreasonably one-sided
16 terms. It thus represents one of the primary safeguards necessary in an environment in which
17 complex terms are adopted without meaningful scrutiny by consumers. Because consumers rarely
18 read or review the non-core, standard contract terms, and because such faintly reviewed terms may
19 nevertheless be adopted under the principles developed in the case law and reflected in §§ 2 and 3
20 of this Restatement, the doctrine of unconscionability is a primary tool against the inclusion of
21 intolerable terms in the consumer contract. While the principal element of the unconscionability
22 doctrine is the substantive prong that identifies such intolerable terms, the doctrine recognizes that
23 sometimes consumers may choose to accept harsh terms in exchange for another benefit (such as
24 low price). The doctrine asks whether consumers in fact meaningfully chose to accept a harsh term
25 by also requiring (except in rare circumstances) a showing of some quantum of procedural
26 unconscionability. In determining whether a contract or a term is unconscionable, a court has to
27 examine its expected effects as they appear at the time that the contract was made (compare
28 Restatement of the Law Second, Contracts § 208 and Uniform Commercial Code (UCC) § 2-302).

29 2. *Sliding scale.* In general, both the substantive and the procedural prongs are necessary
30 for a finding of unconscionability. But they need not be present in the same degree. Under
31 subsection (b), the two prongs are viewed in tandem and a sliding-scale approach is applied: a

1 large quantum of one prong means that a relatively small quantum of the other is sufficient to
2 establish unconscionability. Because the ultimate goal of the unconscionability doctrine is to deny
3 enforcement to contract terms that are fundamentally unfair, in appropriate circumstances a high
4 degree of substantive unconscionability is sufficient to find that a standard contract term, ordinarily
5 not one of the core-deal terms of which most consumers are aware, is unconscionable.

6 3. *Substantive unconscionability.* The substantive-unconscionability test in subsection
7 (b)(1) addresses the unfairness and one-sidedness of a contract term that potentially undermines
8 the consumer’s benefit from the bargain, and for which the business cannot show a reasonable
9 justification. There are various ways to characterize the required severity of the substantive
10 unconscionability—e.g., “shock the conscience,” “oppressive,” “unreasonably harsh,” or
11 “fundamentally unfair.” Those tests, as articulated by courts and in the Uniform Commercial Code,
12 are all intended to capture a limiting criterion, that the doctrine is to be used only when the one-
13 sidedness of a term in the contract is extreme.

14 In general, it is impossible to evaluate the one-sidedness of a particular term at the time the
15 contract is made without looking at the contract as a whole, including the price, and the context
16 surrounding the contract. What might appear as unfair may be merely a bargain-basement deal in
17 which the pro-business term is matched by a pro-consumer price or other consumer advantage.
18 Thus, for example, a contract that provides few rights to a consumer may not be problematic if a
19 low price reflects those minimal rights, but might be problematic without the corresponding benefit
20 of a low price. Likewise, an extreme pro-business term may not be unfair if, in the context
21 surrounding the contract, it reflects or offsets a large risk taken by the business. While the presence
22 of a competitive market environment may suggest that, in ordinary commerce, pro-business terms
23 would lead to more favorable prices or other terms for consumers, it does not preclude a legal
24 finding that a term is substantively unconscionable.

25 4. *Contract terms that are substantively unconscionable.* Subsection (c) provides a
26 nonexhaustive list of categories of standard contract terms that are substantively unconscionable,
27 if their effect is to impose:

28 (a). *Unreasonable limit on the business’s liability or the consumer’s remedies.*
29 Subsection (c)(1) establishes that it is unconscionable to unreasonably exclude or limit the
30 business’s liability or the consumer’s remedies that would otherwise be applicable for (A) death
31 or personal injury for which, in the absence of a contractual provision in the consumer contract,

1 the business would be liable, or (B) any loss to the consumer caused by an intentional or negligent
2 act or omission of the business. Subsection (c)(1) applies both to limits on the consumer's remedies
3 and to limits on the business's liability, including disclaimers of implied warranties. Standard
4 contract terms stating that the liability or remedy limitations are specifically agreed upon, or that
5 conduct that would otherwise be regarded by law as negligent is contractually agreed upon to be
6 non-negligent, do not necessarily render the limit on liability reasonable. A limit on liability for
7 personal injury may be reasonable, for example, in situations in which the consumer is well
8 positioned to prevent the loss or in which the activity is broadly known to involve significant
9 physical risks. But even then the waiver may not apply if the business failed to take cost-effective
10 measures to reduce the risk.

11 **Illustrations:**

12 1. A consumer purchases fitness equipment for her household use. The contract
13 contains standard terms that release the seller from liability for all risk of personal injury
14 arising from the use of the equipment, including injuries arising from defects in the
15 equipment that would otherwise constitute breach of warranty. This limitation of
16 consequential damages is substantively unconscionable. See also UCC § 2-719(3), which
17 states that this limitation is prima facie substantively unconscionable.

18 2. A consumer enters an agreement with a fitness club that uses the same equipment
19 as in Illustration 1. The agreement contains standard contract terms releasing the club from
20 liability for all risks of personal injury, including injuries arising from defective or poorly
21 maintained equipment. While this service contract does not come under UCC § 2-719(3),
22 the same principle of unconscionability applies under this Restatement. The release from
23 liability is substantively unconscionable if, in the absence of such standard contract terms,
24 the business would be liable.

25 3. A consumer purchases a lift ticket at a ski resort. The ticket recites standard
26 contract terms that disclaim the resort's liability for personal injuries to the consumer while
27 the consumer is using the skiing facilities. The disclaimer is not substantively
28 unconscionable because skiing is an activity broadly known to involve significant risk of
29 death or personal injury and the disclaimer is thus not unreasonable. Nevertheless, the
30 application of the disclaimer to risks caused not by an inherent risk of skiing but directly
31 by the resort's negligence—such as negligently allowing fallen logs to remain on the ski

1 runs, or failing to prevent malfunctions of the ski lifts—is substantively unconscionable
2 under subsection (c)(1)(B).

3 (b). *Unreasonable expansion of the consumer’s liability, the business’s remedies,*
4 *or the business’s enforcement powers.* Subsection (c)(2) establishes that consumers’ liability for
5 breach may not unreasonably exceed the liability that would otherwise apply, and that consumers
6 may not be subject to enforcement measures that unreasonably expand the enforcement measures
7 that would otherwise apply. What is reasonable depends on the lost profit incurred by the business,
8 the difficulty of obtaining redress, and the value of the unpaid-for benefits the consumer enjoyed
9 before breach. Under longstanding case law and statutes in many jurisdictions, excessive
10 liquidated damages and early-termination fees are not enforceable, even if they do not rise to the
11 level of substantive unconscionability. (See Restatement of the Law Second, Contracts § 356; UCC
12 § 2-718(1).) Other instances in which expansion of a business’s remedies and enforcement tactics
13 may be substantively unconscionable include, but are not limited to, cross-collateral clauses,
14 waiver-of-defense clauses, and debt-collection clauses. They are unconscionable under consumer-
15 contract law even if, at the same time, they may also be prohibited under other legal rules. A
16 finding of substantive unconscionability can be avoided by showing that the remedial provision is
17 reasonable, for example, when the consumer received some front-end value in exchange for the
18 expanded remedies.

19 **Illustrations:**

20 4. A cellphone-service provider enters into a two-year contract with a consumer.
21 The consumer does *not* receive any meaningful, up-front benefit, like a subsidized device
22 or a lower-than-market rate for the service. The contract stipulates that a consumer who
23 exits the relationship before the end of the two-year commitment period must pay a fee of
24 \$250, regardless of the timing of exit. The termination fee satisfies the substantive-
25 unconscionability test. It may also be an unenforceable penalty for breach (see Restatement
26 of the Law Second, Contracts § 356). If, however, the consumer receives meaningful, up-
27 front benefits for agreeing to the two-year commitment, the termination fee may not be
28 unreasonable and therefore not substantively unconscionable.

29 5. A car dealership enters into a three-year lease contract with a consumer. The
30 contract stipulates that a consumer who terminates the lease prematurely must pay damages

1 that exceed the sum of the remaining payments under the lease contract. The liquidated-
2 damages clause is substantively unconscionable. See also UCC §§ 2A-504 and 2A-528(1).

3 6. An online news source enters into a three-year subscription with a consumer. The
4 contract stipulates that a consumer who terminates the subscription prematurely must pay
5 damages that exceed the sum of remaining payments under the subscription. The
6 liquidated-damages clause is substantively unconscionable because it unreasonably
7 expands the consumer’s liability that would otherwise apply, above the business’s lost
8 profit.

9 (c). *Unreasonable limit on consumer’s ability to enforce a legal right.* Subsection
10 (c)(3) establishes that it is substantively unconscionable to specify an excessively burdensome
11 redress mechanism and, by doing so, to unreasonably limit consumers’ ability to enforce their legal
12 rights. Such limitations are unconscionable because they undermine the substantive rights
13 consumers acquired under the contract. They are substantively unconscionable for the same reason
14 that limitations on remedies are—that it is the essence of a contract that at least minimum adequate
15 recovery for breach be available (UCC § 2-719, Official Comment 1). A business may try to limit
16 consumers’ reasonable redress through unreasonable choice-of-forum clauses, choice-of-law
17 clauses, or arbitration arrangements that in each case impose unreasonably high costs on
18 consumers; waivers of aggregate-litigation processes in situations in which individual suits are
19 impractical; unreasonably short limitations periods; unjustified denial of statutory damages and
20 attorneys’ fees; and more. While consumers may agree to limit their process rights, the agreed-
21 upon arrangements must enable some reasonably effective pursuit of legally available redress for
22 breach of contract or for violation of legal rights that govern the contractual relationship. A limit
23 on the consumer’s ability to enforce a legal right is not substantively unconscionable if it is not too
24 severe or if it serves to screen meritless claims, or when the consumer received some value in
25 return for it.

26 Subsection (c)(3) states a principle of consumer-contract law and does not express a
27 preference for a particular mode of dispute resolution, such as litigation, arbitration, or mediation.
28 The requirement that a consumer’s right to seek redress not be unreasonably hindered may be
29 further strengthened or weakened by other laws and regulations governing the choice of law and
30 forum. For example, it may be bolstered by the doctrine of “effective vindication” in arbitration

1 law, or by laws that prohibit pre-dispute arbitration agreements in specific sectors. And,
2 conversely, the requirement in subsection (c)(3) may be weakened by federal law's preference for
3 some forms of dispute resolution, even if those erode the right to seek redress. In stating a principle
4 of consumer-contract law, subsection (c)(3) does not address the possible interaction of such a
5 contract-law principle with federal law, and specifically, it does not address its possible preemption
6 under the Federal Arbitration Act.

7 **Illustrations:**

8 7. A business's standard contract terms include a dispute-resolution term specifying
9 a forum in a distant location, such that the consumer would have to bear travel and
10 accommodation expenses exceeding the value of the remedy sought. The dispute-
11 resolution forum requires a nonrefundable filing fee exceeding the value of the remedy
12 sought. Either one of these two features unreasonably limits the consumer's ability to
13 enforce legal rights and renders the dispute-resolution clause substantively unconscionable.
14 That result applies to any type of dispute-resolution forum that imposes such an
15 unreasonable cost or personal burden, be it a public court or a private arbitration tribunal.

16 8. A business's standard contract terms include a class-action waiver. A common
17 grievance for consumers entering this contract involves low damages, no more than a few
18 dollars each. A court may determine that the class-action waiver is substantively
19 unconscionable if the waiver unreasonably limits consumers' ability to enforce low-stakes
20 legal rights. This result applies regardless of the type of dispute-resolution forum specified
21 in the contract, be it a public (small-claims) court or a private arbitration tribunal.

22 9. A business's standard contract terms require that all claims against the business
23 be made within three months after the conclusion of the transaction. The clause is
24 substantively unconscionable to the extent that it covers claims arising from latent defects.
25 (Compare UCC § 2-725(1).)

26 (d). *Limits on consumers' ability to pursue or express a complaint.* In the same
27 spirit, it is substantively unconscionable for the business to unreasonably limit the consumer's
28 ability to express or pursue a complaint, or to restrict the ability of the consumer to engage in
29 review, assessment, or analysis of the business's performance. (Compare the Consumer Review
30 Fairness Act of 2016, 15 U.S.C. § 45b.)

1 Illustration:

2 10. A business includes in its standard-form contract a clause that charges a high
3 monetary penalty every time a consumer posts a negative review of the business online or
4 obligates the consumer to indemnify the business for any loss caused by the negative
5 review. This “anti-disparagement” clause is substantively unconscionable, because it
6 unreasonably limits the consumer’s ability to pursue or express a complaint about the
7 product.

8 5. *Substantive unconscionability versus statutory standards.* The substantive-
9 unconscionability standard may capture contract terms that are considered “unfair acts or
10 practices” under the Federal Trade Commission (FTC) Act and state Unfair and Deceptive Acts
11 and Practices (UDAP) statutes. The extensive jurisprudence identifying such unfair acts and
12 practices ought to continue to guide courts in evaluating unfair standard contract terms under the
13 unconscionability doctrine. In addition, the Dodd–Frank Wall Street Reform and Consumer
14 Protection Act prohibits “abusive acts or practices” (12 U.S.C. §§ 5531, 5536(a)). Practices
15 defined by regulatory and enforcement agencies as unfair or abusive may also be substantively
16 unconscionable when authorized in the standard contract terms. However, a finding of substantive
17 unconscionability requires a degree of fundamental unfairness (or abusiveness) that may be higher
18 than the level of unfairness (or abusiveness) that supports some claims under those consumer-
19 protection statutes. Compliance with statutory standards would ordinarily support a finding that a
20 term is not substantively unconscionable, but in proper circumstances would not bar a finding of
21 substantive unconscionability.

22 Illustrations:

23 11. A retail installment-sales contract includes a grant of a nonpossessory security
24 interest in household goods of the consumer other than those acquired in the transaction (a
25 “cross-collateral” clause). The term is unfair under the FTC Credit Practices Rule, 16
26 C.F.R. § 444.2. It is also substantively unconscionable.

27 12. A sales contract contains a waiver-of-defenses clause, under which the
28 consumer promises not to assert against any assignee of the contract any defense the
29 consumer might have against the seller. The term is unfair under § 5 of the FTC Act and

1 the FTC Preservation of Consumers' Claims and Defenses Rule, 16 C.F.R. § 433. It is also
2 substantively unconscionable. (Compare UCC § 9-403(d).)

3 13. A dance studio solicits a client to commit to a large number of dance classes,
4 more than the client can use, and at a price that does not reflect a significant bulk discount.
5 The arrangement is unfair under state UDAP case law. It is also substantively
6 unconscionable.

7 *6. Procedural unconscionability.*

8 (a). *Identifying procedural unconscionability; sliding scale.* The procedural prong
9 of the unconscionability doctrine refers to some defects in the bargaining *process*, like a surprising
10 and unexpected term, or lack of meaningful choice. A finding of procedural unconscionability
11 based solely on the fact that a term was presented in standard, non-negotiable form, without more,
12 constitutes the lowest quantum of procedural unconscionability and would have to be matched
13 with a high degree of substantive unconscionability to render the contract or term unenforceable.

14 (b). *Consumer awareness; market context.* The procedural-unconscionability test
15 may look to consumer awareness of the term in a market context. The question would be whether
16 ordinary consumers would be aware of the term or would expect its inclusion, and thus would be
17 more likely to take it into account when making contracting decisions. When consumers expect or
18 are aware of a term, the term can (but does not always) affect their contracting decisions. In those
19 situations, the reasons for intervention in the substance of the deal are diminished. One question,
20 then, in applying the procedural unconscionability test, is whether a term is likely to affect the
21 contracting decisions of a large enough number of consumers. (If the market is segmented, the
22 question is whether a term is likely to affect the contracting decisions of a large enough number of
23 consumers in the relevant segment.)

24 A term that affects the contracting decisions of a substantial number of consumers is more
25 likely to be subject to forces of market competition, even if it is not negotiated and even if it
26 appears in the contracts of all businesses in the relevant market. Such a term may be policed by
27 market forces, and so policing by courts—through the unconscionability doctrine—may be less
28 necessary and may lead to undesirable results, including a reduction in consumer choice. On the
29 other hand, when drafting terms that do not affect consumers' contracting decisions, the business
30 is not subject to market discipline, and so the unconscionability doctrine is all the more necessary
31 to police such terms.

1 The prevalence, in the relevant market, of similar pro-business terms does not negate a
2 finding of procedural unconscionability. Indeed, if a term does not affect consumers' contracting
3 decisions, all businesses might be tempted to draft a similar term in a one-sided, pro-business
4 fashion.

5 (c). *Market forces and non-core standard contract terms.* Ordinarily, non-core
6 standard contract terms do not affect the contracting decisions of a substantial number of
7 consumers. This observation applies most forcefully when the standard contract term is part of a
8 long list of fine-print terms. Non-core standard contract terms do not affect the contracting
9 decisions of consumers even if they are presented in larger font or positioned in a prominent place
10 in the form contract, because it is exceedingly common for consumers to be unaware even of such
11 bolstered disclosure. In contrast, when the standard contract term is part of the core-deal terms,
12 e.g., a bottom-line price or delivery fee, it ordinarily affects the contracting decisions of consumers.
13 Moreover, some non-core standard contract terms may affect the contracting decisions.

14 In determining whether a standard contract term affects the contracting decisions of a
15 substantial number of consumers, courts ought to look at factors like consumers' limited
16 sophistication, the business's use of incomprehensible language in the standard contract terms, the
17 business's use of high-pressure sales tactics, and the existence of external circumstances (not
18 created by the business) that compelled consumers to execute the contract. In addition, in situations
19 of extreme inequality in bargaining power between the business and the consumer, when
20 consumers are compelled to transact with the business regardless of the standard contract term, the
21 term is unlikely to affect the contracting decisions of many consumers. Of course, a business may
22 demonstrate that a term does affect consumers' contracting decisions with appropriate evidentiary
23 support, for example by survey evidence (as commonly used in litigation involving aspects of
24 unfair competition), or by any other indicia suggesting that the affected term was noticeably
25 communicated in the course of the precontractual representations.

26 **Illustrations:**

27 14. A fitness center advertises two membership plans: Plan 1 charges a lower
28 membership fee but requires a two-year commitment and imposes an early-termination fee.
29 Plan 2, titled "No Contract," charges a higher membership fee, but allows consumers to
30 terminate with no penalty anytime. The zero-termination-fee feature is made explicit in the
31 marketing of the "No Contract" plan. By virtue of the explicit advertising, the possibility

1 and cost of early termination become known to consumers. Consumers can reasonably
2 weigh the value of the choice. Accordingly, the termination penalty in Plan 1 is not
3 procedurally unconscionable.

4 15. A sales contract includes a nonpossessory security-interest clause, like the
5 substantively unconscionable one presented in Illustration 11. The clause is part of a long
6 “boilerplate” form, presented to the consumer during the closing of the transaction, which
7 the consumer must sign to complete the transaction. In circumstances in which consumers
8 have limited financial sophistication, the clause is procedurally unconscionable.

9 *7. Procedural unconscionability—related concepts.*

10 (a). *Subjective knowledge.* Subjective knowledge of an individual consumer does
11 not preclude a finding of procedural unconscionability, if the finding of procedural
12 unconscionability is based on the objective test of consumer awareness. Subjective knowledge
13 does not cure the market failure caused when a term does not affect the contracting decisions of a
14 substantial number of consumers.

15 (b). *Disclosure.* The procedural-unconscionability inquiry should be distinguished
16 from a conspicuousness test. It is not enough that the harsh terms were disclosed in larger typeface
17 or that a ritual of a separate affirmation of assent to the harsh terms was mechanically followed.
18 While such enhanced presentation may satisfy other rules mandating disclosure (e.g.,
19 Magnuson–Moss Warranty Act, 15 U.S.C. § 2301) and may be a factor in determining whether
20 there was a “surprising and unexpected term,” it does not establish a safe harbor against a finding
21 of procedural unconscionability. Because of the length, complexity, and accumulation of standard-
22 form contracts, an enhanced-format disclosure of a term does not guarantee that consumers will
23 not be surprised and thus does not guarantee meaningful choice. The harsh effect of the standard
24 terms can continue to be hidden even in full daylight, given that consumers rarely read those terms
25 and, even if they do, often may not understand or appreciate their effect at the time of contracting.
26 In particular, the display of standard contract terms in ALL CAPS or other enhanced typeface does
27 not, in and of itself, avoid procedural unconscionability. The Uniform Commercial Code provides
28 guidance in this area. While a disclaimer may be conspicuous under UCC § 2-316(2) by virtue of
29 the typeface used to display it (UCC § 1-201(b)(10)), it may still be ineffective under the UCC and
30 procedurally unconscionable. While the UCC stipulates that a conspicuous disclaimer of
31 warranties is effective, it also explains that the underlying purpose is to “protect the buyer from

1 surprise,” namely to deny enforcement to “unexpected and unbargained language” (UCC § 2-
2 316(2) and Official Comment 1). As long as the disclosure is not effective in protecting the
3 consumer from surprise and the disclosed term is not likely to affect the contracting decisions of a
4 substantial number of consumers entering such a transaction, it does not preclude a finding of
5 procedural unconscionability.

6 **Illustration:**

7 16. Goods purchased by a consumer are found to be totally worthless. The standard
8 terms include a disclaimer of the implied warranty of merchantability in large font and in
9 a manner that satisfies the requirements of UCC § 2-316 and of the Magnuson–Moss
10 Warranty Act. If a court finds that the disclaimer is substantively unconscionable, the court
11 may also find that the disclaimer was procedurally unconscionable on grounds that it was
12 “surprising and unexpected” and refuse to enforce it, even if the disclaimer was printed in
13 conspicuous font.

14 8. *Unconscionable price.* The substantive unconscionability test can be applied to
15 scrutinize the contract price, but this should be done with extra care. An excessively high price,
16 substantially in excess of the price at which similar products are obtainable in similar consumer
17 transactions by like consumers, or bearing no reasonable relationship to the cost of providing the
18 good or service, may be found to be substantively unconscionable. The procedural-
19 unconscionability test may be more difficult to satisfy because the price is usually the most
20 prominent element of a transaction and a critical factor in the consumer’s contracting decision (see
21 Comment 6). Still, an egregiously high price may be held unconscionable by courts if it occurs in
22 connection with unfair surprise or the absence of meaningful choice. A price term itself may
23 surprise consumers, for example when a product is sold via a complex pricing scheme. A consumer
24 may be unfairly surprised when the price is multidimensional and certain price dimensions do not
25 affect the contracting decisions. A consumer may also be unfairly surprised when the price is
26 contingent or deferred and the consumer underestimates the likelihood of triggering the relevant
27 price or the importance of certain deferred price dimensions (e.g., a long-term interest rate that
28 replaces a low teaser rate after a long introductory period, or the long-term, overall price of a
29 repeatedly rolled-over short-term loan), and thus underestimates the true cost of the contract. An
30 egregiously high price may also result from absence of meaningful choice when there are market

1 imperfections that make it less likely that the price was set by a freely competitive market to reflect
2 the cost or the fair value of the product. And it may arise in situations in which the consumer's
3 levels of literacy and numeracy or urgency of needs impede the exercise of the sophisticated,
4 prudent judgment needed to evaluate the price. In those circumstances, a court might find that the
5 price term is procedurally unconscionable. When the price, or some element of the price, is hidden
6 from consumers, it may also be policed under § 6 (Deception).

7 **Illustrations:**

8 17. A consumer contracts for a two-year home-security plan, when a one-year plan
9 with much lower monthly payments is available to the consumer from the same business.
10 The business does not advise the consumer of the availability of the one-year plan. It is
11 substantively unconscionable to contract for the two-year plan, which provides no benefit
12 to the consumer relative to the cheaper one-year plan. It is procedurally unconscionable to
13 withhold information about the clearly superior (from the consumer's perspective) one-
14 year plan.

15 18. A business promises to help a consumer obtain a \$14,000 unclaimed surplus
16 from a real-estate foreclosure sale in exchange for half the surplus, i.e., for a \$7,000 fee. In
17 the circumstances, the consumer is aware that the surplus is obtainable, but does not know
18 that it could be easily obtained by visiting the court's help desk (which is easy to find and
19 use), without paying any fee. The \$7,000 fee is substantively unconscionable. The
20 procedural-unconscionability test is also satisfied, because the availability of the court's
21 help desk was withheld from the consumer and a typical consumer dealing with such a
22 business and accepting such advice would not have known that the surplus could be
23 obtained easily and without cost at the court's help desk. The outcome would be different
24 if the business had to expend substantial resources in identifying consumers with such
25 unclaimed surpluses—consumers who, without this contract, would have received nothing.

26 19. A set of cookware is sold, by home solicitation, for \$375 in an area where a set
27 of comparable quality is readily available for \$125 or less. The high price satisfies the
28 substantive-unconscionability test. The procedural-unconscionability test is satisfied if the
29 high-pressure, door-to-door sales method prevented the consumer from obtaining
30 information on the prevailing market price.

1 20. A consumer borrows \$5,000 under a three-year unsecured loan contract
2 carrying an interest rate of 135%. The interest rate is substantively unconscionable if, under
3 the facts of the case, it is excessive relative to the cost of credit the consumer can obtain on
4 a comparable loan elsewhere, or relative to the expected cost for the business of supplying
5 the credit, taking into account the risk of default. The procedural-unconscionability test is
6 satisfied if the interest-rate term was obscured at the time of entering the contract, or if the
7 consumer was under pressure to enter the contract.

8 9. *Noncommercial activity.* The rule of this Section does not draw a distinction between
9 commercial and noncommercial activity. Some courts, for example, have held that the rule of
10 subsection (c)(1) does not apply when the business that supplies the standard contract terms is
11 operating not for profit, or applies those terms only to its noncommercial activity. The black letter
12 rejects this approach. However, the noncommercial nature of the transaction or the presence of a
13 not-for-profit participant may be taken into account by a court in determining whether a contract
14 or a term satisfies the definition of “unconscionable.”

15 10. *Effects of unconscionability.* Under subsection (a), an unconscionable contract or term
16 is unenforceable to the extent stated in § 9. In particular, § 9 restates the power of a court to choose
17 between not enforcing the unconscionable term or contract in its entirety or merely limiting the
18 application of any unconscionable clause so as to avoid any unconscionable result.

19 11. *Illegality.* The doctrine of unconscionability is related to but distinct from the doctrine
20 of illegality or unenforceability on grounds of public policy. A contract or a term is unenforceable
21 if its performance is inconsistent with statutory or regulatory law or with public policy. See
22 Restatement of the Law Second, Contracts § 178. The legal implications of unenforceability are
23 restated in § 9 of this Restatement.

24 **Illustration:**

25 21. Same facts as in Illustration 10. The “anti-disparagement” clause, in addition to
26 being substantively unconscionable, may also be unenforceable under the doctrine of
27 illegality or on grounds of public policy.

28 12. *Shield versus sword.* An unconscionability claim can be used as a defense (“shield”).
29 For example, if a business sues to collect money charged to, but unpaid by, the consumer, the

1 consumer can defend by showing that the charge is unconscionable. The same unconscionability
2 claim can be made by the consumer as a plaintiff, if, for example, an unconscionable charge was
3 already collected by the business, and the consumer is suing to recover it. In that procedural
4 posture, it is sometimes said that the unconscionability claim is used as a “sword.” That description
5 is misleading. The unconscionability claim is used to challenge the business’s exercise of an
6 alleged contractual right, as in the traditional “shield” cases. A true “sword” application would
7 arise if the consumer has a cause of action for the mere inclusion of an unconscionable term in the
8 contract. Some state consumer-protection laws create an unconscionability-based affirmative right
9 of action and allow consumers to sue for statutory damages. Such statutory claims fall outside the
10 scope of this Restatement.

11 *13. Relation to the Uniform Commercial Code and to the Restatement of the Law Second,*
12 *Contracts.* The rules restated herein are consistent with Restatement of the Law Second, Contracts
13 § 208 and UCC § 2-302, as applied by courts. The unconscionability doctrine has long been
14 understood as being comprised of a procedural prong and a substantive prong. Even in sales-of-
15 goods transactions, warranty disclaimers and limitations of remedies are tested not only against
16 the specific rules of UCC §§ 2-316(2) and 2-719(3), but also against the general overarching
17 unconscionability norm of UCC § 2-302. Such scrutiny may add additional circumstances under
18 which provisions may be found unconscionable, beyond those stipulated in the specific rules.

REPORTERS’ NOTES

19 For decades, courts have sought to lay a dual foundation for the unconscionability
20 doctrine—substantive and procedural. (The dual test was initially proposed in Arthur Leff,
21 *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967).)
22 While the motivation for the unconscionability doctrine is grounded in the substantive flaw—the
23 extreme unfairness of a term—courts have also recognized that parties should be free to agree to
24 one-sided deals, as long as the process of agreement leads to a meaningful quid pro quo. When the
25 agreement process is proper, courts ordinarily do not second-guess the substance of the contract.
26 “People are free to opt for bargain-basement adjudication—or, for that matter, bargain-basement
27 tax-preparation services; air carriers that pack passengers like sardines but charge less; and black-
28 and-white television. In competition, prices adjust and both sides gain. ‘Nothing but the best’ may
29 be the motto of a particular consumer but is not something the legal system foists on all
30 consumers.” *Carbajal v. H & R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004)
31 (Easterbrook, J.).

32 Notwithstanding the dual-prong test that pervades American contract law, the doctrine of
33 unconscionability has permitted courts to put greater emphasis on the substantive prong. (Other

1 doctrines, like duress and misrepresentation, put greater emphasis on the procedural flaw and allow
2 courts to vacate agreements even if they are substantively within reason). The main technique
3 through which the emphasis on the substantive element is achieved is the “sliding scale” approach.
4 When the degree of substantive unconscionability is greater, a lesser degree of procedural
5 unconscionability is required. See, e.g., 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS
6 § 4.28, at 585 (3d ed. 2004); *Sitogum Holdings, Inc. v. Ropes*, 800 A.2d 915 (N.J. Super. Ct. Ch.
7 Div. 2002) (collecting cases); Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—*
8 *The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 12-13 (2012) (collecting
9 cases). In appropriate circumstances, a high degree of substantive unconscionability is sufficient
10 to find that a contract term, not within the core terms of which the consumer was aware at the time
11 of contracting, is unconscionable. See *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y.
12 App. Div. 1998) (“While it is true that, under New York law, unconscionability is generally
13 predicated on the presence of both the procedural and substantive elements, the substantive
14 element alone may be sufficient to render the terms of the provision at issue unenforceable.”). Put
15 differently, presenting standard contract terms in a long “boilerplate” may be sufficient to satisfy
16 the procedural unconscionability prong, when a strong showing of substantive unconscionability
17 is made.

18 *Substantive unconscionability.* The approach taken in this Section encourages the
19 continued development of the substantive-unconscionability doctrine in the common-law method,
20 case by case. Rather than enumerate a comprehensive list of “gray” or “black” terms, the common-
21 law method relies on a general standard and delegates to courts the discretion to apply it in
22 individual cases. The substantive standard applied by courts prohibits terms that are so one-sided
23 as to lead to intolerable results.

24 One principle that underlies the substantive test applies to the contract as a whole. It asks
25 whether the inclusion of a term has the potential to remove a primary benefit of the transaction—
26 a benefit that motivated the consumer to enter into the contract in the first place. (Compare
27 UNIFORM CONSUMER SALES PRACTICES ACT § 4(c)(3) (UNIF. LAW COMM’N 1970): “In
28 determining whether an act or practice is unconscionable, the court shall consider circumstances
29 such as the following of which the supplier knew or had reason to know: . . . that when the
30 consumer transaction was entered into the consumer was unable to receive a substantial benefit
31 from the subject of the transaction.”) A similar test asks whether the consumer would have
32 refrained from entering the entire transaction were it known to the consumer that the term was
33 included in the bargain. (Compare Restatement of the Law Second, Contracts § 211(3) (AM. LAW
34 INST. 1981).)

35 In addition, the substantive test applies to individual terms even if they do not have the
36 potential to remove a main benefit of the transaction, but only to remove important rights that are
37 attached to the transaction. Here, this Section lists several types of harsh terms, which have been
38 regarded as unconscionable by courts and statutes. The use of specific categories of substantive
39 unconscionability in subsection (c) provides the benefit of greater certainty for businesses at the
40 front end, and for consumers at the back end. It is also consistent with much of the law of

1 unconscionability. State UDAP statutes often include lists of terms that are presumed to be
2 unconscionable acts and practices. See, e.g., OHIO REV. CODE § 1345.031; MICH. COMP. LAWS
3 § 445.903.

4 The first category listed as substantively unconscionable in subsection (c) is terms that
5 unreasonably exclude the business's liability or limit the consumer's remedies for death or
6 personal injury. This rule extends the presumption of unconscionability in UCC § 2-719(3) (AM.
7 LAW INST. & UNIF. LAW COMM'N) beyond the sale-of-goods context. Not all limits of liability for
8 personal injury are unreasonable. See, e.g., *Larsen v. Pacesetter Sys., Inc.*, 837 P.2d 1273 (Haw.
9 1992) (holding that "[l]imitation of consequential damages for injury to the person in the case of
10 consumer goods is prima facie unconscionable," but stating that the presumption is rebuttable by
11 the business); *Horn v. Boston Sci. Neuromodulation Corp.*, 2011 WL 3893812 (S.D. Ga. Aug. 26,
12 2011) (stating that "defendant's attempt to limit damages for breach of its express warranty to
13 replacement of the product is prima facie unconscionable" and that they failed to rebut this
14 presumption). Specifically, when the risk is known to the consumer and the consumer understands
15 and accepts the contractual allocation of that risk, and the shifting of the risk does not lead to the
16 delivery of unreasonably dangerous goods or services by the business, the limit on liability is not
17 unreasonable. Additionally, under subsection (c)(1)(B), terms excluding the business's liability or
18 limiting the consumer's remedies for losses caused through an intentional or negligent act or
19 omission of the business are also substantively unconscionable.

20 The second category of terms listed as substantively unconscionable covers attempts to
21 unreasonably expand the business's remedies or enforcement powers. Those include, for example:

22 (1) Unreasonably high liquidated damages for consumer breach. Compare RESTATEMENT OF
23 THE LAW SECOND, CONTRACTS § 356 (AM. LAW INST. 1981); UCC § 2-718 (AM. LAW INST. &
24 UNIF. LAW COMM'N). See also *In re Cellphone Termination Fee Cases*, 122 Cal. Rptr. 3d 726 (Cal.
25 Ct. App. 2011) (stating that "because liquidated damage clauses in consumer contracts are
26 presumed void, the burden is on the proponent of the clause to rebut that presumption"); *Mitchell*
27 *v. Ford Motor Credit Co.*, 702 F. Supp. 2d 1356, 1368 (M.D. Fla. 2010); *Fritz v. Nationwide Mut.*
28 *Ins. Co.*, 1990 WL 186448 (Del. Ch. Nov. 26, 1990) (including "the inclusion of penalty clauses"
29 in a multifactor test of unconscionability).

30 (2) Cross-collateralization clauses. Compare 16 C.F.R. § 444.2 (Unfair Credit Practices);
31 *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

32 (3) Terms attempting to disclaim legal defenses that a consumer can assert against an
33 assignee of the debt. Compare 16 C.F.R. § 433.2 (Preservation of Consumers' Claims and
34 Defenses); UCC §§ 9-403(d), 9-404(d) (AM. LAW INST. & UNIF. LAW COMM'N); *Unico v. Owen*,
35 232 A.2d 405 (N.J. 1967); *Holt v. First Nat'l Bank of Minneapolis*, 214 N.W.2d 698 (Minn. 1973).

36 The third category of terms that are listed as substantively unconscionable addresses terms
37 that unreasonably limit consumer redress. This Section does not take a position on the question
38 whether arbitration agreements or class-action waivers are unconscionable under the rules of
39 consumer-contract law. Rather, it restates the contract-law principle that courts have regularly
40 utilized to evaluate a broader set of limitations. Since a contract is the right to receive performance

1 from the other party or, failing that, remedies in its place, limitations on the power to seek remedies
2 that render this option impractical undermine the basis of the contract, including the value of the
3 right to seek performance. The test stated in subsection (c)(3) examines whether contract
4 provisions “[u]nreasonably limit the consumer’s ability to pursue or express a complaint or seek
5 reasonable redress for a violation of a legal right.” See, e.g., *Brower v. Gateway 2000*, 676
6 N.Y.S.2d 569 (N.Y. App. Div. 1998). Most federal and state courts consider limitations on the
7 consumer’s ability to seek redress as an important factor when deciding whether to enforce a
8 contract or clause. State courts that have considered the issue include: California, see, e.g.,
9 *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005) (considering the role of a class action,
10 which can sometimes be a singular means of redress); Florida, see, e.g., *S.D.S. Autos, Inc. v.*
11 *Chrzanowski*, 976 So. 2d 600 (Fla. Dist. Ct. App. 2007) (determining that as a matter of public
12 policy, a private enforcement scheme could not effectively deter violations of a statute if
13 consumers were prevented from seeking relief as a class); Massachusetts, see, e.g., *Feeney v. Dell*
14 *Inc.*, 908 N.E.2d 753 (Mass. 2009) (valuing the right to a class action in a consumer-protection
15 case because, often, aggregation of small claims is likely the only realistic option for pursuing a
16 claim); Missouri, see, e.g., *Ruhl v. Lee’s Summit Honda*, 322 S.W.3d 136 (Mo. 2010) (determining
17 that simply severing an unconscionable class waiver was an insufficient remedy and that the
18 appropriate remedy in that case was to invalidate the entire arbitration agreement as
19 unconscionable); New Mexico, see, e.g., *Fiser v. Dell Computer Corp.*, 188 P.3d 1215 (N.M. 2008)
20 (noting that in view of the fact that the consumer’s alleged damages were just 10 to 20 dollars, by
21 attempting to prevent him from seeking class relief, the corporation had essentially foreclosed the
22 possibility that the consumer could obtain any relief); Ohio, see, e.g., *Schwartz v. Alltel Corp.*,
23 No. 86810, 2006 WL 2243649 (Ohio Ct. App. June 29, 2006) (holding that the limitation of
24 consumer rights found within the arbitration provision establishes a quantum of substantive
25 unconscionability); Tennessee, see, e.g., *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351 (Tenn.
26 Ct. App. 2001) (the ability to seek redress is an important factor, but class-action waivers do not
27 interfere with the ability to seek redress); Washington, see, e.g., *Scott v. Cingular Wireless*, 161
28 P.3d 1000 (Wash. 2007) (ruling that a class-action-waiver clause was an unconscionable violation
29 of Washington’s policy to protect the public and foster fair and honest competition because it
30 drastically forestalled attempts to vindicate consumer rights); West Virginia, see, e.g., *State ex rel.*
31 *Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002) (finding that the provisions in the purchase-and-
32 financing-agreement document that severely limited the buyer’s rights and remedies were
33 unconscionable). The federal courts that have considered the issue are: First Circuit, see, e.g.,
34 *Kristian v. Comcast*, 446 F.3d 25 (1st Cir. 2006) (severing certain provisions of the arbitration
35 clause because they prevented the vindication of statutory rights); Second Circuit, see, e.g., *In re*
36 *Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385 (S.D.N.Y. 2003) (determining that
37 cardholders did not sufficiently demonstrate the likelihood that they would incur large arbitration
38 costs that would effectively preclude them from vindicating their federal statutory rights in
39 arbitration in order to make the agreements unconscionable); Third Circuit, see, e.g., *Homa v. Am.*
40 *Express Co.*, 558 F.3d 225 (3d Cir. 2009) (holding that because claims were of too little value to

1 pursue individually, class-action waiver was unconscionable); Fourth Circuit, see, e.g., Snowden
2 v. Checkpoint Check Cashing, 290 F.3d 631 (4th Cir. 2002) (the Fourth Circuit may be setting a
3 higher bar for limitations on redress that justify nonenforcement; in this case, the court enforced
4 the contract because the attorney's fees were recoverable); Fifth Circuit, see, e.g., Iberia Credit
5 Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159 (5th Cir. 2004) (the Fifth Circuit recognizes
6 the importance of accountability, but considers the Attorney General's enforcement powers as a
7 substitute for the consumer's ability to sue); Seventh Circuit, see, e.g., Livingston v. Assocs. Fin.,
8 Inc., 339 F.3d 553 (7th Cir. 2003) (determining that borrowers had not met their burden of proving
9 that arbitration costs were prohibitively high); Eighth Circuit, see, e.g., Pleasants v. Am. Express
10 Co., 541 F.3d 853 (8th Cir. 2008) (denying an unconscionability claim because the provisions did
11 not limit the consumer's remedies); Ninth Circuit, see, e.g., Chalk v. T-Mobile USA, Inc., 560
12 F.3d 1087 (9th Cir. 2009) (finding an arbitration clause substantively unconscionable and
13 unenforceable based on the unilateral nature of the waiver and the disincentive to litigate that was
14 created); Eleventh Circuit, see, e.g., Jones v. DirecTV, Inc., 381 F. App'x 895 (11th Cir. 2010)
15 (holding that the arbitration agreement with the providers was unconscionable because the costs
16 of arbitration would significantly deter the subscriber from pursuing her complaint against the
17 provider). A few courts, while not expressly denying the importance of the ability to seek redress,
18 have enforced contracts or clauses that limit the ability to seek redress; for example, the Seventh
19 Circuit in Carbajal v. H & R Block Tax Servs., Inc., 372 F.3d 903 (7th Cir. 2004) (consumer can
20 waive statutory rights in exchange for lower prices); and the Delaware Superior Court in Edelist
21 v. MBNA Am. Bank, 790 A.2d 1249 (Del. Super. Ct. 2001) (no discussion of impact on redress
22 when surrender of class action was clearly articulated).

23 This principle—that unreasonable limitations on the ability to seek redress undermine the
24 basis of the contract—applies equally to litigation and arbitration, to individual and aggregate
25 forms of dispute resolution, and to provisions that impose costs in the form of filing fees,
26 procedural inconvenience, or unreasonable limitations periods. The focus is on the costs and
27 burdens of the dispute-resolution process, not on its tribunal classification.

28 Contractual clauses that simplify or reduce costs of dispute resolution, or promote informal
29 procedures, are not substantively unconscionable under this test, whereas clauses that complicate
30 or increase costs of dispute resolution, or promote biased procedures, may be. It is possible that
31 the application of the cost criterion would have a differential impact on private arbitration versus
32 public litigation. Arbitration clauses could satisfy this criterion more easily (when the cost of
33 arbitration is lower, due to its informality); or they could satisfy it less easily (when the cost of
34 arbitration is higher, due to fees and procedures that restrict access).

35 This criterion does not have a definitive implication as to the enforceability of class-action
36 waivers under consumer-contract law. While class aggregation is a method to reduce the costs and
37 burdens of dispute resolution, individual procedures are, in many cases, a reasonable form of
38 dispute resolution. However, contractual clauses that select individual forms of dispute resolution
39 for the purpose of imposing unreasonably high costs on a consumer seeking to enforce a legal right
40 are substantively unconscionable. See, e.g., Scott v. Cingular Wireless, 161 P.3d 1000 (Wash.

1 2007) (finding a class-action waiver unconscionable because it drastically forestalled attempts to
2 vindicate consumer rights and functioned to exculpate the drafter from liability for a broad range
3 of undefined wrongful conduct, including potentially intentional wrongful conduct).

4 The principle restated in subsection (c)(3) is consistent with the general approach taken by
5 contract law toward limitations on redress. For example, the Uniform Commercial Code stipulates
6 that “it is of the very essence of a sales contract that at least minimum adequate remedies be
7 available. If the parties intend to conclude a contract for sale . . . they must accept the legal
8 consequence that there be at least a fair quantum of remedy for breach of the obligations or duties
9 outlined in the contract.” UCC § 2-719, Official Comment 1 (AM. LAW INST. & UNIF. LAW
10 COMM’N). This principle is also consistent with provisions in federal consumer-protection statutes
11 that envision private class actions as a form of redress for low-stakes collective causes of action.
12 (See, e.g., Truth in Lending Act § 130 (15 U.S.C. § 1640); Fair Credit Reporting Act
13 § 707 (15 U.S.C. § 1691e); Fair Debt Collection Practices Act § 813 (15 U.S.C. § 1692k);
14 Electronic Fund Transfer Act § 915 (15 U.S.C. § 1693m); Credit Repair Organizations Act § 409
15 (15 U.S.C. § 1679g). But note that the scope of some of these statutory rights has been curtailed
16 by *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012).) Accordingly, if particular forms of
17 arbitration or other remedial procedures place an unreasonable burden on consumers and
18 undermine the principle of minimum adequate redress, they are substantively unconscionable.

19 Subsection (c)(3) states a principle of consumer-contract law, that unreasonable limits on
20 consumers’ ability to seek redress for breach of contract are substantively unconscionable. In
21 particular, subsection (c)(3) does not address the possible preemption of contract-law claims under
22 the Federal Arbitration Act. See *AT&T Mobility v. Concepcion*, 563 U.S. 321 (2011). In the wake
23 of *Concepcion*, courts have considered the enforceability of arbitration clauses and class-action
24 waivers, and the limits of their power to strike them down under state law in light of the preemption
25 holding of the U.S. Supreme Court. When the procedures of the agreed-upon arbitration clause are
26 more costly or burdensome than reasonable, courts have struck them down as unconscionable,
27 without overstepping the boundaries of state law under the preemption holding. See, e.g., *Lau v.*
28 *Mercedes-Benz USA, LLC*, 2012 WL 370557 (N.D. Cal. Jan. 31, 2012) (holding that the
29 arbitration clause was substantively unconscionable because it imposed unreasonably high costs
30 on the consumer). See also *Penilla v. Westmont Corp.*, 3 Cal. App. 5th 205 (Cal. 2016) (finding
31 that an arbitration clause was substantively unconscionable because it imposed prohibitively
32 expensive arbitration fees and significant limitations on remedies, and distinguishing the case from
33 *Concepcion* by noting that the latter involved class-action waivers, not limitations on arbitral
34 remedies); *Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197 (Wash. 2013) (finding that the
35 arbitration clause at issue was unconscionable and distinguishing it from *Concepcion* by
36 explaining that the arbitration clause “here contained numerous unconscionable provisions based
37 on the specific facts at issue in the current case. *Concepcion* provides no basis for preempting our
38 relevant case law, nor does it require the enforcement of Freedom’s arbitration clause.”); *Brewer*
39 *v. Mo. Title Loans* 364 S.W.3d 486 (Mo. 2012), cert. denied, 133 S. Ct. 191 (2012) (ruling that
40 the FAA did not preempt the defense of unconscionability, and that the class arbitration waiver

1 was in fact unconscionable because the evidence, including the lack of available counsel,
2 demonstrated that there was no practical, viable means of individualized dispute resolution). The
3 gist of those decisions is to require that a term drafted by the business mandating arbitration of a
4 consumer’s complaint not impose unnecessary costs on the consumer, particularly when other,
5 more accessible or less costly arbitration avenues exist.

6 Subsection (c)(3) also covers other restrictions and burdens that businesses may impose on
7 consumers seeking to complain or respond to breach. For example, some businesses try to prevent
8 consumers from posting their complaints publicly through negative reviews, by inserting so-called
9 anti-disparagement clauses in their standard-form contract. Such attempts to limit the consumer’s
10 ability to voice a complaint have been scrutinized by courts and legislatures. See, e.g., *People v.*
11 *Network Associates, Inc.*, 758 N.Y.S.2d 466 (N.Y. Sup. Ct. 2003) (enjoining the LLC from selling
12 software under conditions that prohibited consumers from publishing reviews of the LLC’s
13 products without the LLC’s consent); *Palmer v. Kleargear*, No. 13-cv-00175 (D. Utah 2013)
14 (entering judgment against the defendant for violating the Fair Credit Reporting Act when the
15 internet retailer billed customers following a negative review in accordance with its anti-
16 disparagement clause in the site’s terms and conditions); CAL. CIV. CODE § 1670.8 (making it
17 unlawful for a contract to include a provision “waiving the consumer’s right to make any statement
18 regarding the seller or lessor or its employees or agents, or concerning the goods or services”);
19 Consumer Review Fairness Act of 2016 (Public Law No. 114-258). Such restrictions undermine
20 the reputation mechanism. In consumer markets, in which legal forms of redress are often
21 impractical or delayed, the existence of a robust reputation mechanism is particularly important.
22 Contractual arrangements that purport to weaken it are therefore against public policy and
23 substantively unconscionable.

24 Subsections (c)(1) to (c)(3) enumerate important categories of substantively
25 unconscionable terms, but they do not constitute an exhaustive list of such terms. The concept of
26 substantive unconscionability has been developed in case law to encompass other contractual
27 practices as well. Importantly, substantive unconscionability is closely related to the standard of
28 “unfairness” under FTC law (compare FTC Act, 15 U.S.C. § 45(n)) and UDAP statutes. Seventeen
29 state UDAP statutes prohibit unconscionable practices. See NATIONAL CONSUMER LAW CENTER
30 (NCLC), *UNFAIR AND DECEPTIVE ACTS AND PRACTICES* (8th ed. 2012 & Supp. 2013). See also
31 UNIFORM CONSUMER SALES PRACTICES ACT § 4 (UNIF. LAW COMM’N 1970). For example,
32 charging an unconscionably high price has been found to be unfair under UDAP statutes. See
33 NCLC, *UNFAIR AND DECEPTIVE ACTS AND PRACTICES* 289 n.818 (8th ed. 2012) (collecting cases).
34 In UDAP case law, terms have been found to be substantively unconscionable when, for example,
35 the contract price grossly exceeded the price at which similar goods or services were readily
36 obtainable. See, e.g., *Besta v. Beneficial Loan Co. of Iowa*, 855 F.2d 532 (8th Cir. 1988) (holding
37 that not telling Besta that she could have repaid the same loan with lower monthly payments in
38 one-half the time deprived her of fair notice and amounted to unfair surprise, constituting
39 procedural unconscionability); NCLC, *UNFAIR AND DECEPTIVE ACTS AND PRACTICES* 293 n.866
40 (8th ed. 2012) & Supp. 2013, at 44 (collecting cases). Terms have been found to be unfair also

1 when there was a low likelihood that the consumer would be able to receive the benefit of the
2 bargain. See, e.g., *Bennett v. Bailey*, 597 S.W.2d 532 (Tex. 1980) (soliciting a client of a dance
3 studio to commit to more service than she can potentially use). Terms have also been found to be
4 unconscionable when there was a low likelihood that the consumer could pay the obligation in full
5 and avoid debt collection and the associated losses.

6 Beyond the more traditional “unfairness” criterion under FTC law and UDAP statutes, a
7 new standard of “abusiveness” has been recently introduced by the Dodd–Frank Wall Street
8 Reform and Consumer Protection Act of 2010, Pub L. No. 111-203, 124 Stat. 1376 (2010). The
9 Consumer Financial Protection Bureau (CFPB), which was put in charge of enforcing that standard
10 in the consumer-credit area, sees it as protecting against exploitation of consumers’ imperfect
11 understanding and limited sophistication. CFPB Supervision and Examination Manual v. 2 (Oct.
12 2012). As the new standard is developed by courts and regulatory agencies, it may also inform the
13 continued development of the unconscionability doctrine.

14 Finally, the substantive-unconscionability test can be applied to scrutinize the contract
15 price, but that should be done with extra care. When prices are salient—and they often are the most
16 salient element of the transaction—egregiously high prices ought not to be held unconscionable
17 by courts, unless they are specifically prohibited by statute, or unless special circumstances of the
18 case justify a finding of procedural unconscionability. Prices are not always salient, and nonsalient,
19 egregious prices (as well as salient but underappreciated egregious price dimensions) can be found
20 unconscionable. An example is an excessively high fee for service that is incidental to the main
21 purpose of the transaction (and which, therefore, the consumer may not have appreciated when
22 ordering the service). See, e.g., *Perdue v. Crocker Nat’l Bank*, 702 P.2d 503 (Cal. 1985), which
23 found that the overdraft fee charged by a bank might be substantively unconscionable. (Compare
24 UNIFORM CONSUMER SALES PRACTICES ACT § 4(c)(2) (UNIF. LAW COMM’N 1970), adopted by
25 many UDAP statutes.) A price may also be found procedurally unconscionable when it results
26 from absence of meaningful choice due to market power of the business, pressure tactics during
27 the negotiation and formation of the contract, or urgency. Accordingly, a price term has also been
28 found to be unconscionable when it exceeded, by a substantial margin, market prices for similar
29 goods or services that are readily available. See, e.g., UNIFORM CONSUMER SALES PRACTICES ACT
30 § 4(c)(2) (UNIF. LAW COMM’N 1970). (See also *Fritz v. Nationwide Mut. Ins. Co.*, Civ. A. No.
31 1369, 1990 WL 186448 (Del. Ch. Nov. 26, 1990) (including “a significant cost-price disparity or
32 excessive price” in a multifactor test of unconscionability).) While cases finding a price term to be
33 unconscionable are not common, the basic test—whether the term is overly harsh and whether it
34 results in unfair surprise or from absence of meaningful choice—applies to price terms as it does
35 to any other term in the contract. Such cases commonly involve short-term loan agreements with
36 exceedingly high interest rates and other fees. See, generally, *De La Torre v. CashCall, Inc.*, 422
37 P.3d 1004 (Cal. 2018); *James v. National Financial, LLC*, 132 A.3d 799 (Del. 2016).

38 *Procedural unconscionability.* Since general contract law already provides for process-
39 based invalidation doctrines (like duress, mistake, and misrepresentation), courts have labored to
40 identify the type of procedural flaw that would be sufficient to render substantive

1 unconscionability actionable. While the stated procedural tests often require “absence of
2 meaningful choice” or “undue surprise,” in many cases the procedural flaw is nothing more than
3 the delivery of the terms in a nonnegotiable, standard-term document (sometimes labeled
4 derogatorily “contract of adhesion”). The problem with that solution is that it proves too much.
5 Are all consumer contracts procedurally unconscionable? Does the procedural unconscionability
6 prong establish any meaningful requirement? The absence of a clear criterion for procedural
7 unconscionability has diminished the usefulness of that requirement, and has led courts to set it
8 aside in many cases. Courts have used the “sliding scale” approach to minimize the procedural-
9 unconscionability requirement and emphasize the substantive-unconscionability requirement. See,
10 e.g., Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An*
11 *Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067 (2006) (surveying a large number
12 of cases and finding that courts tend to focus on substantive, rather than procedural,
13 unconscionability).

14 To maintain the dual-test doctrine, but rest it on a more coherent conceptual framework
15 that more closely tracks the doctrine’s normative underpinnings, this Section adopts an approach
16 that is consistent with the notion of *salience*. A term is salient if it is likely to affect the contracting
17 decisions of a substantial number of consumers. Salience is the heart of the procedural test. The
18 great majority of standard terms are *not* salient, and such nonsalience alone—without additional
19 procedural flaws—ought to meet the minimum quantum necessary for the procedural test.
20 Accordingly, if standard terms are *prima facie* nonsalient, courts adjudicating an unconscionability
21 claim can focus their attention on the substantive inquiry. And yet, if the standard form
22 presentation of the term and its nonsalience are the only grounds for procedural unconscionability,
23 a greater quantum of substantive unconscionability would be required.

24 As a normative matter, salience is a suitable underlying test because competition can
25 normally be counted on to police salient terms, but not nonsalient ones. If competition scrutinizes
26 salient terms, courts need not provide additional discipline. Because competition does not police
27 nonsalient terms, the existence of alternative sellers that the consumer could have purchased from
28 should not provide a defense against unconscionability claims *vis-à-vis* nonsalient terms. If the
29 relevant term is nonsalient, that term would not affect consumers’ choice among alternative sellers,
30 and thus competition would not drive sellers to produce terms that respond to demand. As a result,
31 even in a fiercely competitive market, sellers might all offer similarly unfairly one-sided standard-
32 form terms. See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and*
33 *Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

34 Note that a term may affect the purchasing decisions of many consumers and yet be
35 misunderstood by (imperfectly rational) consumers who misinterpret the effect of the term to
36 increase, rather than decrease, their benefit of the bargain. That term would affect the purchasing
37 decisions of many consumers, but in the wrong direction. Courts may find such terms procedurally
38 unconscionable. Such terms may also be policed under § 6 (Deception).

39 Standard terms are not salient, even if they meet technical criteria of disclosure, or even if
40 affirmed by signatures, because it is cognitively impossible to process and comprehend dense

1 quantities of information packaged in standard forms. Most consumers are not capable of carefully
2 reading, and businesses that seek to take advantage of consumers who are unable to fully
3 understand the standard contract terms should not enjoy full immunity simply by “shoving”
4 comprehensive disclosure in front of such consumers. See *Verna Emery v. American General*
5 *Finance, Inc.*, 71 F.3d 1343 (7th Cir. 1995) (determining that the allegation that the plaintiff
6 “belongs to a class of borrowers who are not competent interpreters of such forms and that the
7 defendant knows this and sought to take advantage of it” was sufficient to withstand a motion to
8 dismiss). However, a court may find that other processes of formation and of negotiation, including
9 processes by which sellers disseminate information in the marketplace or processes by which
10 consumers share such information among themselves, render a standard term salient.

11 The concept of salience underlies the metrics regularly used by courts to evaluate the
12 procedural-unconscionability claim. For example, a “lack of meaningful choice” occurs when the
13 terms do not affect consumers’ contracting decisions. Similarly, an “unfair surprise” occurs only
14 when the terms were not salient. Other tests, such as “hidden” or “unduly complex” contract terms,
15 or “uneven bargaining power” are either synonymous with, or direct results of, nonsalience. The
16 salience test is also similar to the test employed by the Uniform Commercial Code to evaluate
17 warranty disclaimers. Under UCC § 2-316(2), the disclaimer must be “conspicuous,” as the Code
18 “seeks to protect a buyer from unexpected and unbargained language of disclaimer” thus
19 “permitting the exclusion of implied warranties only by conspicuous language *or other*
20 *circumstances which protect the buyer from surprise.*” UCC § 2-316, Official Comment 1 (AM.
21 LAW INST. & UNIF. LAW COMM’N) (emphasis added).

22 If courts were to focus on the criterion of salience, rather than on technical elements like
23 disclosure, they would be able to avoid undesirable circumvention of the unconscionability test.
24 When the procedural-unconscionability test is based on formalistic tests like conspicuousness of
25 the typeface or the comprehensiveness of the disclosure, businesses can be ensured that the terms
26 will be enforceable, even if they are substantively unconscionable and nonsalient. Businesses
27 design forms with large-type and bold-face fonts—but that are just as likely to remain unread by
28 consumers. Rather than scrutinizing unread, standard-form terms, a conspicuousness-of-disclosure
29 procedural-unconscionability test immunizes those terms from substantive scrutiny. The
30 conspicuousness-of-disclosure rule brings about an outcome that is inconsistent with the rule’s
31 underlying purpose. The salience criterion restores harmony between doctrine and policy. Further,
32 using salience to determine whether disclosure was successfully conspicuous would provide
33 appropriate underpinning to the conspicuousness test. The test should examine whether the term
34 was surprising to many consumers. Using large typeface or all caps in printing the standard terms
35 should not guarantee conspicuousness or salience.

36 Nevertheless, various statutes provide a safe harbor for businesses that technically comply
37 with disclosure or conspicuousness requirements. The salience test does not purport to override
38 the explicit instruction of such provisions. The salience test could, however, provide a metric by
39 which courts determine whether a disclosure was indeed conspicuous. Other statutes specify that
40 conspicuousness is a necessary condition for enforceability, but not a sufficient condition. In those

1 cases, courts must still apply the unconscionability doctrine, as restated here. For example, UCC
2 § 2-316(2) (AM. LAW INST. & UNIF. LAW COMM'N) requires that disclaimers of warranties be
3 conspicuous, and courts, after finding that the conspicuousness requirement has been met, have
4 proceeded to scrutinize the disclaimers for unconscionability. See *Martin v. Joseph Harris Co.*,
5 767 F.2d 296 (6th Cir. 1985) (considering the fact that the purchasers were uncounseled lay
6 persons and that they were not at all aware of the fact that the disclaimer clauses in question altered
7 significant statutory rights); *Jefferson Credit Corp. v. Marcano*, 302 N.Y.S.2d 390, 393-394 (N.Y.
8 Civ. Ct. 1969) (“It can be stated with a fair degree of certainty that [the consumer] neither knew
9 nor understood he had waived the implied warranty of merchantability and the implied warranty
10 of fitness for a particular purpose, despite the fact that those waivers are printed in large black type
11 in the contract.”).

12 § 6. Deception

13 **(a) A contract or a term adopted as a result of a deceptive act or practice by the**
14 **business is unenforceable by the business to the extent stated in § 9.**

15 **(b) Without limiting the scope of subsection (a), an act or practice is deceptive if it has**
16 **the effect of:**

17 **(1) contradicting or unreasonably limiting in the standard contract terms a**
18 **material affirmation of fact or promise made by the business before the consumer**
19 **assented to the transaction; or**

20 **(2) obscuring a charge to be paid by the consumer or the overall cost to the**
21 **consumer.**

22 **Comment:**

23 *1. Deception renders a contract or term voidable.* This Section provides the consumer with
24 the power to avoid any contract or term that is a result of a deceptive act or practice by the business.
25 Deception undermines the premise that the contract term was agreed to and that it promotes the
26 interests of all contracting parties. Deception under this Section does not require an intent to
27 deceive. This Section expands the rule in the Restatement of the Law Second, Contracts, to permit
28 voidability for all terms that conflict with acts and practices that preceded the manifestation of
29 assent, even though the acts or practices may not be made or undertaken with an intent to deceive
30 and may not be material. Deception is evaluated in context: how the act or practice alleged to be
31 deceptive typically affects a consumer who is the target of such act or practice. Compare

1 Restatement of the Law Second, Contracts § 164 (contract voidable as a result of a
2 misrepresentation that is either fraudulent *or* material). The consumer may avoid the specific term,
3 or, if the deceptive terms undermine the value of the contract as a whole, the entire contract. The
4 effect of severing a term from the contract is addressed in § 9.

5 2. *Specific forms of deception.* Subsection (b) lists two examples of acts or practices that
6 are prima facie deceptive. These two examples share a pattern in which the business draws the
7 consumer in with a false or misleading affirmation of fact or promise, which the business then
8 attempts to undo or qualify in a less noticeable manner.

9 Subsection (b)(1) establishes that it is deceptive to make a material affirmation of fact or
10 promise that is contradicted by or unreasonably limited in the standard contract terms. (See
11 § 1(a)(6) for the definition of “affirmation of fact or promise.”) For example, it is deceptive to
12 represent that a service is covered by an extensive warranty when the standard contract terms
13 include broad disclaimers of implied warranties and other limitations on the business’s liability. In
14 the same spirit, a clause in the standard contract terms claiming precedence over contract terms
15 individually and expressly negotiated is voidable.

16 A consumer alleging that a standard contract term contradicts or unreasonably limits an
17 affirmation of fact or promise under subsection (b)(1) has to prove the existence of such a deceptive
18 affirmation of fact or promise. It would be easier to prove the claimed prior affirmation of fact or
19 promise if it was made in the form of a public advertisement. It would be more difficult for a
20 consumer to prove the claimed prior affirmation of fact or promise if it was made privately in the
21 form of an oral statement by an agent of the business to the consumer (see § 8.) If the consumer
22 provides evidence of the affirmation of fact or promise, the business may then seek to demonstrate
23 circumstances that render its affirmation or promise nondeceptive, for example by showing that
24 additional precontractual communications between the parties reflected the provision subsequently
25 adopted in the standard contract terms.

26 Subsection (b)(2) establishes that it is deceptive to make a false or misleading
27 representation about price. In many consumer contracts, price is multidimensional, comprised of
28 different fees, rates, discounts, rebates, add-ons, etc. It is misleading for a business to unduly
29 emphasize certain price dimensions, while relegating other price dimensions to the standard
30 contract terms, if such emphasis obscures the total cost. When certain price dimensions are
31 contingent upon the occurrence of future events, it is deceptive for a business to make a false or

1 misleading affirmation of fact or promise about the likely occurrence or nonoccurrence of such
2 events. It is also deceptive to induce consumers to pay an additional price for add-ons or services
3 that are reasonably available to the consumer for little or no charge, implicitly representing that
4 such payments are necessary to obtain the services.

5 **Illustrations:**

6 1. A business advertises on its website a “complete assembled product,” but the
7 product is delivered as a “do it yourself” kit for assembly by the consumer. The standard
8 contract terms to which the consumer clicked “I Agree” when purchasing the product
9 contained a disclaimer “notwithstanding any representation made elsewhere, it is agreed
10 that the product will be delivered unassembled and will require further assembly by the
11 consumer.” The explicit advertisement on the website, which is an affirmation of fact, is
12 deceptive, and the disclaimer in the standard contract terms is voidable by the consumer.
13 (Compare UCC § 2-316(1).)

14 2. A business sells a service along with the statement: “free cancellations with full
15 refunds, without restrictions, up to 90 days, no questions asked.” During checkout, the
16 consumer agrees to Terms and Conditions that contain a provision permitting cancellations
17 and refunds of purchased service only if the service has not been used. The “free
18 cancellations” affirmation is deceptive and the limitation on returns in the standard contract
19 terms is voidable.

20 3. A consumer orders a concert ticket on a website. On the checkout webpage, a
21 service fee of \$10 appears, as well as a prominent link to “Terms and Conditions.” The
22 consumer manifests assent to the transaction by clicking “I Agree.” Among the standard
23 contract terms in the “Terms and Conditions” page is a two-dollar surcharge added to all
24 services, to be charged separately to the consumer’s credit card. The representation that the
25 service fee amounts to \$10 is deceptive and the two-dollar surcharge term is voidable.

26 4. A business advertises, “Free Phone” for new customers joining the service. An
27 easily visible asterisk is attached to the phrase “Free Phone” referring the recipient to a
28 footnote, printed at the bottom of the advertisement page, which states: “some fees and
29 charges may apply.” The consumer is charged a sales tax and connection fees when
30 receiving the phone. The “Free Phone” affirmation in the advertisement is not deceptive

1 because the qualification was presented in a manner that is reasonable and therefore
2 becomes part of the affirmation itself.

3 3. *Deception as to value.* An affirmation of fact or promise is deceptive if it would imply
4 to a reasonable consumer that the contract's value substantially exceeds the actual value a
5 consumer derives from the contract.

6 **Illustration:**

7 5. A business sells a kitchen appliance and with it sells, for an additional price, a
8 two-year service contract, commencing on the date of purchase. The appliance comes with
9 a manufacturer's warranty offering the same protection as the service contract, albeit for a
10 period of one year. Selling the service contract is deceptive, unless the business explains
11 that the service contract provides only one year of additional coverage.

12 4. *Deception in solicitation of acceptance.* It is deceptive to solicit consumers' entry into
13 an ancillary contract without their knowledge. Such deception may be done by inducing the
14 consumer to receive and not reject an unsolicited free product, accompanied by standard terms
15 that, unbeknownst to the consumer, stipulate recurring deliveries by the business at a stated price.
16 "Negative option" contracts can be beneficial, as they allow consumers to receive uninterrupted
17 services without the hassle of having to renew them. However, "negative options" are deceptive
18 when the business misrepresents the scope of acceptance, obscuring the obligation to pay and
19 relegating it to the standard contract terms.

20 **Illustrations:**

21 6. A business offers a product to a consumer for free during a trial period, and then
22 charges the consumer periodically until she cancels the arrangement. Unless the automatic
23 renewal is clearly stated in the inducing solicitation and the consumer is informed how to
24 cancel the arrangement, it is deceptive.

25 7. A business offers the consumer a service with "no contract." The service is
26 governed by standard contract terms to which the consumer clicked "I Agree." Those terms
27 do not include any duration commitment and do not reflect a termination fee. The
28 affirmation of "no contract" is not deceptive because consumers frequently view the term
29 "no contract" as implying there is no long-term commitment and no termination fee. If,

1 however, the standard contract terms contain a termination fee, the “no contract”
2 affirmation is deceptive and any term inconsistent with free exit is voidable.

3 5. *Relevance of reliance.* The rules in this Section provide for avoidance of a contract or
4 term when that contract or term was agreed to “as a result of” a deceptive act or practice. Compare
5 Restatement of the Law Second, Contracts § 167 (When a Misrepresentation Is an Inducing Cause).
6 The causation requirement can be satisfied either by the satisfaction of (i) an actual-reliance
7 requirement (as in the common law of fraud; see Restatement of the Law Third, Torts: Liability
8 for Economic Harm § 11; Restatement of the Law Second, Torts § 552), or (ii) a requirement that
9 a typical consumer entering such transactions is entitled to rely on the allegedly deceptive act or
10 practice when agreeing to the contract or term (compare the Federal Trade Commission’s Policy
11 Statement on Deception (1983), which rejects an actual-reliance requirement and states that
12 deception occurs when a material representation or omission is “likely to mislead” consumers
13 acting reasonably in the circumstances; see also the “basis of the bargain” test under UCC § 2-
14 313). Elaborating on interpretation (ii), a deceptive advertisement can affect the market
15 equilibrium (e.g., by raising the market price) and may thus affect all consumers alike, including
16 those who were not aware of it and did not rely on it. Accordingly, deception under this Section
17 could result in the avoidance of a contract or term, even if the specific consumer-plaintiff did not
18 see the advertisement. The rule in this Section is also consistent with the general principle of
19 estoppel, preventing a business that engaged in a deceptive act or practice from claiming a right to
20 the detriment of a consumer who was entitled to rely on the business’s conduct.

21 6. *Effects of deception.* The ordinary consequence of a conflict between an affirmation of
22 fact or promise and a standard contract term under this Section is the removal of the standard
23 contract term from the agreement, to the extent necessary to avoid the conflict. If severance of
24 specific standard contract terms is not sufficient to undo the conflict with the affirmation of fact or
25 promise, the consumer may avoid the contract in its entirety. Any terms voided under this Section
26 may be replaced by provisions consistent with the affirmation of fact or promise made to the
27 consumer and, if necessary, by gap-fillers in accordance with the guidelines in § 9.

28 7. *Shield versus sword.* A deception claim can be used as a defense (“shield”). For example,
29 if a business sues to collect money charged to, but unpaid by, the consumer, the consumer can
30 defend by showing that the charge had arisen from a deceptive term. The same deception claim
31 can be made by the consumer as a plaintiff, if, for example, a deceptive charge was already

1 collected by the business, and the consumer is suing to recover it. In that procedural posture, it is
2 sometimes said that the deception claim is used as a “sword.” That description is misleading. The
3 deception claim is used to challenge the business’s exercise of an alleged contractual right, as in
4 the traditional “shield” cases. A true “sword” application would arise if the consumer has a cause
5 of action for the mere inclusion of a deceptive term in the contract. Some state consumer-protection
6 laws create a deception-based affirmative right of action and allow consumers to sue for statutory
7 damages. Such statutory claims fall outside the scope of this Restatement.

8 8. *Relation to other law.* The rules restated in this Section are related to several other legal
9 doctrines, both within and beyond traditional contract law:

10 (a). *Law of precontractual misrepresentation.* This Section is consistent with the
11 general principle that agreements reached as a result of a material misrepresentation are not
12 binding. See Restatement of the Law Second, Contracts, Chapter 7, Topic 1. It is also consistent
13 with the tort of misrepresentation. See Restatement of the Law Second, Torts § 552; Restatement
14 of the Law Third, Torts: Liability for Economic Harm § 9. Whereas the standard result of
15 precontractual misrepresentation under contract law is to render the entire agreement voidable, and
16 under tort law to recover the pecuniary loss caused by reliance on the misrepresentation, this
17 Section as an alternative enables courts to strike the standard contract terms that are inconsistent
18 with the affirmations of facts or promises and enforce the remainder of the contract (see § 9),
19 thereby protecting the consumer’s forward-looking expectation. That result is often more practical
20 and favorable to consumers than outright cancellation of the contract or the recovery of reliance
21 damages.

22 (b). *Federal and state anti-deception law.* This Section is consistent with federal
23 and state anti-deception law. At both the federal and state level, statutory law, as applied by
24 agencies and courts, protects consumers against deception. Those laws share the same goal as
25 this Section—to prevent deceptive affirmations of fact or promises—and they often provide
26 redress beyond the avoidance of a contract or term or the enforcement of a specific contract. This
27 Section does not expand the reach of the statutory anti-deception law, but merely clarifies an
28 additional consequence of deception—the voidability of some contract terms.

29 (c). *Parol-evidence rule.* This Section affects the resolution of conflicts between
30 standard contract terms and prior oral representations, and, specifically, prevents standard contract
31 terms from overriding or modifying prior affirmations of fact or promises that are part of the

1 bargain in fact. See, in particular, subsection (b)(1). While the common law’s parol-evidence rule
2 generally gives precedence to written terms over prior oral statements, the fraud or
3 misrepresentation exception to the parol-evidence rule is consistent with the rule restated in this
4 Section. (See Restatement of the Law Second, Contracts § 214(d).) Indeed, the parol-evidence rule
5 gives precedence to a written document when the parties intend for that document to be the only
6 source of their contractual obligations (superseding prior oral or written agreements and
7 contemporaneous oral agreements); no such intent can be inferred when an affirmation of fact or
8 promise is deceptively undermined by the standard contract terms that are only weakly scrutinized
9 by consumers. See also § 8.

10 (d). *Exclusion or modification of warranties.* Some of the rules restated in this
11 Section prevent a business from making an express promise and then attempting to exclude or
12 modify this promise in the standard contract terms. See, in particular, subsection (b)(1). These
13 rules are consistent with UCC § 2-316, which requires that an express warranty and its disclaimer
14 “be construed wherever reasonable as consistent with each other” or, when that cannot be done,
15 requires that the limitation be rendered inoperative (see, in particular, Official Comment 1), and
16 the Magnuson–Moss Warranty Act, 15 U.S.C. § 2308.

REPORTERS’ NOTES

17 Deception is one of the main concerns permeating consumer-contract law. This Section
18 restates the general rule that a contract or term agreed to as a result of deception is voidable.

19 This Section then proceeds to delineate acts or practices that are deceptive. These acts or
20 practices share a common theme: affirmations or promises undermined by subsequent standard
21 contract terms. The concern is that a business would make a representation designed to attract
22 consumers and then undermine that representation in its standard contract terms. The rules restated
23 in this Section designate such acts or practices as deceptive, rendering voidable any standard
24 contract term that is inconsistent with the prior representation.

25 The law of deception plays a central role not only in consumer-contract law (and the
26 common law in general), but also in statutory consumer-protection law. In practice, deceptive acts
27 and practices give rise to lawsuits that raise both contract-law claims and claims under the relevant
28 consumer-protection statute. Recognizing the similarity between those bodies of law—their shared
29 policy to combat deception and their application in similar situations—this Section explicitly
30 incorporates doctrines originally developed under federal and state anti-deception law
31 (specifically, Section 5 of the Federal Trade Commission Act and state unfair and deceptive acts
32 and practices statutes).

1 Deception should be understood broadly to encompass not only outright fraud, but any act
2 or practice that is likely to mislead the reasonable consumer. The emphasis is on the consumer's
3 false perception, not on the business's intent to deceive. Indeed, a reasonable consumer might be
4 deceived, even when the business had no intention to deceive. (Compare FTC Policy Statement on
5 Deception, Letter to John D. Dingell, Chairman, Subcommittee on Oversight and Investigations,
6 Committee on Energy and Commerce (Oct. 14, 1983), reprinted as applied to *In re Cliffdale*
7 *Assoc.*, 103 F.T.C. 110, 174 (1984).) The law of deception, so understood, places a burden on the
8 business to police representations made by its agents and verify that they are not inconsistent with
9 the standard contract terms that it offers.

10 Deception may apply to the mere presence of an obligation to pay. A business is acting
11 deceptively when it induces consumers to enter a contract and accept an obligation to pay without
12 their knowledge. Such is the case when consumers receive unsolicited products that are reasonably
13 perceived to be provided for free, and when the obligation to pay for those products appears only
14 in the standard contract terms. That may occur at the initiation of a transaction, or at the time of
15 renewal. Misleading, negative options are regarded as an unfair and deceptive practice by the
16 Federal Trade Commission and a number of state attorneys general. See, e.g., *Federal Trade*
17 *Commission and State of Connecticut v. LeanSpa, LLC*, 920 F. Supp. 2d 270 (D. Conn. 2013)
18 (denying motions to dismiss complaints regarding how LeadClick defendants deceptively solicited
19 consumers to sign up for an allegedly free trial of the product); *Federal Trade Commission v.*
20 *NextClick Media, LLC.*, C08-1718-VRW (N.D. Cal. Nov. 3, 2009); *Federal Trade Commission*
21 *v. UltraLife Fitness, CV08-07655-DSF-PJW* (C.D. Cal. Dec. 3, 2008); *State ex rel. Miller v.*
22 *Vertrue, Inc.*, 834 N.W.2d 12 (Iowa 2013) (dealing with an action brought by the state attorney
23 general against Vertrue for consumer fraud, including deceptively offering consumers free trial
24 memberships with negative options). To curb the potential for abuse, the Federal Trade
25 Commission enacted a rule that requires sellers who engage in negative-option marketing to satisfy
26 a "clear and conspicuous" standard of disclosure. The rule also requires that consumers manifest
27 affirmative consent to the negative-option offer and that businesses establish simple cancellation
28 procedures that allow consumers to easily exit negative-option plans at any time. See 16 C.F.R.
29 Part 425 (1998).

30 A related deceptive practice under subsection (b)(2) is "post-transaction marketing," in
31 which a third-party company deceptively offers purportedly discount subscription services for a
32 fee while a consumer completes the online check-out process from a known vendor. The offer is
33 often deceptively entitled "Reward" or "Bonus" and at first glance appears to be some sort of gift.
34 The consumer is asked to accept the offer by entering his or her email address, completing a survey,
35 or entering the last four digits of his or her credit-card number. Once this step is completed, the
36 known merchant will automatically transfer the consumer's payment information to the third-party
37 vendor and the consumer's credit card will be automatically billed a small amount each month
38 until the consumer notices the charge and figures out how to cancel it. Notice of the obligation to
39 pay for the membership rewards is generally hidden in tiny print under deceptive titles, such as
40 "Claim Prize Here" or "Free Coupon" for services associated with the known vendor. This practice

1 has been declared deceptive in actions brought by the Federal Trade Commission and various state
2 attorneys general. See, e.g., *Minnesota ex rel. Hatch v. U.S. Bancorp, Inc.*, No. 99-872 (D. Minn.
3 1999); *In re AT&T Mobility*, No. 09-2-00463-1 (Wash. Dist. Ct. Feb. 26, 2009); *FTC v. Smolev*,
4 No. 01-8922-CIV-ZLOCH (S.D. Fla. Nov. 27, 2001); *Illinois v. Blitz Media, Inc.*, No. 2001-CH-
5 592 (Sangamon Co. Ill. Dec. 2001). Furthermore, the practice of automatic transfer of consumer-
6 payment information from a merchant to a third-party vendor has been rendered illegal by the
7 Restore Online Shoppers' Confidence Act, 15 U.S.C. § 8401 (2010). The Act also makes it
8 unlawful for a post-transaction third-party seller to charge, or attempt to charge, a consumer for
9 products sold online unless the material terms of the transaction are clearly disclosed to the
10 consumer, and the seller obtains the consent and payment information directly from the consumer.

11 Price is one of the most important elements of a consumer contract—an element that the
12 consumer will often be keenly aware of. It would thus seem more difficult to deceive the consumer
13 about price. Still, deception about price exists, and is addressed in subsection (b)(2) (see also
14 Comment 2). In many consumer contracts, price is multidimensional, including multiple, possibly
15 contingent fees and rates, discounts, rebates, add-ons, etc. Price deception might occur when the
16 seller emphasizes one (or more) price dimension(s), while obscuring other price dimensions. An
17 unnecessarily complex and multidimensional pricing scheme designed to conceal the true cost of
18 the product or service can be deceptive in and of itself. Adding nonsalient price dimensions that
19 are likely to be ignored or underestimated by the consumer can also be deceptive.

20 § 7. Affirmations of Fact and Promises That Are Part of the Consumer Contract

21 **(a) An affirmation of fact or promise made by the business that creates a reasonable**
22 **expectation by a reasonable consumer who is its intended audience that the subject matter**
23 **of the contract will have the described attribute becomes part of the consumer contract.**

24 **(b) An affirmation of fact or promise made by a third party that creates a reasonable**
25 **expectation by a reasonable consumer who is its intended audience that the subject matter**
26 **of the contract will have the described attribute:**

27 **(1) becomes part of the contract between the business and the consumer if:**

28 **(A) the business knew or reasonably should have known of it, and**

29 **(B) the consumer could have reasonably believed that the business**
30 **intended to stand behind the affirmation or promise; and**

31 **(2) creates a contractual obligation of the third party to the consumer, even if**
32 **the third party did not transact directly with the consumer, so long as the third party**
33 **has an appreciable financial interest in the contract between the business and the**
34 **consumer.**

1 **(c) Standard contract terms that purport to negate or limit affirmations of fact or**
2 **promises that become part of the consumer contract under subsections (a) and (b) are not**
3 **enforceable.**

4 **Comment:**

5 *1. Generally.* This Section deals with representations made by businesses that become part
6 of the consumer contract and that address various objective aspects of the value the consumer can
7 expect from the transaction. Those affirmations of fact and promises include matters that
8 traditionally come under the law of express warranties, but also aspects like comparative cost,
9 price, and discounts (including rebates). The affirmations of fact and promises may be made in
10 any statement, description of the subject matter of the contract, exhibitions of a sample or model
11 depicting that subject matter, promises made by businesses' representatives, or any other form of
12 communication in the course of contracting (see § 1), as well as communications made in the
13 precontractual phase by parties who are not in immediate contractual relation with the consumer
14 but who have an appreciable financial interest in the transaction.

15 *2. Reasonable expectations.* An obligation under this Section arises from an affirmation of
16 fact or a promise that creates reasonable expectations by a consumer who is their intended
17 audience, that the subject matter of the contract will have the described attributes. The test is an
18 objective one—whether a reasonable person would have formed such expectations—and does not
19 require proof of the specific expectation formed by the consumer. Factors such as the materiality,
20 salience, and prominence; specificity and definiteness; certainty; and verifiability of the
21 representation determine whether the representation is indicative of a commitment and is made
22 part of the consumer contract. Sales talk that is reasonably understood as “puffing” or statements
23 of opinion do not become part of the basis of the bargain.

24 *3. Advertising.* A contractual obligation can arise based on affirmations or promises made
25 in advertising. In the context of advertising, some puffing is more likely and therefore some degree
26 of skepticism about the information content is reasonable. Nevertheless, language in advertising
27 that is specific, verifiable, and/or indicative of commitment should be treated no differently than
28 such language used in any other context.

1 Illustration:

2 1. A business advertises that a gaming hardware is compatible with gaming
3 software of another system. A consumer purchases the gaming hardware. The
4 advertisement creates an obligation that the device be compatible with the other system.

5 4. *Timing of affirmations or promises.* Normally, the affirmations or promises that are part
6 of the consumer contract are made prior to the consumer's manifestation of assent. However, this
7 Section does not restrict its application to such precontractual statements. Some are made after the
8 consumer manifests assent, in accordance with § 2, or in the course of a modification of the
9 contract. See Uniform Commercial Code (UCC) § 2-313, Official Comment 7 (explaining that a
10 post-assent affirmation or promise can become a modification). It is common for warranty
11 statements to be sealed in the box, and consumers reasonably expect the party making the warranty
12 to stand by its promise.

13 Illustrations:

14 2. One year after purchasing a software program, a consumer receives a notice from
15 the business that an update is available for download. The notice also highlights some new
16 functionalities of the updated version and a statement that it is compatible with more
17 hardware platforms. The consumer downloads the software update. The notice creates an
18 obligation that the updated version conform to the description.

19 3. A consumer purchases a car from a dealership. Two weeks later, on an icy day,
20 when the consumer picks up the car from the lot, in response to the consumer's inquiry,
21 the salesperson tells the consumer that the car is equipped with anti-lock brakes. The
22 affirmation becomes part of the consumer contract, which thus includes an obligation to
23 supply anti-lock brakes.

24 4. A consumer purchases an appliance from a store, along with an installation and
25 extended-service contract. Two week later, when the appliance is delivered and installed,
26 the store's installer tells the consumer that the service contract includes a 10 percent
27 discount on parts. The affirmation becomes part of the consumer contract, which thus
28 includes the 10 percent discount.

1 5. *Affirmations of fact or promises by third parties.* An obligation of the business can arise
2 from precontractual affirmations of fact or promises made by other parties, if the consumer could
3 reasonably view the business as standing behind the affirmation or promise and the business knew
4 or should have known of the affirmation or promise. Those third parties are typically parties who
5 are prior links in the normal chain of distribution or involved in procuring customers for the
6 business. For example, such affirmations or promises are often made by a manufacturer and appear
7 in advertising, or as claims made on the package, although the consumer only transacts directly
8 with a retailer. In those circumstances, the affirmations or promises that contribute to the
9 consumer’s willingness to enter into the contract and to pay for its subject matter directly benefit
10 the business (i.e., the retailer). Further, consumers often do not know which entity is responsible
11 for making the affirmation or promise—whether it is the entity with whom they transact or a prior
12 link in the chain of distribution—and reasonably believe that the business intends to stand behind
13 the claims made in the affirmations or promises. It would be both inefficient and unfair to place
14 on consumers the burden of distinguishing between the representing and contracting parties. Thus,
15 even a business that did not know of such affirmations or promises may nevertheless be bound to
16 them, unless it can also be established by the business that it could not have reasonably known of
17 them. The rule in subsection (b)(1) does not apply to standard terms supplied by the third party,
18 such as warranty statements sealed in the box, unless the third party made reference to those terms
19 in a manner that could reasonably have brought them to the attention of the consumer and the
20 business prior to the contract. But, under subsection (b)(2), such standard terms may create a direct
21 obligation of the third party to the consumer.

22 6. *Obligation without contract privity.* A third party that makes an affirmation of fact or a
23 promise that creates a reasonable expectation by a reasonable consumer who is its intended
24 audience that the subject matter of the contract will have the described attribute may be
25 independently obligated under subsection (b)(2) to ensure that the contract conforms to its
26 affirmation of fact or promise, even if it does not contract directly with the consumer. Such
27 obligation to a remote consumer is consistent with the manifest intention of the party making the
28 affirmation of fact or promise, and with longstanding market norms. For example, a “limited
29 warranty” statement enclosed in the box by a manufacturer who has not contracted directly with
30 the consumer creates an obligation on the manufacturer to stand by its promise. (Compare § 2
31 Comment 7, explaining when the obligation by a third party is adopted as part of the contract.)

1 This obligation generally applies to third parties that are businesses in the supply chain,
2 such as a manufacturer or wholesale distributor, who have an appreciable financial interest in the
3 specific transaction that is the subject of the contract between the business and the consumer. But
4 the obligation could potentially apply to third parties not in the supply chain but who nonetheless
5 have an appreciable financial interest in the specific transaction. For example, it could apply to
6 affirmations or promises by a third party hired by the business to solicit customers for the business,
7 or by a trade organization representing a group of businesses with similar interests. In contrast, it
8 would not apply to affirmations or promises by individual consumers based on their personal
9 experiences with the business or the product or service, or by agents of the consumer, or by
10 independent testers and reviewers not affiliated with the business or others in the supply chain.
11 Liability would chill the activity and speech of such third parties, and they are unable to reallocate
12 that liability to the business with whom they do not have a contractual relationship. In some
13 circumstances, however, the consumer may have a separate contractual relationship with advisors
14 or other third parties who shape the consumer’s expectations and decisions, and separate causes of
15 action may arise under those contracts.

16 **Illustration:**

17 5. A consumer purchases a car from a dealer and does not transact directly with the
18 car’s manufacturer. The car comes with an owner’s manual from the manufacturer that
19 contains a “limited warranty,” which is intended to inform the consumer about the scope
20 of the express warranty provided by the manufacturer. Under subsection (b)(2), the
21 “limited warranty” creates a contractual obligation by the manufacturer to the consumer.
22 Because the “limited warranty” does not create a reasonable expectation that the dealer
23 would be obligated on the warranty, it does not become part of the contract between the
24 consumer and the dealer.

25 7. *Inability to negate or limit the effects of an affirmation or promise.* When a business or
26 third party makes an affirmation or promise that becomes part of the contract between the business
27 and the consumer or creates an obligation of the third party toward the consumer, the effect of that
28 affirmation or promise cannot be negated or limited in the standard contract terms. See also § 8,
29 Comment 3. Compare: UCC § 2-316(1). Note, however, that when an affirmation of fact or
30 promise contains its own limitation, the affirmation of fact or promise and the limitation must be

1 construed whenever reasonable as consistent with each other, but the limitation is inoperative to
2 the extent that such construction is unreasonable.

3 8. *Remedy.* Affirmations and promises that may become part of the contract under this
4 Section, if they are not honored by the business or the third party, give rise to standard remedies
5 for breach of contract.

6 9. *Relation to the Uniform Commercial Code and to warranty law.* The rule restated in
7 subsection (a) is consistent with UCC § 2-313 and reflects the application of the “basis of the
8 bargain” principle beyond the sales-of-goods context without the use of that language. The rule
9 restated in subsection (b)(1), while formally broader than UCC § 2-313, derives from the same
10 principle. The rule of subsection (b)(2) goes beyond existing obligations created under the UCC
11 and reflects the Magnuson–Moss Warranty Act, 15 U.S.C. § 2301, which contemplates
12 enforceable warranty obligations by remote “suppliers” to consumers, and establishes the format
13 that such warranty statements, when made, must have.

REPORTERS’ NOTES

14 Consumer contracts are often preceded by various affirmations of fact and promises that
15 are intended to arouse consumer interest in the subject matter of the contract, to create expectations
16 about specific attributes of the transaction, to increase consumers’ willingness to pay the quoted
17 price, and ultimately to encourage consumers to enter into a contract. Those communications can
18 be done through advertising, front-of-the-box claims, demonstrations, samples, and various other
19 salient ways that can be reasonably understood by consumers as supplying concrete information
20 about the transaction. They are also done after the consumer manifests assent to the transaction,
21 through manuals, warranty statements, and other channels that inform consumers about the subject
22 matter of the contract. This Section is intended to hold the business, and potentially other third
23 parties, to the truth of those affirmations and promises. It thus serves several purposes. First, it
24 affords protection to consumers’ reasonable expectations. Second, it enables businesses to make
25 credible representations and to be taken seriously by their target customers. Lastly, it reduces
26 consumers’ need to rely on more expensive search and verification tools, and thus improves the
27 efficiency of the marketplace.

28 In many markets, the parties that make such affirmations and promises are ones who
29 participate in earlier links of the chain of distribution and who benefit directly from an increased
30 volume of purchases by consumers, but who do not deal directly with the consumers and thus do
31 not have contractual privity. For example, original manufacturers or importers of the products
32 make various representations through ads and labels directed at the consumer, but they are not a
33 party to the subsequent retail contract, which is concluded between a consumer and the retail outlet.
34 Similarly, trade associations might make similar representations also intended to affect demand.

1 In some cases, there is a post-purchase formation of a separate contract with the manufacturer (as,
2 for example, when a consumer installs a computer or software purchased from a retailer, and is
3 asked to adopt additional terms provided by the computer manufacturer or the software transferor).
4 But often there is only one contract, with the direct retailer. Nevertheless, consumers' interest in
5 that transaction may have been triggered, in significant part, by representations made by such third
6 parties, and those representations are as much a part of the contract, in the mind of consumers, as
7 if the retailer made them. That is also the case when a warranty statement by a third party is sealed
8 in the box. While consumers rarely see the warranties before entering the contract with the
9 business, the expectation that a warranty attached to a product will create a binding obligation
10 often drives the consumers' willingness to enter the contract. This Section is intended to provide
11 consumers with a level of protection that is not diminished by the separation between the
12 representing party and the transacting party (the retailer). Consumers often do not know if they
13 have a contract with the representing party, and the burden to become aware of such matters would
14 be expensive and inefficient.

15 To secure that level of protection for consumers who received precontractual affirmations
16 and promises from third parties, subsection (b)(1) makes the business liable for representations
17 made by third parties provided that the business knew or had reason to know of the representations
18 and the consumer could have reasonably believed that the business intended to stand behind the
19 representations. Since the business benefits from such representations in terms of consumers'
20 willingness to transact, it should also be liable for their breach. This rule is consistent with Uniform
21 Commercial Code § 2-313 (AM. LAW INST. & UNIF. LAW COMM'N), which states, inter alia, that
22 "[a]ny description of the goods which is made part of the basis of the bargain creates an express
23 warranty that the goods shall conform to the description." A store that displays goods in their boxes
24 thus provides an express warranty that the goods in the boxes will conform to the labels on the
25 boxes. This principle is consistent with the rulings in *Keith v. Buchanan*, 220 Cal. Rptr. 392 (Cal.
26 Ct. App. 1985) (determining that representations made in the sales brochure amounted to express
27 warranties); *Beckett v. F. W. Woolworth Co.*, 28 N.E.2d 804 (Ill. App. Ct. 1940) (holding that a
28 retailer permitting the sale of mascara with an express warranty on the container and a card
29 assumed responsibility that it was harmless for the use for which it was intended); *Postell v. Boykin*
30 *Tool & Supply Co.*, 71 S.E.2d 783 (Ga. Ct. App. 1952) (deciding that a retailer, in stating that he
31 would stand behind what turned out to be defective paint, knew that the purchaser would look to
32 him rather than to the manufacturer to make good any defect, and he sold the paint subject to that
33 condition); *Dorfman v. Nutramax Labs., Inc.*, No. 13cv0873 WQH (RBB), 2013 WL 5353043
34 (S.D. Cal. Sept. 23, 2013) (ruling in favor of a plaintiff alleging that claims on the label of a joint
35 health supplement were false and misleading insofar as the label stated that the product would
36 protect cartilage and reduce joint pain). But see *In re Hydroxycut Mktg. & Sales Practices Litig.*,
37 299 F.R.D. 648, 657 (S.D. Cal. 2014) (dismissing class-action express-warranty claims because
38 plaintiffs had not specified who made the representations that they were exposed to prior to
39 purchasing the products).

1 Further, to preserve the integrity of precontractual affirmations and promises, the party
2 who makes them in expectation that they would be part of the contract with the consumer should
3 be held responsible for the truth of its representations, even if it does not deal directly with the
4 consumer. Thus, subsection (b)(2) allows the consumer to recover not only from the party to the
5 transaction (the retailer), but also from the party originally making the affirmations of facts or
6 promises. This is the case even though the consumer does not have contractual privity with that
7 third party. This rule is consistent with the Magnuson–Moss Warranty Act, 15 U.S.C. § 2301,
8 which contemplates liability by a supplier making a warranty to a remote purchaser. The Act
9 applies to a party who is “engaged in the business of making a consumer product directly or
10 *indirectly* available to consumers.” 15 U.S.C. § 2301(4) (emphasis added). FTC regulations
11 confirm that such remote suppliers are creating an enforceable obligation. For example, “The
12 supplier of the refrigerator [to be installed in a boat or RV] relies on the boat or vehicle assembler
13 to convey the written agreement to the consumer. In this case, the supplier’s written warranty is to
14 a consumer, and is covered by the Act.” (16 C.F.R. § 700.3(c)). While such warranty arises in the
15 absence of privity, it only operates between the party making the warranty and the specific persons
16 to whom that party directed its warranty statement, namely the customer.

17 Many cases find that an express warranty arises despite the absence of privity. See, e.g.,
18 *Kinlaw v. Long Manufacturing N.C., Inc.*, 259 S.E.2d 552, 557 (N.C. 1979) (finding absence of
19 privity not fatal to remote buyer’s claim for breach of an express warranty against manufacturer
20 when plaintiff purchased a new tractor from dealer and the tractor came with an owner’s manual
21 from manufacturer); *Stapp v. Takeuchi Mfg. Co. (U.S.)*, No. C07-5446RJB, 2008 WL 4460268,
22 at *10 (W.D. Wash. Oct. 2, 2008) (“The privity requirement is ‘relaxed,’ however, if the
23 manufacturer makes express representations to the plaintiff and the plaintiff knows of such
24 representation.”); *Cardinal Health 301, Inc. v. Tyco Electronics Corp.*, 87 Cal. Rptr. 3d 5, 27 (Cal.
25 Ct. App. 2008) (finding sufficient privity between a buyer and its manufacturer’s successor,
26 because although the successor did not itself engage in negotiations with the purchaser as to the
27 initial purchase agreement, it accepted and benefited from those negotiations in taking the place
28 of the original product supplier); *Prairie Prod., Inc. v. Agchem Div.-Pennwalt Corp.*, 514 N.E.2d
29 1299, 1302 (Ind. Ct. App. 1987) (ruling that written affirmations created an express warranty from
30 defendant corporation to plaintiff despite the corporation being a remote manufacturer with no
31 contractual privity). But see *Sanders v. City of Fresno*, 65 Fed. R. Serv. 3d 960 (E.D. Cal. 2006)
32 (holding a victim’s breach-of-warranty claims against a Taser manufacturing company did not fit
33 into the exception to the privity requirement for reliance on the manufacturer’s written
34 representations in labels or advertising materials). See generally James J. White, *Warranty in the*
35 *Box*, 46 SAN DIEGO L. REV. 733, 749-751 (2009) (“thousands of claims are made against these
36 [third-party] warranties each year, but we find no case in which a remote seller of new goods who
37 has made an express warranty packaged with the product has denied the legal effectiveness of that
38 warranty.”)

39 Under subsection (c), the obligations arising under this Section cannot be derogated from
40 through less-noticeable standard contract terms. There is a concern that businesses would draft

1 express limitations in the standard contract terms intended to undo the effect of precontractual
2 representations. While the stipulation of conditions and limitations is often necessary and
3 permissible, especially when those do not conflict with the precontractual affirmations of fact or
4 promises, they have the potential of reducing or completely eliminating the value to consumers of
5 liability for precontractual representations. Such limitations are inoperable if deceptive (under
6 § 6) or if they negate the reasonably expected effect of the precontractual affirmations and
7 promises (under this Section). A business seeking to limit the liability arising from its
8 precontractual representations must do so as part of the representation itself.

9 If a business is held liable for representations made by another party in an earlier link along
10 the distribution chain or in the marketing process, it may be entitled to indemnification. That is so
11 even if the business is deemed to have made the same representations (for example, by displaying
12 the product in its store, along with the labels on the box). The business should not bear the ultimate
13 liability for any nonconformity when the business does not have a reasonable opportunity to
14 inspect and discover the existence of the nonconformity. For example, when the business is a
15 retailer that acquires the goods in sealed packages, it might be liable to consumers but it then has
16 the right to be indemnified by its upstream suppliers. See, e.g., *Ruping v. Great Atlantic & Pacific*
17 *Tea Co.*, 126 N.Y.S.2d 687 (N.Y. App. Div. 1953) (deciding, in regard to a ginger ale explosion,
18 that if the store was found passively negligent it would have been entitled to recover against the
19 glass company); *Borchard v. Wefco, Inc.*, 733 P.2d 776 (Idaho 1987) (holding that a wholesaler
20 was bound to indemnify the retailer because the retailer did not make any warranties outside those
21 made by the wholesaler on the package). This Section does not take a position on the question of
22 whether the business's right to indemnification covers all or only part of its cost of liability.

23 § 8. Standard Contract Terms and the Parol Evidence Rule

24 **A standard contract term that contradicts, unreasonably limits, or fails to give the**
25 **reasonably intended effect to a prior affirmation of fact or promise by the business does not**
26 **constitute a final expression of the agreement regarding the subject matter of that term and**
27 **does not have the effect under the parol evidence rule of discharging obligations that would**
28 **otherwise arise as a result of the prior affirmation of fact or promise.**

29 **Comment:**

30 *1. Balancing two interests.* Consumer contracts, like all contracts, are subject to the parol
31 evidence rule (Restatement of the Law Second, Contracts §§ 209-218). As that rule is stated in
32 § 213 of the Restatement of the Law Second, Contracts, a conclusion that an agreement is partially
33 or completely integrated—that is, that the agreement consists of a writing (including in electronic
34 form) that constitutes a final expression of one or more terms of an agreement—has the effect of

1 discharging prior agreements. In consumer contracts, the finality provided by the parol evidence
2 rule protects an important interest of the business in certainty and security. But such finality might
3 undermine the interest of consumers in enforcing their reasonable expectations, as formed by
4 affirmations of fact or promises made outside the standard contract terms. Since the standard
5 contract terms do not result from a combined effort by both parties to draft a negotiated agreement,
6 there is less justification to view them as a joint affirmative memorialization of a mutually designed
7 agreement, and thus less reason to allow them to override affirmations of fact or promises made to
8 the consumer. Accordingly, when standard contract terms are inconsistent with prior affirmations
9 of fact or promises, this Section denies those terms the preclusive effect of the parol evidence rule.
10 It accomplishes this by negating the prerequisite for finding an integrated agreement—the
11 conclusion that the standard contract terms constitute a final expression of those terms. This is
12 consistent with § 7, which holds that such affirmations of fact or promises are part of the contract
13 and cannot be undone by standard contract terms (see § 7(c)). Indeed, an attempt to use standard
14 contract terms to contradict or unreasonably limit an affirmation or promise is deceptive under
15 § 6. The result stated in this Section is, therefore, a logical corollary of §§ 6 and 7.

16 **Illustrations:**

17 1. A consumer who lives in an area with frequent, heavy snowfalls enters into a
18 contract with a snow-removal business to shovel her sidewalk the day following snowfalls
19 of two inches or more. During the negotiations, the business’s representative assures the
20 consumer that all snow removal will be completed by 10 a.m. on the day of removal. This
21 is important to the consumer because a local ordinance requires sidewalks to be shoveled
22 by that time. The written agreement signed by the consumer and the business, however,
23 contains a standard contract term stating that the business promises only to complete snow
24 removal by sunset on the day of removal. That standard contract term contradicts the prior
25 promise that snow will be removed by 10 a.m. Accordingly, the “snow removal by sunset”
26 term in the written agreement does not constitute the parties’ final expression of the timing
27 term.

28 2. A consumer enters a dealership to buy a vehicle and, after identifying a
29 satisfactory model for purchase, the dealer promises that delivery will occur within 10
30 weeks. The time of delivery is important for the consumer because he will be borrowing a

1 vehicle until delivery, but such option is available only for a short amount of time. The
2 consumer manifests assent to the transaction by signing the dealership’s Contract for Sale.
3 That document makes no reference to delivery obligations by the seller. It contains a
4 merger clause. The absence of a statement or any reference to the promised delivery does
5 not discharge the obligation of the business that arose from the promise to deliver within
6 10 weeks.

7 3. A consumer visits a health club with an interest in becoming a member. After an
8 agent for the club gives the consumer a tour of the facilities and explains membership fees
9 and costs of said membership, the consumer expresses interest in joining, but requests an
10 additional period to make a final decision. The agent presents the consumer with a
11 Membership Contract to sign, but assures the consumer that it will not go into effect upon
12 signing, promising that the consumer may take additional time to make a final decision and
13 give express approval. The standard contract terms contain an initiation term that
14 contradicts the agent’s assurance that the agreement will not be effective immediately. The
15 initiation term in the written agreement does not constitute the parties’ final expression of
16 agreement regarding the effective date when the membership and resulting obligations will
17 begin.

18 2. *Demonstrating prior affirmations of fact or promises.* A consumer may demonstrate that
19 a standard contract term contradicts, unreasonably limits, or fails to give the reasonably intended
20 effect to a prior affirmation of fact or promise by the business even when the standard contract
21 term is unambiguous. Accordingly, in consumer contracts, the “four corners test” does not apply,
22 and a determination of integration must be informed by the alleged prior affirmations of fact or
23 promises. (See Restatement of the Law Second, Contracts § 209, Comment *c.*)

24 3. *Merger clauses.* Consumer contracts often contain “merger clauses” stating that there
25 are no affirmations of fact, promises, or agreements between the parties except those found in the
26 writing. Because consumers are not likely to notice, read, or understand the effect of such merger
27 clauses, they do not control the conclusion of whether the standard contract terms constitute a
28 partially or completely integrated agreement, and thus do not preclude a finding that the standard
29 contract terms do not constitute the parties’ final expression of a particular matter.

30 4. *Relation to the Restatement of the Law Second, Contracts, and the Uniform Commercial*
31 *Code.* The rule of this Section supplements the approach taken by Restatement of the Law Second,

1 Contracts § 213. Uniform Commercial Code (UCC) §§ 2-202 and 2A-202, which are similar in
2 effect to § 213 (although they employ a different structure and different terminology), are also
3 triggered by a “final expression.” As a result, this Section can be used to supplement those UCC
4 provisions.

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5 The Parol Evidence Rule (Restatement of the Law Second, Contracts §§ 209-218 (Am.
6 Law Inst. 1981)) applies to consumer contracts. Indeed, given the reality of consumer contracts,
7 there is a general understanding that the business can set the standard terms of the transaction
8 within reason (see §§ 2, 5). See, e.g., *Gregorio v. Geico General Insurance Co.*, 815 F. Supp. 2d
9 1097 (D. Ariz. 2011) (refusing to use the reasonable-expectations doctrine to add coverage that
10 was not in the policy because the insurer had an objectively reasonable basis for denying coverage).
11 Accordingly, standard contract terms will often be considered a partially or fully integrated
12 agreement under § 213 of the Restatement of the Law Second, Contracts (Am. Law Inst. 1981).

13 That result applies unless the standard contract terms contradict, unreasonably limit, or fail
14 to give the reasonably intended effect (from the perspective of a reasonable consumer) to a prior
15 affirmation of fact or promise by the business. The existence of such a prior affirmation of fact or
16 promise, which is inconsistent with the standard contract terms, undermines the prerequisite for
17 finding an integrated agreement—the conclusion that the standard contract terms constitute a final
18 expression of the parties’ intent with respect to those terms (see Restatement of the Law Second,
19 Contracts § 213 (Am. Law Inst. 1981)). The standard terms, which consumers rarely read, cannot
20 override affirmations of fact or promises that either become part of the basis of the bargain or
21 otherwise inform the consumer’s reasonable expectations. See § 7(c). (This Section does not take
22 a position on the question, on which different jurisdictions might differ, as to what conditions must
23 be satisfied for a precontractual affirmation of fact or promise to create an enforceable obligation.)
24 Indeed, it is deceptive for the business to induce the consumer to contract by making certain
25 affirmations of fact or promises and then to contradict, unreasonably limit, or fail to give effect to
26 those affirmations or promises in the standard contract terms. See § 6(b)(1).

27 Illustration 2 is based on *Bob Robertson, Inc. v. Webster*, 679 S.W.2d 683 (Tex. App.
28 1984). Illustration 3 is based on *Our Fair Lady Health Resort v. Miller*, 564 S.W.2d 410 (Tex. Civ.
29 App. 1978)).

30 In the standard contract terms, businesses often include an express, complete integration
31 clause (or “merger clause”) that presents the standard terms as the complete and exclusive
32 expression of the parties’ intent regarding any and all issues relating to the transaction. In consumer
33 contracts, there is no persuasive reason why such a clause, which like other standard terms goes
34 unread by most consumers, could change the legal consequences. Thus, its inclusion does not
35 preclude a finding that the standard contract terms do not constitute the parties’ final expression
36 of a particular matter. While a few courts consider a merger clause as conclusive on the question

1 of complete integration, most courts allow consumers to demonstrate that an affirmation of fact or
2 promise made to them did not receive its reasonably intended effect in the standard contract terms.

3 The rules in this Section pertaining to the application of the parol evidence rule in
4 consumer-contracts cases derive from existing case law. Starting with the traditional analysis, this
5 Restatement focuses on the most recent published decisions by the highest courts. There are 16
6 states in which the state supreme court, a state appellate court, or a federal appellate court applying
7 state law have weighed in on the application of the parol evidence rule to consumer contracts.

8 Those courts have allowed evidence from prior communications to qualify the enforcement
9 of subsequent standard-form terms. In seven cases, the contract included a merger clause. In only
10 one of those did the court explicitly reject the possibility of admitting prior evidence, stating that
11 the merger clause conclusively prevents the admission of parol evidence. See *Yocca v. Pittsburgh*
12 *Steelers Sports, Inc.*, 854 A.2d 425 (Pa. 2004) (indicating that the integration clause was a “clear
13 sign that the writing is meant to be just that and thereby expresses all of the parties’ negotiations,
14 conversations, and agreements made prior to its execution”). In another case, the court concluded
15 that a clear and unambiguous merger clause precluded the admission of parol evidence. See
16 *Tangren Family Tr. v. Tangren*, 154 P.3d 180 (Utah Ct. App. 2006) (determining that the plaintiff
17 had not overcome the presumption that a writing that on its face appears to be an integrated
18 agreement is what it appears to be). In the remaining five cases, courts enumerated the various
19 circumstances under which parol evidence could potentially be admissible, including holding that
20 previous conflicting terms could be a sign that the parties did not intend the standard terms to be
21 the final expression of agreement. See *Lopez v. Reynoso*, 118 P.3d 398 (Wash. Ct. App. 2005);
22 *Colafrancesco v. Crown Pontiac-GMC, Inc.*, 485 So. 2d 1131 (Ala. 1986); *Korff v. Hilton Resorts*
23 *Corp.*, 506 F. App’x 473 (6th Cir. 2012) (acknowledging a specific merger clause disclaims
24 reliance on specific prior oral representation); *Olah v. Ganley Chevrolet, Inc.*, 946 N.E.2d 771
25 (Ohio Ct. App. 2010) (interpreting the rule to be that absent fraud, mistake, or other invalidating
26 cause, the parties’ final written integration of their agreement may not be varied, contradicted, or
27 supplemented by evidence of prior or contemporaneous oral agreements, or prior written
28 agreements), and *Posey v. Ford Motor Credit Co.*, 111 P.3d 162 (Idaho Ct. App. 2005) (siding
29 with the UCC parol evidence provision that was intended to liberalize the common-law rule).

30 In the absence of a merger clause, courts have admitted parol evidence. In one case, the
31 court explicitly ruled that parol evidence could potentially be admitted even though the writing
32 would presumptively create an integrated agreement. See *Sims v. Honda Motor Co.*, 623 A.2d 995
33 (Conn. 1993). In the remaining cases, courts did not explicitly rule on that issue, but some allowed
34 parol evidence in particular circumstances, such as when the court determined that the written
35 agreement did not include all the terms that the parties apparently had agreed to, including terms
36 in prior negotiations See *Kaufman v. Audubon Ford/Audubon Imps., Inc.*, 916 So. 2d 1060 (La.
37 2005); *George v. Auto. Club of S. Cal.*, 135 Cal. Rptr. 3d 480 (Cal. Ct. App. 2011) (siding with
38 partial integration, saying “the trial court must provisionally consider parol evidence allegations,
39 but unless those allegations would support an interpretation to which the contract is reasonably
40 susceptible, a demurrer is properly sustained”); *Life Care Ponte Vedra, Inc. v. Wu*, 162 So. 3d 188

1 (Fla. Dist. Ct. App. 2015) (subscribing to a partial-integration approach in finding that the trial
2 court erred in failing to consider extrinsic evidence); CIT Grp./Sales Fin., Inc. v. E-Z Pay Used
3 Cars, Inc., 32 P.3d 1197 (Kan. Ct. App. 2001) (commenting that considering evidence that is
4 not inconsistent with the final articulation of the parties' contractual intent does not violate the
5 parol evidence rule); Stanley v. Huntington Nat'l Bank, 492 F. App'x 456 (4th Cir. 2012)
6 (supporting a presumption of complete integration such that the parol evidence rule bars the
7 admission of oral statements made prior to or contemporaneously with the execution of a clear and
8 unambiguous contract); Portfolio Acquisitions, L.L.C. v. Feltman, 909 N.E.2d 876 (Ill. App. Ct.
9 2009) (including parol evidence because the parties failed to identify that all the essential terms
10 are in writing and ascertainable from the instrument itself); and William P. Terrell, Inc. v. Miller,
11 697 S.W.2d 454 (Tex. App. 1985) (allowing parol evidence because there was no integrated
12 agreement covering the entirety of the transactions).

13 The rules in this Section gain further support from a comprehensive, empirical examination
14 of all cases in federal and state courts available on LexisNexis® and Westlaw® (excluding
15 employment cases) that address the admission of previous or contemporaneous agreements in light
16 of a final standard-form contract. The cases considered start with Our Fair Lady Health Resort v.
17 Miller, 564 S.W.2d 410 (Tex. Civ. App. 1978) and end with Life Care Ponte Vedra, Inc. v. Wu,
18 162 So. 3d 188 (Fla. Dist. Ct. App. 2015). The analysis includes 32 cases, including five
19 unpublished cases. The cases span 21 states and eight federal circuits, including the District of
20 Columbia, and include cases from four state supreme courts, nine state appellate courts, and three
21 federal circuit courts.

22 In most cases, whether the contract had a merger clause or not, courts have found that,
23 under certain circumstances, prior statements could be admitted in light of a subsequent, standard
24 written agreement. Specifically, the courts adopted that position in all but one of the 14 cases in
25 which the contract lacked a merger clause or the court did not discuss one. Among the 18 cases in
26 which the contracts had merger clauses, courts stated that extrinsic evidence could potentially be
27 admitted despite a subsequent, integrated agreement in 15 cases and denied that possibility in three
28 cases. Two of those three cases are unpublished, state-appellate-court cases from Michigan and
29 Ohio, and the third is a state-supreme-court case from Pennsylvania. To this date, this is the only
30 published high-court case taking such a position.

31 In 17 cases, a prior affirmation of fact or promise conflicted with a standard contract. In
32 six of those cases, there was no merger clause. The courts admitted extrinsic evidence in all six
33 cases. In 11 cases, there were merger clauses. Parol evidence was allowed in five of those cases.
34 And of the remaining six cases, in which parol evidence was ultimately not allowed, the courts
35 ruled that parol evidence was presumptively admissible.

36 Finally, an analysis of the most influential cases in this area, measured by out-of-state and
37 out-of-circuit court citations, reveals results consistent with the approach of this Section. The
38 analysis is restricted to only those cases that have an average of at least two out-of-state citations
39 per year. Cases in which the court ruled or articulated that evidence of prior agreements could be
40 admissible in light of subsequent integrated consumer standard-form contracts are more likely to

1 be cited than cases in which the court ruled that the presumption is conclusive. The first category
2 is headed by *George*, with 23 total out-of-state citations and over four citations per year, followed
3 by *Force v. ITT Hartford Life & Annuity Ins. Co.*, 4 F. Supp. 2d 843 (D. Minn. 1998), with 67
4 total out-of-state citations and almost four such citations per year. The only case in the second
5 category is *Yocca*, with 23 total out-of-state citations and over two such citations per year.

6 § 9. Effects of Derogation from Mandatory Rules

7 (a) If a court finds that a contract or any term excludes, limits, or violates any
8 mandatory rule, the court should do one of the following:

9 (1) refuse to enforce the contract,

10 (2) enforce the remainder of the contract without the derogating term, or

11 (3) limit the application of the derogating term.

12 (b) If the court enforces the remainder of the contract without the derogating term,
13 the court may replace the derogating term with:

14 (1) a term that is reasonable in the circumstances,

15 (2) a term that effects the minimal correction necessary to bring the contract
16 into compliance with the mandatory rule, or

17 (3) if the contravening term was placed by the business in bad faith, a term
18 that is calculated to give the business an incentive to avoid placing such terms in
19 consumer contracts.

20 Comment:

21 *1. General.* This Restatement contains several mandatory rules—rules that cannot be
22 derogated from by agreement of the parties. See, in particular, § 3(c) (modifications must be made
23 in good faith); § 4(b) (consumer contracts may not include a term purporting to grant the business
24 the unbridled discretion to determine its contractual rights; obligations unrestrained by any good-
25 faith obligation unenforceable); § 5 (unconscionable terms or contracts are unenforceable); § 6
26 (prohibition against engaging in deceptive acts or practices); § 7 (contract terms limiting or
27 negating affirmations of fact or promises that have become part of the consumer contract are
28 unenforceable). Consumer contracts are also governed by additional mandatory rules—statutory
29 or otherwise—beyond those in this Restatement. See Comment 5. This Section describes the legal
30 implications of an attempt by the business to derogate from those mandatory rules. It restates

1 general principles of reformation of contracts and severability and applies them to consumer
2 contracts.

3 2. *Severability.* When a term in a consumer contract violates a mandatory rule, the court
4 may either: (i) refuse to enforce the entire contract, (ii) sever the offending term and enforce the
5 remainder of the contract without it, or (iii) limit the application of the offending term. If the court
6 enforces the contract without the offending term, it may fill the resultant gap as explained below.

7 The quality and magnitude of reformation of the contract that the court exercises should be
8 proportional to the severity and willfulness of the violation by the business. When the offending
9 term is immaterial, it should be sufficient to sever the term and enforce the remainder of the
10 contract. When the offending term is material, the court is more likely to refuse to enforce the
11 entire contract. The presence of a severability clause in the contract is relevant but not conclusive
12 for severability and enforceability questions.

13 In certain cases, when the offending term is material, the court may give the consumer a
14 choice between: (i) severing the offending term and enforcing the remainder of the contract, and
15 (ii) treating the entire contract as unenforceable. In deception cases, when the term constitutes a
16 deceptive act or practice under § 6, the consumer may be given that choice even if the term is
17 immaterial.

18 **Illustration:**

19 1. A contract contains a provision that allows the business to amend any of the
20 standard terms at its discretion, explicitly disavowing any good-faith or other constraint on
21 the business's discretion. The provision is material and its effect is to render the contract
22 illusory. The court should give deference to the consumer's choice whether to sever the
23 provision and enforce the remainder of the contract or to treat the entire contract as
24 unenforceable.

25 3. *Gap-filling.* When the court decides to enforce the contract without the offending term,
26 it may be required to fill a gap left by the unenforceable term. For example, if a price term is
27 excessive and unconscionable, or if a period of limitations is too short and unconscionable, the
28 term will not be enforced—but what price or limitations period would fill the gap created by their
29 severance? The rule in this Section treats this question as a gap-filling problem. It offers three
30 criteria of gap-filling. The first and principal criterion, stated in subsection (b)(1), requires the gap

1 in the contract to be filled with a reasonable term—the term that reasonable parties would choose
2 in the circumstances. This is the approach to gap-filling found in the Uniform Commercial Code,
3 Article 2, Part 3. In deception cases, when the term violates § 6, and the consumer elects to avoid
4 only the specific terms that are inconsistent with an affirmation of fact or a promise, the gap created
5 by the removal of the inconsistent term is filled by terms that reflect the affirmation of fact or the
6 promise or by terms that are reasonable in the circumstances. This form of redress protects the
7 consumer’s reasonable expectations under the contract and allows the consumer to recover the
8 benefit of the bargain.

9 Often, however, there is a range of reasonable terms, and it is within the court’s discretion
10 to choose a reasonable term along that range. If the offending term was placed in the contract by
11 the business without bad faith and in an attempt to protect a material interest of the business,
12 subsection (b)(2) enables the court to fill the gap while preserving as much of the original
13 agreement as may properly survive the severance of the offending portion. Once the offending
14 feature of the term is removed, the protection to which the consumer is entitled ends, and there are
15 no additional grounds for intervention and for further severance.

16 If, instead, the offending term was placed in the contract by the business in bad faith, for
17 example, when the business knew that the term was unenforceable, subsection (b)(3) enables the
18 court to fill the gap with a term calculated to give the business an incentive to avoid such bad-faith
19 drafting. In that case, the invalidated term is replaced with a term that operates against the business,
20 to an extent proportionate to the degree of bad faith. (Compare the interpretation principle of *contra*
21 *proferentem* in Restatement of the Law Second, Contracts § 206.)

22 **Illustrations:**

23 2. A contract contains an arbitration clause that requires consumers to arbitrate
24 under the auspices of a specified arbitration forum. The clause is unconscionable under
25 § 5 because the named arbitration forum has admitted to using pro-business biased
26 arbitrators. If the business did not know about this bias and chose the arbitration forum
27 innocently, subsection (b)(1) allows the court to replace the contractually specified
28 arbitration forum with another arbitration forum that the court considers most reasonable
29 in the circumstances, reflecting the most common market practices in similar transactions.
30 Subsection (b)(2) allows the court to replace the contractually specified forum with
31 arbitration that most resembles the proceedings in the named forum, but one that is free

1 from bias. This solution preserves, as much as possible, the original agreement, and should
2 apply only if the business was not aware of the scam when it named the arbitration forum
3 in its contract. Additionally, subsection (b)(3) allows the court to replace the biased
4 arbitration forum with a dispute-resolution forum that is most favorable, within reason, to
5 the consumer. For example, the court may let the consumer choose a forum, including
6 litigation in court. This solution should apply if the business knew about the arbitrators'
7 bias.

8 3. A contract contains an arbitration clause that requires consumers to arbitrate at a
9 forum that charges a filing fee that is held to be excessive and thus unconscionable under
10 § 5. If the business knew that this element of the arbitration clause would likely be deemed
11 unconscionable, the entire arbitration clause may be severed under subsection (b)(3) and
12 the consumer may then be entitled to bring an action in court. If, instead, the inclusion of
13 the unconscionable element was not done in bad faith, the court may decide to sever only
14 the offending element (say, by allowing the business to reimburse the consumer for the
15 filing fee, or by switching to arbitration at a different forum that does not charge the high
16 filing fee).

17 4. A consumer borrows \$5,000 under a three-year, unsecured loan contract carrying
18 an interest rate of 135%. The interest rate is unconscionable under § 5. The court may
19 adjust the interest rate to reflect the rate prevailing for similar loans (under subsection
20 (b)(1)). Or, the court may adjust the interest rate to the highest level that, in the
21 circumstances, is not substantively unconscionable (under subsection (b)(2)). If the court
22 concludes that the violation was deliberate and in bad faith, it may, under subsection (b)(3),
23 further reduce the interest rate (and levy other sanctions stipulated by law).

24 5. A contract contains a service-warranty provision, but grants the business the
25 power to modify the terms of the warranty and apply the new terms to past transactions,
26 entered into prior to the modification. The warranty-service agreement explicitly conflicts
27 with the good-faith requirement of § 4. The court may substitute a reasonable warranty
28 clause (under subsection (b)(1)), or merely remove the retroactivity element (under
29 subsection (b)(2)). If the court concludes that the violation was deliberate, it may substitute
30 a warranty-service agreement that is especially protective of consumers (under subsection
31 (b)(3)).

1 4. *Enforcement by the consumer.* While an offending contract or term cannot be enforced
2 by the business against the consumer, the consumer has no obligation to assert that the contract or
3 term are not enforceable, and may choose to obtain the benefit of the agreement. If the consumer
4 so chooses, the business may not assert that the contract or term are not enforceable.

5 5. *Other invalidating causes.* The methodology laid out in this Section also applies to
6 situations in which a contract or term is found to violate mandatory rules that are not restated here.
7 For example, when a term is unenforceable because it is against public policy, or when it violates
8 a statute, courts may need to supply an alternative term, and the three gap-filling approaches in
9 subsection (b) of this Section provide guidance.

10 **Illustration:**

11 6. A contract contains an early-termination fee that the court holds to be excessive
12 and thus unenforceable under the doctrine that requires liquidated damages to be
13 reasonable (but the court does not determine it to be unconscionable). Under subsection
14 (b)(1), the court would replace the fee with a reasonable fee. Under subsection (b)(2), the
15 court would merely reduce the fee to the highest level that it determines is permissible
16 under the penalty doctrine as applied to liquidated damages. Under subsection (b)(3), if the
17 court determines that the excessive fee was included in bad faith, the court may reduce it
18 to zero.

19 6. *Relation to Restatement of the Law Second, Contracts; the Uniform Commercial Code;*
20 *and other law.* The rules of this Section are consistent with the approaches taken by courts when
21 a term is deemed unconscionable under the provisions of the Uniform Commercial Code and the
22 Restatement of the Law Second, Contracts (as explained in the preceding Comments). This Section
23 goes further, however, restating the criteria courts deploy in adjusting the gap-filler to the
24 circumstances that led to the inclusion of the offending term. It allows courts to choose a
25 reasonable term more favorable to the consumer to discourage businesses from overreaching, or
26 more favorable to the business if the violation was innocent. Nothing in this Restatement is
27 intended to replace causes of action or defenses arising under the common law not expressly
28 addressed herein.

REPORTERS' NOTES

1 The legal consequences of a term that attempts to derogate from a mandatory rule are
2 restated in this Section. This Section begins by following the language of the Uniform Commercial
3 Code § 2-302 (Am. Law Inst. & Unif. Law Comm'n) and Restatement of the Law Second,
4 Contracts § 208 (Am. Law Inst. 1981). While that language was originally developed to govern
5 the consequences of an unconscionability finding, it applies more broadly to any contract or term
6 that violates a mandatory rule.

7 When a term attempts to derogate from a mandatory rule, the court can choose to not
8 enforce the contract at all, to sever the offending term and enforce the remainder of the contract,
9 or to limit the application of the offending term. That decision is influenced by the materiality of
10 the offending term. An immaterial term is more likely to be severed, allowing for the enforcement
11 of the remainder of the contract. If the offending term is material, the court is more likely to deem
12 the entire contract unenforceable.

13 When the court decides to sever the offending term and enforce the remainder of the
14 contract, it may need to fill a gap left by the severed term. The latter part of this Section addresses
15 this gap-filling problem. It identifies three criteria that have been followed in the case law. See
16 generally Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 STANFORD L. REV. 869 (2011); Bailey
17 Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L.
18 REV. 845 (1988).

19 The first and most widely used criterion for filling gaps left by unenforceable terms, stated
20 in subsection (b)(1), is the reasonableness criterion: replace the offending term with the most
21 reasonable alternative. For example, when the court strikes an arbitration term that picked a forum
22 too inconvenient to the consumer, it would replace it with the arbitration forum that the court
23 deems most reasonable. Or, if a court invalidates a liquidated-damages clause or early-termination
24 fee that is over-compensatory, it would replace it with standard expectation damages.

25 But the range of reasonable terms is often broad, and circumstances might justify choosing
26 a gap-filler at either end of this range. One such circumstance is when the offending term was
27 placed innocently, without intent by the business to overreach. Under that circumstance, a court is
28 more likely to follow the second criterion for gap-filling, stated in subsection (b)(2), which is
29 minimal intervention: adjust the contract minimally—only to the extent necessary to bring it across
30 the enforceability threshold. Stated by Corbin, in the unconscionability context, “a contract that
31 requires a payment of a very high interest will be enforced, *up to the point at which*
32 *unconscionability becomes an operative factor.*” 1 ARTHUR LINTON CORBIN, CORBIN ON
33 CONTRACTS § 129, at 556 (1963) (emphasis added). Corbin recognizes this rationale: “[T]he line
34 [representing the enforceable term] must be drawn somewhere, and it is drawn at the point where
35 the protection to which the buyer is justly entitled ends.” Arthur L. Corbin, *A Comment on Beit v.*
36 *Beit*, 23 CONN. B.J. 43, 46 (1949). “Partial enforcement [of a contract term] involves much less of
37 a variation from the effects intended by the parties than total non-enforcement would.” Corbin,
38 *supra* at 50. This criterion is consistent with the language of severability clauses that appear in
39 many standard-form contracts, which stipulate that if any provision of the agreement shall be held

1 illegal or unenforceable, that provision shall be limited or eliminated to the minimum extent
2 necessary so that the agreement shall otherwise remain in full effect. It is also consistent with the
3 doctrine of partial enforcement and the way it is applied when noncompetition clauses are found
4 to be unenforceable. As stated by one court, the restraint is “not enforceable beyond a time or area
5 considered reasonable by the [c]ourt.” *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 685 (Tex. 1973).
6 This criterion may effectively apply when the defendant is proposing to replace the unenforceable
7 element with one that the court deems acceptable. For example, if the court regards a particular
8 arbitration tribunal as too inconvenient and unreasonable, the court may replace the tribunal with
9 another forum proposed by the business, as long as it is tolerable.

10 The third criterion for filling gaps left by unenforceable terms, stated in subsection (b)(3),
11 is replacing the offending term with the term least favorable to the business. It is justified as a
12 mode of deterrence against deliberate overreaching, calculated to give the business an incentive
13 not to overreach. It should be applied only when the court determines that the business included
14 the term knowing that it was unenforceable. This added deterrence is needed, because, if the
15 drafting party expects that the court would only strike the excessive increment, what incentive
16 does it have to avoid overreaching? Such stronger intervention has been implemented in
17 employment cases in which employers insert restraints knowing them to be unenforceable: for
18 example, in *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 37 (Tenn. 1984), the court
19 notes: “We recognize the force of the objection that judicial modification could permit an employer
20 to insert oppressive and unnecessary restrictions into a contract knowing that the courts can modify
21 and enforce the covenant on reasonable terms. . . . [T]he employer may have nothing to lose by
22 going to court, thereby provoking needless litigation. If there is credible evidence to sustain a
23 finding that a contract is deliberately unreasonable and oppressive, then the covenant is
24 invalid.” See also *Jenkins v. Jenkins Irrigation, Inc.*, 259 S.E.2d 47, 51 (Ga. 1979) (holding that
25 when unreasonably broad territorial restrictions were found in noncompete covenants related to
26 the sale of a business, the court would enjoin the seller from competing in only that area shown by
27 clear and convincing evidence to be essential to protect the buyer); *Walker v. Sheldon*, 179 N.E.2d
28 497 (N.Y. 1961) (holding that punitive damages would be justified in a case in which fraudulent
29 transactions were not part of an isolated incident on the part of an otherwise legitimate business,
30 but were the very basis of the business). It is also consistent with punitive provisions in statutes
31 addressing violations of permissible contracting, e.g., Fair Labor Standards Act of 1938, 29 U.S.C.
32 § 216(b) (2006) (awarding an aggrieved employee who was paid less than minimum wage double
33 the unpaid wages); Alabama Small Loan Act, Code of Ala. Tit. 5, Ch. 18, Sec. 5-18-15(l) (reducing
34 the finance charge in a loan that violated the maximum permissible finance charge to zero dollars,
35 in addition to levying fines on the lender, if the excess charge was deliberate or in reckless
36 disregard of the permitted limits).

**APPENDIX
BLACK LETTER OF TENTATIVE DRAFT**

§ 1. Definitions and Scope

(a) Definitions:

(1) “Consumer” – An individual acting primarily for personal, family, or household purposes.

(2) “Business” – An individual or entity other than a consumer that regularly participates in or solicits, directly or indirectly, transactions with consumers.

(3) “Contract” – A promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

(4) “Consumer contract” – A contract between a business and a consumer other than an employment contract.

(5) “Standard contract term” – A term, relating to a consumer contract, that has been drafted prior to the transaction for use in multiple transactions between the business and consumer parties.

(6) “Affirmation of fact or promise” – Any statement about the transaction, including but not limited to statements about quantity, quality, characteristics, utility, price, discount, comparative cost, service, and remedy, intended to reach consumers, including in negotiations, advertising, brochures, or labels, or in any record accompanying the transaction, but excluding statements that would be reasonably understood by consumers as “puffing” or statements of belief not founded on fact.

(7) “Good faith” – Honesty in fact and the observance of reasonable commercial standards of fair dealing.

(b) Scope: This Restatement applies to consumer contracts, except to the extent that a matter is governed by statute or regulation. It restates contract-law principles under state law and takes no position on the proper relationship between statutory or regulatory requirements and these principles.

§ 2. Adoption of Standard Contract Terms

(a) A standard contract term is adopted as part of a consumer contract if the consumer manifests assent to the transaction after receiving:

(1) a reasonable notice of the standard contract term and of the intent to include the term as part of the consumer contract, and

(2) a reasonable opportunity to review the standard contract term.

(b) When a standard contract term is available for review only after the consumer manifests assent to the transaction, the standard contract term is adopted as part of the consumer contract if:

(1) before manifesting assent to the transaction, the consumer receives a reasonable notice regarding the existence of the standard contract term intended to be provided later and to be part of the consumer contract, informing the consumer about the opportunity to review and terminate the contract, and explaining that the failure to terminate would result in the adoption of the standard contract term;

(2) after manifesting assent to the transaction, the consumer receives a reasonable opportunity to review the standard contract term; and

(3) after the standard contract term is made available for review, the consumer has a reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden, and does not exercise that power.

(c) If the consumer manifests assent to the transaction, a contract exists even if some of the standard contract terms are not adopted. In such case, the terms of the contract are those adopted under subsections (a) and (b), and, if the consumer elects, the unadopted standard terms, along with any terms supplied by law.

§ 3. Modification of Standard Contract Terms

(a) A standard contract term in a consumer contract governing an ongoing relationship is modified if:

(1) the consumer receives a reasonable notice of the proposed modified term and a reasonable opportunity to review it;

(2) the consumer receives a reasonable opportunity to reject the proposed modified term and continue the contractual relationship under the existing term, and a reasonable notice of this opportunity; and

(3) the consumer either:

(A) manifests assent to the modified term or

(B) does not reject the proposed modified term and continues the contractual relationship after the expiration of the rejection period provided in the proposal.

(b) A consumer contract governing an ongoing relationship may provide for a reasonable procedure under which the business may propose a modification of the standard contract terms, but may not, to the detriment of the consumer, exclude the application of subsection (a), except that the established procedure may replace the reasonable opportunity to reject the proposed modified term with a reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden.

(c) A modification of a standard contract term in a consumer contract is enforceable only if it is proposed in good faith and if it does not have the effect of undermining an affirmation or promise made by the business that was made part of the basis of the original bargain between the business and the consumer.

§ 4. Discretionary Obligations

(a) A contract or any term that grants the business discretion to determine its rights and obligations must be interpreted, when reasonably susceptible to such interpretation, to provide that such discretion will be exercised in good faith.

(b) A term in a contract that purports to grant the business absolute and unlimited discretion to determine its contractual rights and obligations unconstrained by the good-faith obligation is unenforceable by the business.

§ 5. Unconscionability

(a) An unconscionable contract or term is unenforceable, to the extent stated in § 9.

(b) A contract or a term is unconscionable if at the time the contract is made it is:

(1) substantively unconscionable, namely fundamentally unfair or unreasonably one-sided, and

(2) procedurally unconscionable, because it results in unfair surprise or results from the absence of meaningful choice on the part of the consumer.

In determining that a contract or a term is unconscionable, a greater degree of one of the elements in this subsection means that a lesser degree of the other element is sufficient to establish unconscionability.

(c) Without limiting the scope of subsection (b)(1), a contract term is substantively unconscionable if its effect is to:

(1) unreasonably exclude or limit the business's liability or the consumer's remedies that would otherwise be applicable for:

(A) death or personal injury for which, in the absence of a contractual provision in the consumer contract, the business would be liable, or

(B) any loss to the consumer caused by an intentional or negligent act or omission of the business;

(2) unreasonably expand the consumer's liability, the business's remedies, or the business's enforcement powers that would otherwise be applicable in the event of breach of contract by the consumer; or

(3) unreasonably limit the consumer's ability to pursue or express a complaint or seek reasonable redress for a violation of a legal right.

(d) In determining whether a contract or a term is unconscionable, the court should afford the parties a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect.

§ 6. Deception

(a) A contract or a term adopted as a result of a deceptive act or practice by the business is unenforceable by the business to the extent stated in § 9.

(b) Without limiting the scope of subsection (a), an act or practice is deceptive if it has the effect of:

(1) contradicting or unreasonably limiting in the standard contract terms a material affirmation of fact or promise made by the business before the consumer assented to the transaction; or

(2) obscuring a charge to be paid by the consumer or the overall cost to the consumer.

§ 7. Affirmations of Fact and Promises That Are Part of the Consumer Contract

(a) An affirmation of fact or promise made by the business that creates a reasonable expectation by a reasonable consumer who is its intended audience that the subject matter of the contract will have the described attribute becomes part of the consumer contract.

(b) An affirmation of fact or promise made by a third party that creates a reasonable expectation by a reasonable consumer who is its intended audience that the subject matter of the contract will have the described attribute:

(1) becomes part of the contract between the business and the consumer if:

(A) the business knew or reasonably should have known of it, and

(B) the consumer could have reasonably believed that the business intended to stand behind the affirmation or promise; and

(2) creates a contractual obligation of the third party to the consumer, even if the third party did not transact directly with the consumer, so long as the third party has an appreciable financial interest in the contract between the business and the consumer.

(c) Standard contract terms that purport to negate or limit affirmations of fact or promises that become part of the consumer contract under subsections (a) and (b) are not enforceable.

§ 8. Standard Contract Terms and the Parol Evidence Rule

A standard contract term that contradicts, unreasonably limits, or fails to give the reasonably intended effect to a prior affirmation of fact or promise by the business does not constitute a final expression of the agreement regarding the subject matter of that term and does not have the effect under the parol evidence rule of discharging obligations that would otherwise arise as a result of the prior affirmation of fact or promise.

§ 9. Effects of Derogation from Mandatory Rules

(a) If a court finds that a contract or any term excludes, limits, or violates any mandatory rule, the court should do one of the following:

- (1) refuse to enforce the contract,**
- (2) enforce the remainder of the contract without the derogating term,**

or

- (3) limit the application of the derogating term.**

(b) If the court enforces the remainder of the contract without the derogating term, the court may replace the derogating term with:

- (1) a term that is reasonable in the circumstances,**
- (2) a term that effects the minimal correction necessary to bring the contract into compliance with the mandatory rule, or**
- (3) if the contravening term was placed by the business in bad faith, a term that is calculated to give the business an incentive to avoid placing such terms in consumer contracts.**