Consumer Finance Monitor (Season 5, Episode 20): The American Law Institute's Restatement of the Law, Consumer Contracts: An Introduction for Consumer Financial Services Providers, with Special Guest Steven O. Weise, ALI Council Member

Speakers: Alan Kaplinsky and Steven O. Weise

Alan Kaplinsky:

Welcome to Consumer Finance Monitor Podcast, a podcast show sponsored by the law firm of Ballard Spahr. I'm Alan Kaplinsky. I'm Senior Council at Ballard Spahr. I'm formerly the chair of the consumer financial services group, and I'm very pleased to host our special podcast show today. Let me, first of all, tell you the topic and then I will introduce our guest. So, what we're going talk about today is the American Law Institute Restatement of the Law of Consumer Contracts, tentative draft number two. Tentative draft number two of this restatement is going to be considered by the members of the American Law Institute at a meeting in Washington, DC on May 17th. It will actually be the first item on the agenda on May 17th. It is widely anticipated that after the reporters describe this version of the restatement and the various sections of the restatement that it will come to a vote and it will then be approved by the members and this will become a formal restatement.

Alan Kaplinsky:

It should be noted that this Restatement of the Law of Consumer Contracts supplements, to some extent, I think that's probably the right word, but our guests will clarify that for me, the Restatement of the Law of Contracts, which has been a formal document of ALI for many, many decades, and this is something new. It's largely, I would say it's fair to say it's flown under the radar, at least during the pandemic. It was considered about three years ago at a membership meeting and they did not get through it. I think they maybe passed. There was one section the members approved, but it didn't have the requisite support and the reporters in the meantime went back to the drawing board to some extent and made a lot of changes. Now, it's up once again and people are going to have to become very familiar with this, particularly those of you that deal with consumer contract matters.

Alan Kaplinsky:

It is a lot broader than consumer finance. It covers most consumer contract matters because it will be cited in briefs and it'll be cited by the courts. So, let me now introduce our guest. Our guest today is Steve Weiss and Steve is the partner in the corporate department of Proskauer Rose, and he practices in all areas of commercial law. His experience in financing is extensive, especially in those secured by personal property, including structured financing. He also handles matters involving guarantees, sales of goods, equipment leasing, commercial paper and checks, letters of credit, and investment securities, workouts, and California real property anti-deficiency laws. Steve's experience covers e-commerce contract law, including plain English drafting, electronic contracting, legal opinions, and consumer credit law compliance matters. He's a member of the council of the American Law Institute, where he's actively participated in many projects, including this Restatement of the Law of Consumer Contracts that we're going to be very focused on today.

Alan Kaplinsky:

He's also a member of the permanent editorial board for the Uniform Commercial Code and several UCC drafting committees, including the drafting committee currently preparing amendments to the UCC to address emerging technologies. In addition to that, Steve lectures widely on commercial law topics and legal opinion letters and is the author of over a

hundred articles on these topics. One other thing I would add, of all the members on the council of ALI, Steve has really played a pivotal role and a leadership role in trying to reconcile the various positions that various people and groups and companies were taking. This was, at least through 1919, a very controversial and contentious restatement with ironically industry groups and consumer groups opposed to it, but generally for different reasons. Steve has really played the role of the diplomat in getting things ironed out. I've seen it firsthand because I was on the board of advisors for this project at ALI, which, by the way began, I believe, in 2011. So, we're in the 11th year. I got a lot of questions for Steve, but first of all, a very warm welcome to our podcast show today.

Steven O. Weise:

Well, thank you, Alan. I'm pleased to be here and glad to have another opportunity to chat about this subject.

Alan Kaplinsky:

Great. So, Steve, I'm going to start with some fundamentals, and that is what is the purpose of a restatement, or what is a restatement?

Steven O. Weise:

So, thank you, Alan. The American Law Institute since its formation almost a hundred years ago, has undertaken to try to clarify the law. As the United States has had more of a national economy, it's been important to have an understanding of how basic areas of law, contract law, tort law, choice of law, things like that, operate across the states, and as our clients and everybody enters into transactions between different states, it's good, it's efficient for the economy to have a consistent set of rules for contract law. While many of the states have very similar rules, let's say the common law of contracts, they're not identical. What the ALI does is puts together a group one, two, three reporters who are typically very experienced professors in this area, a group of advisors, like you are a member of, both from practice, industry, and law schools to advise the reporters.

Steven O. Weise:

It takes all the cases out there and the reporters end up reading hundreds and hundreds of cases and tries to come up with a set of provisions in the restatement that synthesize all these rules across the state. Sometimes, a state may not have a well developed set of cases in a particular area of, say, contracts law. So, instead of having to research the law in a whole bunch of other states, they can open up the restatement and find the right subsection of the restatement and say, "Oh, look. Bunch of very capable people have thought about this and read the cases and made everything consistent and here's a rule and we can adopt it or not." But very often, they do adopt that rule.

Steven O. Weise:

So, that's, that's the approach. The Restatement of Contracts, there was a first restatement somewhere in the early days of ALI. The second restatement was completed around 1980. Of course, had 50 years of law to update. Now, this consumer contracts takes a look at how the courts have taken the general rules of contract law and applied them in the context of consumer transactions and in particular, over the last 10, 15 years, online consumer transactions.

Alan Kaplinsky:

So, Steve, I take it that the restatement is an exposition of what the law is, the common law, not statutory law, and we'll get to that in a minute. What the common law is throughout the various states. It's not a document which reflects the desires of the reporters or ALI or anybody else.

Steven O. Weise:

That's exactly right, Alan, the goal is to figure out what the courts have done to see if you can find a through line, as it were, through the cases in some of the areas, and we can talk about this as we go through. The courts have been very consistent in

their approach, such as the online adoption of standard terms to a contract. In the unconscionability area, the cases are a little more split, not quite half and half on whether you need, and we can talk about this, procedural and substantive unconscionability or not.

Steven O. Weise:

The reporters have the ability, if they think there's a minority rule that's better than a majority rule, they can propose that to the council, propose that to the members. But they have to explain why they think as a policy matter, the minority rule is better. Maybe the majority rule has become outdated, in case of developments. But it's not like somebody's writing a statute and decides on policy goals and then emerges at the far end with a statute that implements those policy goals.

Alan Kaplinsky:

So, in trying to decide what to put in the restatement when the law isn't completely consistent with it throughout the 50 states where there is a majority view and a minority view, does it matter at all during that deliberative process whether the states taking the majority view from a population standpoint outweigh the states that take a minority standpoint? In other words, is the views of one state's highest court any better than the views of another state's highest court?

Steven O. Weise:

No, not at all. It really looks at the reasoning and how solid the reasoning has to be. There's factually a very good example in the section two, which deals with questions of adoption of standard terms to a contract. At the beginning of last year, the Massachusetts Supreme Judicial Court issued a very important decision called Kauders. One might think of Massachusetts as a relatively large state, and it was very consistent with what the restatement did. The reporters have tinkered and tweaked the restatement to be consistent with it. But then early this year, the Supreme Judicial Court of Maine, which is a relatively low population state in a case called Sarchi, just the same issue and came out with the exact same set of results in terms of analysis and whatnot. So, it was always reassuring to have consistent results, but you had the same answers in both places.

Steven O. Weise:

When we talk about it in a little bit about unconscionability, this question of whether you need procedural and substantive or one or the other, there was a lot of discussion about that and reporters, through a research assistant, looked at the law of all 50 states and totaled it up. There was little bit in the 50s required both and in the 40s would look at one or the other. But there was no effort to weigh the votes, as it were, like the electoral college or something like that. It sort of looked at the trends and the real goal is to find reasoning that is persuasive and consistent and things like that.

Alan Kaplinsky:

Yeah. So, Steve, why was this restatement undertaken, this project undertaken to begin with? As you pointed out, we've had a Restatement of the Law of Contracts for many decades. We now have a second Restatement of the Law of Contracts. Why can't everything be dealt with in the general restatement of contract law?

Steven O. Weise:

So, the consumer contract disputes have gotten more frequent over the last 20 years or whatever, since people started doing so many online transactions. As it happened, of course, during the pandemic, there was even more of that going on. The courts, as common law courts were doing what they were supposed to do, which is take the general principles of contract law and applying them in the context of consumer transactions, and the ALI thought, well, there's a sufficient body of law developing here where it would be helpful to businesses, to consumers, to courts to pull together what the courts have been doing in this context because many of the issues here have to do with reasonable notice or the context of the transaction. If you and I, Alan, enter into a transaction law firm to law firm, we're fairly sophisticated users of transactions.

Steven O. Weise:

So, the context there is we can maybe fend for ourself a little bit more. Consumers' ability to understand the nature of what's going on if they're not trained lawyers and all that is a little less. So, what the courts try and do is take general rules of contract law largely out of the restatement and then apply it in context. That's what this is about is seeing what the courts have done in context. I've had judges say to me informally that they really appreciate this project because they're seeing these cases at the trial court level and they need some help in how to take those rules of contract law and fit them into this context.

Alan Kaplinsky:

I know I may be overgeneralizing here, but I take it that at the end of the day, there may be fact scenarios in a consumer to business context where a certain dispute arises, and a similar dispute could arise in a B2B context where the outcome could be different. In other words, if you apply the restatement of contracts, which applies generally, the rules might differ to some extent. Is that correct?

Steven O. Weise:

That right. It's not that the rule per se would differ, it's that the application of the rule in the context. So, if I go online to buy something, I'm a lawyer, I know contracts, my relative sophistication would mean that I have a better chance of understanding the terms I might click through and actually read the terms and conditions. What the cases do is one of the many factors that is looked at is the sophistication of the consumer.

Steven O. Weise:

If it's somebody like me, who's relatively sophisticated in business and legal matters, then that counts towards enforceability, so to speak. If somebody who's less sophisticated in those areas, the court takes that into account. One of the key points, particularly the section two, which has to do with adoption of standard terms, is that there's a dozen or 15 factors one looks at to determine whether there's reasonable notice of what's going on, and the nature of the consumer is one of those factors.

Alan Kaplinsky:

So, how do we know, when does this Restatement of the Law of Consumer Contracts, when does it apply? Is it only apply business to consumer transactions, or might it apply in a situation where there is a business doing business with a small unsophisticated business? Because if anybody in the consumer finance area now, more and more the principles that have applied in a B2C context are being applied when the small business is the actual consumer.

Steven O. Weise:

Yeah. So, the set of factors that go into this ... Well, let me just back up a moment. The restatement itself applies only to business and consumer transactions on its face. But the test, the multifactor test, it would not surprise me if a court said, "Well, what they did here is they took the rules of contract law and looked at the context and the context on its face is consumers. But if we have a small business, maybe they're not consumers. Maybe they're a little more sophisticated. Well, let's take the reasonable notice standard, which is part of the standard of section two and adoption of standard terms and let's take the factors, but let's take them in the context, not of a consumer, but the context of a small business and see how it fits in there."

Steven O. Weise:

Even in the consumer area, there are some cases where the very same judge looks at a fact pattern with an unsophisticated consumer and says no contract or no adoption. Then a year or two later, the exact same judge and the exact same business involved looks at it and says, "Well, here, the consumer was sophisticated. So, I'm going to be a little more open to finding that there was reasonable notice and the standard terms were adopted." So, the exact same judge involving the exact same business held in one case no adoption, and in the second case, there is adoption. So, it's very contextual, what sometimes is referred to as the totality of the circumstances. But that takes into account who the parties are.

Alan Kaplinsky:

So, how does the restatement, Steve, relate to statutory law? Is there a total disconnect between the two?

Steven O. Weise:

So, the restatement is an effort to restate, as it were, collect and restate common law, what the courts use with the common law of contracts. In some cases, courts have, in deciding common law questions of deception and things like that, well, sometimes for inspiration, let's say, will look at what the anti-deception statutes in the consumer context might say is a deceptive act. So, the restatement does not implement those statutes. What it does is it looks at what courts have done in contract law or court misrepresentation law. If the court has found analogous reasoning and the court then makes a whole conclusion as a matter of common law that a certain thing is deceptive or a certain act rather is deceptive, then the court will decide that as a matter of common law, and then the restatement would take the common law conclusion.

Steven O. Weise:

This was most evident in the second restatement where the then president of the American Law Institute, Herb Wexler, was talking about, and he used the word inspirations, which is why I used it before, that the uniform commercial code, which is a statute, particularly in the sale of goods area, had a series of rules that dealt with contracts for the sale of goods and said that those rules, even though they were statutes, had good thinking embedded in them. So, they were, he used the word inspiration. They were inspiration for common law courts who were considering those issues. They said, "Well, somebody thought about this and looks like a pretty good rule and this was part of the evolving of the common law of contracts. So, let's use it." So, that's how it sort of fits together.

Alan Kaplinsky:

Understood. So, let's now roll back, go into our time machine, I guess, and go back to May of 2019. At that, I mentioned during my introductory remarks that it came before the annual meeting of members at that time, but did not gain approval. I'm wondering if you could tell us why that happened and what were the key lessons that were learned from the discussion that took place at that annual meeting?

Steven O. Weise:

Yeah. So, the section one was approved and there were a lot of questions a lot of people had and there was an extensive discussion and the meeting simply ran out of time to keep pushing on. But the lessons learned were very important. One concern some people had was that, although there was a very consistent body of law in some of these areas, much of it was federal courts applying and interpreting state law. There was one case in California, for example, on the question of adoption of standard terms in online contracts. But that was one case and it was an intermediate court in California and one hope they got it right, but it was only one case. For some reason, a lot of these cases ended up in federal court. Who knows why? We had a lot of circuit court decisions, Second Circuit, Seventh Circuit, First.

Steven O. Weise:

Just about all of the federal circuits had addressed these issues very consistently, but there wasn't a lot of state law. So, there was a very fair comment. They said, "Well, gee. Shouldn't we wait and see, for example, what the state courts do with this?" Since then, the two cases I mentioned earlier about big states and little states, the Massachusetts case and the Maine case, we have the highest courts in those states addressing the precise issue that is in section two of the restatement. In California, by way of example, we have another four, five, six cases at the state court level. Not the California Supreme Court, but the intermediate court, and they all cite each other. They all cite the federal cases. The same thing, the reporters attract common law developments across the country. There are a lot more state court cases, which was a very fair comment back in 2019.

Steven O. Weise:

They've all converged and they've converged in a way where there are consistent with each other, consistent with what their restatement said. But the reporters also saw in these cases that the courts used certain ways of phrasing things. There were comments that came in from industry, from professors and things like that that pointed out developments in cases. So, they went back and looked at it. While the black letter is substantially the same as it was, the comment, which elaborates on it, has a much more full discussion of the kinds of factors the courts have been looking at. So, it's the lessons where, see what the state courts are doing, see what people are saying in their comments on these kinds of things, keep that broad net cast. Try to use the wording the courts have used, the terminology, the factors, things like that.

Alan Kaplinsky:

Right. Right. I take it, most of the activity dating from that annual meeting in 2019 up to now has been the reporters, and by the way, we should mention who the reporters are. They're very distinguished law professors.

Steven O. Weise:

Yeah. So, it's Omri Ben-Shahar from the University of Chicago, Oren from Harvard Law School, and Florencia Marotta-Wurgler from NYU Law School, all very well versed and distinguished in contract law, consumer law, things like that. They work really well together on this and are they're really smart. It's fun working with-

Alan Kaplinsky:

Right. Right. Yeah. I know them. I actually knew a couple of them even before the project began. Oren Bar-Gill collaborated with Senator Elizabeth Warren, who was not a senator back then, in writing a seminal law review article for, I think it was the Penn Law Review, University of Pennsylvania, that became the blueprint for the Consumer Financial Protection Bureau. He definitely had served his dues in studying quite a bit of consumer law. So, there was one meeting I think, of the board of advisors. Unfortunately, I couldn't attend that. Then it came before the council. Am I right? I think in January?

Steven O. Weise:

That's right. The so-called, the board of advisors, and there's a second group called the members consultative group and they met together with the reporters, went through the full thing, and then the council reviewed it in its entirety in January with the reporters there to answer questions and take comments and the council approved it. That's part of the standard ALI process. It goes to the council before it goes to the membership and that'll be in front of the members for their consideration.

Alan Kaplinsky:

If you could describe for us, I think it would be very helpful. What are some of the important changes or clarifications in this draft restatement that came about as a result of all the efforts of the reporters and other people?

Steven O. Weise:

Thanks, Alan. So, a couple of things. One is there was some concern on what the relationship was with the restatement of contracts, that this is not a full restatement of consumer contracts. It's a restatement of particular issues. So, language is added clarifying that the full restatement still applies, and except that to the extent this restatement takes the full original restatement of contracts second and applies it, that this elaborates in the consumer context. Then that's part of that, rather. There was a particular provision, section 211, sub three of the second restatement, which has to do with reasonable expectations of consumers. Even though the general thing I just said, that the full second restatement applies to this unless there's something in particular in this new restatement, people thought that was a very important section in this context. So, language was added to the black letter, gave them more emphasis to the continued applicability of that section.

Steven O. Weise:

Similarly, there's a rule I'm sure we're all familiar with in contract law that if there's an ambiguity in the agreement, you interpret it against the drafter. That's almost always in this business context, it's the business that did the drafting and not the consumer, of course. So, if the business drafted in an ambiguity, that rule, which is already in the second restatement, continues to apply. That shouldn't be a big surprise, I would think. Language is being added, that the analysis of reasonable notice takes into account the nature that a consumer is probably not going to be sophisticated most of the time. So, that's a factor the court would take into account. The question of who has the burden of proving the satisfaction of the elements stated in the restatement, again, that was already there in the law. The person trying to enforce the contract has to prove that it exists. But again, people were concerned.

Steven O. Weise:

So, the reporters said "Fine. We'll add some express language that says that the business has to demonstrate that the terms of the contract have become a contract in these contexts." So, that's, again, a lot of things that were already there implicitly through the continued relevance of the restatement second of contracts have been made express, which just says expressly what I think people thought was probably already there implicitly. So, that came along. There's provisions on adoption of modifications to a contract. There have been some very important changes there. One of them was to add a test taken directly from the second restatement of contacts, contracts rather, that the modifications have to be fair and equitable. Those are the three words that are in the second restatement that was, people thought, implicit through the good faith requirement in the earlier draft of the consumer contracts restatement, but it's been added again expressly to clarify that there was no effort to leave that rule behind, so to speak, in the second restatement modifications.

Steven O. Weise:

Also now have a rule that if the contract has been substantially performed that you can't go back and retroactively change a done deal, so to speak, and the further definition of the meaning of good faith, that you've got to have a good faith reason to want to amend it, you can't just mess around with the contract because you'd like to because you've got the power to do it. I've mentioned the unconscionability question and the original 2019 version said that in order to find unconscionability, there had to be both procedural and substantive unconscionability, so-called sliding scale. More of one means less than the other and vice versa. There were a fair number of comments. Some of these came up with the council also that, but while that's true, mostly, not all the states adopt that. So, the reporters said, "Okay, we hear you. We'll go out and do a survey."

Steven O. Weise:

ALI has what they call fellows, which are law students who are on staff to do some research, and one of them was asked to look at the law in all 50 states. He did exactly that, and it turns out, somewhat contrary to some of the expectations, that there's a very large minority of states that can say one or the other, but you don't need both all the time. So, the reporters said, "Okay, that's a substantial minority rule." It's not just an isolated state here, an isolated state there. So, the test for unconscionability in section five of the restatement was revised to say, well, look at all these factors as a group, as a holistic group. If some states want to have both, that's fine. If some states want to look at it as a combined analysis, that's fine. It explains why in the comments this change was made from the black letter formerly saying you got to have both to the black letter now saying we got these factors. So, all that's explained out in context here so people can understand what these changes were.

Alan Kaplinsky:

Yeah. So, I take it that particular change is something that the consumer advocates wanted. As I recall, reflecting back on some of the problems they had with the earlier draft, they didn't like the fact that the earlier draft had adopted that sliding scale that you needed both.

Steven O. Weise:

I think that's right, Alan. But this also goes to demonstrate the point you made in the question and my answer earlier that this is not a project where the reporters get to implement their views of the world, but rather reporters said, "Well, let's go take a look." Well, let's do the research, see what the states have done and the research was done and there's an extensive memo on this. Lo and behold, there's a very substantial minority view. So, the consumers wanted it, but it wasn't changed because the consumers wanted it. It was changed because the state cases demonstrated that what they wanted was consistent with what a large minority was doing.

Alan Kaplinsky:

Right, right, right. I'd like to maybe delve a little bit into the nitty gritty of the restatement and maybe first start with the adoption of the standard contract terms. I guess without getting into too much of the weeds, I'm wondering if you could describe what the restatement says in terms of how online contracts are formed, because that's really, in today's environment, that's where the great interest is. It's not so much bricks and mortar anymore. It's in an online environment where these phrases like click wrap and browse wrap, and I think there are some other terminology has been used. How did that all get sorted out?

Steven O. Weise:

Yeah. So, it got sorted out, I think, quite nicely. Again, totally consistent with these cases. So, there's an overall test that the consumer has to have reasonable notice, and I'll come back to what that means, of two things. The terms and the fact that by taking a particular act, the consumer will be entering into a contract on those terms. So, the question then is, well, what the heck is reasonable notice in the online context? The reasonable notice comes from general contract law. But with this online context and consumers is what's new about this. So, the restatement, and particularly over the last three years, has developed an extensive comment, comment two to section two, that says we got all these factors. Often, the standard terms, the so-called boiler plate sometimes, are not in the page you're looking at, it says, "Click here if you want to see our standard terms and conditions," and there's a link. Then you can click the link and you go see the standard terms and conditions.

Steven O. Weise:

Among the factors are, well, how obvious is it that that link is important? Is it just something buried someplace? Is it near the beginning or maybe near where you click, "I agree," or something like that? So, you look at the process. Is it presented in a way where people are likely to see it? A whole bunch of factors like that? Then you mention the click wrap and the browse wrap. Click wrap is where you click a button says, "I agree." So, it's pretty clear you meant it. If you did that browse wrap, the webpage says, "If you continue to use our product, we'll treat that as your agreement." So, it's less of an overt manifestation. So, what the courts have said, "Okay, we've got this overall test of reasonable notice, and then we have these factors of how obvious it is. Where the link and is the link distinctive, and all that?"

Steven O. Weise:

Then they say, "Well, in click wrap, the consumer's manifestation of agreement is pretty clear." So, that's easier to satisfy reasonable notice. In the browse wrap, the consumer may not understand that by continuing to use the service or buy the goods, they're actually entering into a contract. So, the courts apply a tougher analysis using all the same factors. But the way they weigh the factors and apply the factors, this is the same kind of thing that we were talking about before, sophisticated, less sophisticated consumers.

Steven O. Weise:

Browse wrap is at one end where it's the toughest application of the test. It's the same test, but the weighing and application of the factors are done in a little more strict sense, so to speak. Then in between, there are all these great terms people have come up with, scroll wrap and all sorts of things. One California court said, March 29th, the court said, I'm paraphrasing, that all

these terms are nice, but the terms don't matter. What matters is we do the analysis of whether there was reasonable notice and we apply all these tests, which are substantively the same tests you see in the restatement.

Alan Kaplinsky:

I take it reasonable notice doesn't mean that in order to be bound, the consumer has to have read the relevant terms of the contract. Nothing has changed there, right? It's always been the law that you're bound by what you sign. You put your signature on a contract and then you go to court and say, "Well, I didn't read it. I didn't know that was in there." That wasn't going to help you then and it's still not going to help you today. Am I right?

Steven O. Weise:

That's exactly right. The restatement expressly says the expectation is that consumers aren't going to read it. If businesses don't read them half the time, certainly consumers aren't going to read them. So, this reasonable notice overall test with the specific implementation is, roughly speaking, saying, "Okay, we know you're not going to read it, but to give you a fair shot, you have to have reasonable notice that you're about to enter into a contract, reasonable notice of the terms and conditions," that sort of thing. So, at least you're sort of a fair warning kind of approach. But if you don't read it, you're still stuck with it if there was reasonable notice.

Alan Kaplinsky:

Yeah. Let's turn to that modification or change in terms provision because that also is very, very important to the consumer financial services industry because credit card issuers or other purveyors of revolving or open-end credit are using changing terms all the time. Nothing is etched in stone, and the same thing with other kinds of consumer contracts. Deposit account, checking account agreements, same thing. So, I know you referred to it a little bit earlier during our discussion, but how will the law look at a new term that's added through a change? How's that going to work?

Steven O. Weise:

Yeah. So, there are two paths on this. So far, we're talking about the first path. Let me talk about the second path and then I'll come back to the first path. The second path is one I suspect most credit card companies, banks will use. That is that if the original contract has a provision that says, "We can amend this contract by doing A, B, and C," and then they do A, B, and C, and it's done in good faith and it's fair and equitable, then the section 3B of the restatements says, "Fine. You can do that."

Steven O. Weise:

What 3A says, and that was some of the changes I referred to before, if you don't have a built in amendment modification provision, as I suspect most credit card companies would, for example, or banks, people who are in that industry, if you don't have that, then you can still do an amendment. But the same reasonable notice standard apply. So, when the consumer receives notice, the amendment has to be reasonable. The links have to be apparent, all that sort of stuff. Plus, the same good faith, fair, and equitable tests apply. Plus, you can't amend a contract that's been substantially completed and change the terms after the fact. So, it's more of a going forward kind of thing.

Alan Kaplinsky:

Yeah. Let's take a subject that's near and dear to my heart, and that is adding an arbitration provision through a change in terms notice. Many years ago, gee, probably at least 20 now, there was a case called Beatty vs. Bank of America where bank of America was adding a, I think it was, yeah, an arbitration provision, I think, to its credit card account agreement, and the court said that change would not be effective because the subject of dispute resolution was not dealt with in the original contract. It's not enough just to have language saying, "We have the right to change terms and when we do that, this is how we're going to go about it." In order to change something, the subject that is being addressed has to have been dealt with in some other fashion. How's that going to work?

Steven O. Weise:

Yeah. So, two things. One is the restatement assiduously stays clear of what the Supreme Court has been up to in the arbitration area because that's federal law and, of course, state law here.

Alan Kaplinsky:

The US Supreme Court. Yeah.

Steven O. Weise:

US Supreme Court. Right. So, the AT&T case and all the subsequent cases since then, they are what they are and that's what it is. But more specifically, as a matter of state law, I think that would be analyzed under the fair and equitable test and whether it's so unrelated that it just doesn't fit in or, in other words, if you amended a contract to buy some goods and then the amendment had something to do with buying services wholly unrelated to the goods, that might be not fair and equitable.

Steven O. Weise:

Adding an arbitration clause, I don't want to speculate too much, but there's nothing per se about whether it has to relate to the subject matter. I think it would come under the broader rubric of good faith and fair and equitable as a whole. So, for example, if the contract was performed and the consumer had a complaint and they brought an action, I think it might be tough to add the arbitration clause after the fact. But if it's mid-contract and it's not substantially performed and it provides for arbitration of the matters discussed in the contract, or transaction rather, covered by the contract, then that's going to probably get a better treatment, I would guess, under somebody applying the fair and equitable test.

Alan Kaplinsky:

Yeah. Let turn, I guess, to section four, discretionary obligations. What does that cover, Steve?

Steven O. Weise:

Yeah. So, here, his brings back, in large part, our good friend, good faith. Of course, the second restatement and contract law in most every state, I think, says that there's implied covenant, good faith, and fair dealing, which requires honesty and fact and the observance of reasonable commercial standards of fair dealing. So, if a business has discretionary rights to take certain actions, it's a reminder that you've got to do that in good faith. What the restatement says has two parts. It says there's this general good faith role, as I described, and then it says if the business attempts to write a provision that says, "We don't have to act in good faith. When we mean discretion, that includes our bad faith discretion," then there restatement says, "Well, we should just throw that out." But if it's discretion in good faith, that's okay, but it's got to be in good faith.

Alan Kaplinsky:

Okay. Now, let's turn to unconscionability. We talked already about, I guess, one of the more important aspects of unconscionability, namely the question of whether there's got to be both procedural and substantive unconscionability. You discussed how the reporters dealt with that issue. Are there any other important issues dealing with unconscionability that our listeners ought to be aware of?

Steven O. Weise:

Yeah. There's one other one, which was really, I think it was there in the 2019 draft, but in any event, certainly there now, that even in states that require procedural unconscionability and plus some level of substantive unconscionability, a lot of states already had a rule, California in particular, that if it's a so-called adhesion contract, which is sometimes hard to define, that the mere status as an adhesion contract satisfies the procedural, not the substantive, but the procedural unconscionability, and when applying the sliding scale, procedural unconscionability based solely on the existence of an adhesion contract is a low level of procedural unconscionability.

Steven O. Weise:

So, if that was the only procedural unconscionability, you would still have to show a fairly high level of substantive unconscionability. The restatement has a provision that says that if you have a non-negotiated term, which is going to be the case in almost every one of these online contracts, that would establish procedural unconscionability. So, the big discussion about whether you need one or both is going to be sort of a moot point a lot of the time because there's almost always going to be procedural unconscionability under whether you call it non-negotiable terms or adhesion contracts, which is what some state courts lose, use rather, as terminology. So, the real question, I think, will be is it substantively unconscionable or not?

Alan Kaplinsky:

So, I know when we talked about arbitration a moment ago, you said this restatement does not deal with any of the US Supreme Court opinions that have held under the Federal Arbitration Act, that it preempts state law to the extent that under state law, the arbitration provision would be unconscionable. But I'm wondering, there are, I guess, some limited circumstances in which the Federal Arbitration Act does not apply. That is where there's no interstate commerce involved. In an online environment, there's always interstate commerce involved. But if you had a situation like that where it was a purely very local transaction, not online, does the restatement take a position on arbitration, consumer arbitration?

Steven O. Weise:

No, it doesn't. It uses arbitration clauses as examples, mostly in the standard terms provision, section 10, and whether there was reasonable notice of the existence of the arbitration clause, for example. But there's, there's no rule that says that you can't have an arbitration clause. There are provisions that say that it could be substantively unconscionable if the consumer gives up important rights, they agree, for example, that they can't sue if they're physically injured or something like that. Not sue. They can't make a claim, I shouldn't say sue, that sounds like court vs. arbitration.

Steven O. Weise:

So, there's no, per se, as it were, rule on that. There are general rules and I would think in a particular circumstance, a court would look at whether mandatory arbitration clause interferes with an important right, or if it said not only do you have to arbitrate, but you can't bring personal injury claims ever, or something that would be affected by one of these general rules to say giving up super important rights can be-

Alan Kaplinsky:

What about a class action, a class action waiver? Just about every arbitration provision has that language. How does that bear on this issue?

Steven O. Weise:

Yeah. So, the same thing. The restatement doesn't, again, have any express view on class action waivers as such, and rather has these generic tests about giving up very important rights. It's sort of like, but only sort of like the UCC has a provision for individuals that waiving rights for claims for personal injury are unconscionable or something like that. So, there may be something like that. How a class action waiver would fit in there, there's nothing express. So, it would be tested under these more general rules.

Alan Kaplinsky:

Now, deception. That's section six. What does the restatement say with respect to deception?

Steven O. Weise:

Yeah. So, it looks at deception, and this is where some of these questions about the effect of statutory law and state level consumer deception protective laws come in, and it looks at whether if there is a deception, that the salesperson promises that the car will, I don't know, get 75 miles to the gallon, it's a hybrid electric kind of thing, and it only gets 45, I'm making up facts

here, and the actual sales contract doesn't say anything about 70 miles to the gallon. It says whatever you see on that sticker on the window that the car manufacturer has to put in there, it gives a little more opening to extra contractual outside of the contract statements that are material, that induce the consumer to enter into the contract, and that that can amount to deception, even in the face of an integration clause.

Steven O. Weise:

It's a distant cousin of those cases one sees in M&A transactions, the non-reliance clauses that are so popular in the Delaware courts. I don't know if you follow all that stuff, but the Delaware courts, even among super sophisticated people, are sort of strict in applying those things. Here again, there's this sort of protection for the consumer, again, who presumably is less sophisticated, that they don't know what an integration clause is in the terms and conditions. So, if the salesperson makes all these factual statements, not puffing, but factual statements about whatever it is they're buying, it's one thing to say this is the best computer ever made. It's another thing to say it'll run your software at light speed or something like that. So, it creates some availability of those kinds of claims, notwithstanding the integration clause.

Alan Kaplinsky:

Right, right, right. So, let me circle back just for a second to unconscionability because it triggered a thought in my mind. Very recently, the CFPB amended its examination manual dealing with UDAAP, unfair, deceptive, and abusive acts and practices, which is a statutory provision. It came out and it said this for the first time ever that the UDAAP provisions could cover all kinds of discrimination in a consumer context. Everybody's familiar with the Equal Credit Opportunity Act, which prohibits discrimination against certain prescribed protected classes like women, African Americans, and there are several others. Anyway, CFPB came out and said, "Well, from now on, when applying our jurisdiction to supervise companies and enforce the law, we're going to apply UDAAP, namely the unfairness prong of UDAAP. If you discriminate, either in a credit context or non-credit context, you have violated the unfairness prong." How would that come out? I know this is sort of a trick question, Steve. But I'm just wondering how you would analyze that under this restatement.

Steven O. Weise:

So, first, because the restatement's a common law document, the rules from the federal government or the state law level UDAAP statutes are not part of it. If state common law court in applying common law contract principles or deception tort kinds of principles were to look at the UDAAP rules or the federal rules as, again, using this word inspiration for common law effects, they might apply that in that case. But the fact that there's a regulatory rule that says X is a bad thing to do doesn't mean it's a bad thing for common law purposes. It might be incorporated as a common law thing by state courts who are always looking for good ideas. But the simple fact or the bare fact that it exists as a statutory or regulatory rule does not automatically make it part of.

Alan Kaplinsky:

All right. We're almost at the end of the restatement, but next one is affirmations of fact and promises that are part of the consumer contract. What's that about?

Steven O. Weise:

So, that's similar to the deception kind of thing that consumers, again, being less sophisticated and not understanding the role of integration clauses and things like that, that where there are affirmations of fact or omissions of ... We're all used to materiality being meeting the state of fact necessary to make the facts you do state not misleading, that these kinds of statements, notwithstanding the integration clause or the parol evidence rule, in the consumer context may not ... It can still be the basis for a consumer claim in these contexts. So, it's looking at the context again of the consumer transaction. Again, if your law firm and my law firm entered into a contract of some sort and had a nice well drafted integration clause, which you and I helped them draft or something like that, probably that's going to be enforced because we understand it and we negotiated it. Not quite the same thing in the consumer context. So, there's more room for a court to look at the facts and circumstances.

Alan Kaplinsky:

Then section eight deals with standard contract terms in the parol evidence rule. What about that?

Steven O. Weise:

That's, again, all these are of a piece, as it were, and parol evidence, the general rules on parol evidence, which are looser in some states like California and stricter in other states, aren't going to interfere with the ability to make reference to statements, whether they're deceptive or their affirmations of fact, or things like that. These are sort of a set of rules that I think work together.

Alan Kaplinsky:

Yeah. Then the final section, effective derogation from mandatory provisions.

Steven O. Weise:

So, that's the remedies provisions, so to speak. The first thing that's one of the changes since 2019, and again, I would've thought it was implicit, but nothing wrong with making it explicit, a couple of things, is that section one now says that the remedies described in section nine are not exclusive, and section nine says that. If state law otherwise would provide additional or similar or different kinds of remedies, those aren't displaced, so to speak. In addition, there was a concern, and again, I didn't think this would've been the right interpretation, but again, now it's explicit that just because a contract satisfies the reasonable notice requirements for adoption of standard terms in section two or modification of standard terms in section three, that's not a safe harbor from being evaluated for unconscionability or deception or something like that. So, you still could get to the section nine remedies for something that's unconscionable, for example.

Steven O. Weise:

Then what section nine says, so it's not exclusive. It's a set of remedies. The fact that the terms were adopted doesn't mean you can't still question them under the other provisions of the restatement. Well, section nine then says if you get to that point, the court has concluded that they were adopted, but they're unconscionable or they were deceptive or whatever, that the court has, taking into the context of what happened, the court has flexibility to fashion a remedy. In the right circumstances, it can toss the term out. In the right circumstances, it can substitute sort of a market kind of term. So, depending on what's going on, it can throw out the whole contract if it's really, really, really awful. Although, I don't think that's necessarily going to happen all the time or that much. So, it describes the range of remedies a court would have to adjust the circumstances to award damages, to award equitable relief, to do the right thing. But doing the right thing takes into account the severity of what went wrong, so to speak.

Alan Kaplinsky:

Right. So, the version of the restatement called tentative draft number two, that is accessible to anybody, I should say, on the American Law Institute website. It can be viewed there. It can be printed there. Is that going to be the version that's going to be up for final approval before the membership meeting on the 17th? Or is anything else being added?

Steven O. Weise:

Part of the ALI process is that the so-called tentative draft, which is the version submitted for approval, is posted in time for people to take a look at it, send comments, and there have been some comments. So, there will be some adjustments, none of which I think change any of the real substance. But what the reporters will do at the meeting is say, "Well, we had a bunch of conversation." They probably won't use the word bunch, "But we had a bunch of conversations since the tentative draft was posted and people pointed out this or pointed out that, so we're going to clarify this, and here's what we're going to say. We're going to add a comment here. Without actually reciting the text, say, of a comment, is it a comment, we'll say, functionally, the following, something like that, in order to be sure that people have the whole deal before them."

Steven O. Weise:

People can go up to microphones and make comments and things like that. It's not at all unusual for someone to come to a meeting and say, "Well, I really like it, but this one comment isn't quite right. Can you fix it? Can you say this?" The reporters will say, "Yeah, okay. You're right. Good point." So, that's part of the dialogue. The ultimate motion, called the Boskey motion, named after a recently deceased member of ALI, Bennett Boskey, the motion invites the members to approve the document subject to the discussion that day.

Steven O. Weise:

So, the discussion will include both whatever the reporters announced that they've reached accommodations with people up to the meeting, plus anything that, in the flow of the meeting, as it were, people understand or the reporters say, "We'll take that as a friendly amendment, and we'll do that. Trust us. We'll get it done." Then they'll do that. This is totally common across the restatements. If a specific person had a specific comment, typically the reports will draft the new thing. They'll send an email to that person, that sort of thing.

Alan Kaplinsky:

Yeah. Now, other than those things that have come up in the last month or so since this has been publicly available and things that might come up at the meeting, are there any other remaining open issues, Steve, that you think still need to get resolved?

Steven O. Weise:

I don't think so. There have been some very constructive conversations and people making the comments have their own views on how material they are. To me, they're all enhancements, clarifications, interpretations, things that I would've thought were there. The people, making the comments think they're very important, that's fine, and the reporters have been accommodating where they think the comments fit into their view of what the restatement already has, and there's no need to debate whether it's material or semi-material or something like that. If it fits in and if somebody is a lot more comfortable by saying something explicitly that the reporters thought was implicit, that's fine. That's that sort of thing. So, I think I don't see any huge issues there. Everybody's got their own way of saying something's better.

Alan Kaplinsky:

So, in the final analysis, because we've got to wrap up our show very soon, what does this restatement offer to consumers, and on the other side of the coin, what does it offer to businesses?

Steven O. Weise:

Yeah. So, what it offers, I think, to consumers is some comfort. Consumers aren't going to read it for the most part, but it builds into the law some comfort that there's a process there that gives consumers a fair shot on these things, whether it's adoption of standard terms or unconscionability issues. On the other side, I think if I were ... Well, when I do represent businesses, I think what it provides is real guidance, particularly on the adoption of standard terms and the adoption of modifications. It says to you, if you take into account the following factors and you do a decent job of implementing them, that you're going to get your standard terms adopted. All restatements do, it has a whole series of illustrations, A did A, B, and C. Standard not adopted. But if A had done D, then the standard terms would have been adopted.

Steven O. Weise:

So, if you're a business or a lawyer representing a business and you want to use these, I think you take the illustrations, the discussion, and you say, "Not only is it my guidance, but because it's a national restatement, I don't have to go research the law in the 30 states we do business in. I've got a reasonable hope or expectation that most of those 30 states are going to follow this rule, which is reporters went to the effort of reading all cases." I've personally read hundreds and hundreds of cases and it's all very educational. So, I think it's comfort from the consumer side. I think it's guidance from the business side. The

unconscionability, it says if you do A, B, and C, you're in trouble, but if you don't, if you do D, E, and F, you're not. So, you just read it and conform your processes, and not that hard.

Alan Kaplinsky:

One final question I have for you, you mentioned in the course of our discussion that the reporters and people who helped them did a number of 50 state surveys of the law. I recall one dealing with, they had it broken down by click wrap, browse wrap, and it was a very comprehensive research job. Something that if a client were to come to you today to try to put together something like that, I'm sure it would cost a fortune to compile all these cases and analyze them. Is any of that research available to the public?

Steven O. Weise:

So, there's been some discussion, but it hasn't been resolved yet, whether to use some of it as an appendix, so to speak, for research. In some other restatements, there's been reviews of state law, and there's an appendix that says 33 states and here they are do this and things like that. That hasn't quite been resolved yet. I imagine, but I'm speaking out of school here that one way or another, it'll be available. I don't know if it'll be formally part of the restatement or remain available in some other fashion.

Alan Kaplinsky:

Yeah. I think that would be a tremendous resource that would make this even more valuable. Now, from a technical standpoint, let's assume at the membership meeting, it gets approved under this Boskey rule. What happens next? I take it there will be still some other process before it becomes the official restatement. Am I right?

Steven O. Weise:

Well, that's right. It's a little fluid. So, technically, the vote by the membership approves it, so it exists, as it were. But as I said, there have been some changes and understandings reached in the month or so since it was posted online for review. Those have to be inserted and implemented. There'll be, I'm sure, some of the changes are not specific wording, but says, "We'll add a comment to this effect or we'll revise a comment to that effect."

Steven O. Weise:

So, all of those kinds of implementations will have to take place, and that'll take a couple months and whatnot. Then ALI, let's assume that all goes smoothly and it's summer and people get it done. Sometime in the fall, ALI has a really excellent staff that sits down and goes through it in a real technical sense, makes sure the commas are right and the sites are right and the quotations are right and the verbs match and all that good stuff. So, that all happens. Then eventually, it's sort of the final, final, final version exists. The addition of these understood changes, they'll certainly be shown to people who made the specific comments. Everybody takes really good notes and all that.

Alan Kaplinsky:

Yes. Yes. Then will there be yet another vote of the council that will have the final, final, final version in front of it, or no?

Steven O. Weise:

No, there won't be. The council will leave it to the reporters. If the reporters think they have a problem or an issue, they'll call Ricky Revesz, who's the director of the ALI, and say, "You think we can do this within the scope of the Boskey motion?" Or something like that. So, there's some judgment. Everybody trusts everybody.

Alan Kaplinsky:

Yeah. Yeah. I got it. Got it. Got it. Okay. Well, unless there's something else, anything else you'd like to add, so that we've overlooked during our discussion, I think we've really covered the waterfront here. Is there anything you want to add, Steve?

Steven O. Weise:

Let me just mention two things. One is if anybody has any difficulty getting a copy of the draft, send me an email, or send Alan an email, I suppose, and be happy to provide it to if you have any trouble with the ALI website. Then also, I did a little article that was just published in the ALI newsletter summarizing the principle changes,. If anybody would like that, send me an email.

Alan Kaplinsky:

Terrific. Well, that would be wonderful. This brings our program to a conclusion today. As I indicated, this is a very important, I indicated at the outset, very important project of ALI that is finally coming to fruition. I guess it's 11 years roughly. A lot of people provided a lot of input and a lot of people deserve a lot of credit for seeing this thing through. I must say it one time. If I were a betting man, I would've bet against it because I just thought there was so much opposition to it and I thought the project was really over and done with after it didn't get approval at the 2019 annual meeting.

Alan Kaplinsky:

So, my thanks go to Steve. I want to thank all our listeners today. Let me just remind everybody, if you're new to our show, we release a new show every Thursday. Also want to mention that the law firm consultants that deal with law firms using online media last year named our podcast show as the second best law firm podcast show in the country, and I'm very, very proud of that achievement.

Steven O. Weise:

Congratulations on that, Alan.

Alan Kaplinsky:

Yeah. Well, thank you, Steve. With that, I'm going to wish everybody a good day.