ELIZABETH WARREN
MASSACHUSETTS

COMMITTEES:
BANKING, HOUSING, AND URBAN AFFAIRS
HEALTH, EDUCATION, LABOR, AND PENSIONS
ARMED SERVICES
SPECIAL COMMITTEE ON AGING

United States Senate

UNITED STATES SENATE
WASHINGTON, DC 20510-2105
P: 202-224-4543

2400 JFK FEDERAL BUILDING
15 NEW SUDBURY STREET
BOSTON, MA 02203
P: 617-565-3170

1550 MAIN STREET
SUITE 406
SPRINGFIELD, MA 01103
P: 413-788-2690

www.warren.senate.gov

December 11, 2017

Dean David Levi
President, American Law Institute
4025 Chestnut Street,
Philadelphia, PA 19104

Dear Dean Levi:

I write to you as a proud ALI Life Member and former ALI Vice-Chair. I have great respect for the work of the Institute, both past and present, but I am concerned about the direction of the draft Restatement of Consumer Contracts. I no longer live in the academic world, but I spent decades teaching, researching, and writing about contract law generally and consumer contracts in particular, so I have taken special interest in the ALI's work on this Restatement.

Contract law is the first line of consumer protection. Given the sharp limitations on public enforcement resources, it is often the *only* line of consumer protection. For that reason, I am particularly troubled by both the normative choice in the draft Restatement's abandonment of meaningful consumer assent in exchange for a supposed increase in judicial scrutiny of contract terms, as well as by the soundness of the empirical work underlying the Reporters' argument for this exchange (the so-called "Grand Bargain").

This "bargain" would more readily bind consumers to contracts and to contract modifications in exchange for theoretically stronger defenses to contract enforcement. I fear, however, that this bargain is illusory because it does not account for the serious procedural and economic hurdles consumers face in attempting to challenge oppressive contract terms.

One example illustrates the point: binding mandatory arbitration clauses are common in consumer contracts. Those clauses require consumers to challenge contract terms before arbitrators in individual proceedings, not before courts in aggregate actions. There is substantial data showing that arbitration is often heavily stacked against consumers, which means that one small clause buried in the fine print of consumer contracts can eliminate a consumer's ability to call on the defenses otherwise guaranteed in law. In other words, the compromise proposed in the draft Restatement's "bargain" is illusory in the millions of transactions in which a consumer will have no access to courts or class actions.

I am also concerned about the claimed empirical basis for the draft Restatement. During my years as a professor, I undertook multiple empirical research projects with a number of well-respected academics across different fields. I know how powerful data can be as a tool of persuasion, and that power of persuasion makes it doubly important that empirical work be well-founded.

The draft's "bargain" rests on an empirical claim that courts have largely dispensed with meaningful assent to contract formation and modification—if courts aren't giving consumers a chance to raise their lack of assent, then consumers aren't giving much up if they lose that chance in exchange for more defenses to contract performance.
Whether that is a good tradeoff or not, the initial claim about courts' behavior is in serious doubt. Independent reviews of the Reporters' empirical work suggest that there may be substantial and pervasive problems in the Reporters' coding of cases. While I do not have a view on the underlying merits of the empirical dispute, I am convinced that it would be a mistake for the ALI to proceed on the draft Restatement unless it has full confidence that the Restatement accurately represents the current state of the law.

There is no question that the law of consumer contracts needs improvement; too often contracts have become a tool for abuse of consumers. I do not believe, however, that the draft Restatement will rectify this problem, and I fear that in may make it worse.

I appreciate the thoughtful work of the ALI, and I hope the concerns I raise here will be helpful in finding a better approach to consumer contracts.

Sincerely,

Elizabeth Warren
U.S. Senator