

ASSEMBLY, No. 1073

STATE OF NEW JERSEY 216th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2014 SESSION

Sponsored by:

Assemblyman GARY S. SCHAER

District 36 (Bergen and Passaic)

SYNOPSIS

Establishes procedures for determining enforceability of standard form contracts; invalidates certain indemnification clauses.

CURRENT VERSION OF TEXT

Introduced Pending Technical Review by Legislative Counsel



1 **AN ACT** concerning standard form contracts and supplementing
2 Title 56 of the Revised Statutes.

3

4 **BE IT ENACTED** *by the Senate and General Assembly of the State*
5 *of New Jersey:*

6

7 1. This act shall be known and may be cited as the “New Jersey
8 Standard Form Contracts Act.”

9

10 2. The Legislature finds and declares that:

11 a. Most contracts are standard form contracts. A standard form
12 contract is prepared by the seller and contains some fixed terms not
13 subject to negotiation. Standard form contracts are offered on a
14 “take it or leave it” basis. Buyers often do not have the opportunity
15 to consider the terms and must accept them to acquire goods and
16 services.

17 b. The use of standard form contracts eliminates the need to
18 negotiate contracts individually for transactions taking place in the
19 marketplace and may reduce the costs of goods and services.
20 However, since the seller alone drafts standard form contracts, they
21 may contain one-sided and unfair terms. The law must protect
22 buyers from such terms without eliminating the social benefit of
23 uniform contract terms.

24 c. Standard form contracts pose a special problem for the law.
25 Under traditional contract principles, the terms of a contract are
26 enforced against a party because the party has consented to them.
27 This rule cannot be applied to standard form contracts because these
28 terms are not the product of negotiation and consent of the parties.

29 d. New Jersey courts have treated standard form contracts as a
30 class of contracts subject to special scrutiny. When a court
31 identifies a contract as one of “adhesion,” the court subjects the
32 contract to a judicial determination of fairness based on the doctrine
33 of unconscionability. The use of this principle of equity has not
34 provided a cogent response to problems posed by standard form
35 contracts.

36 e. The doctrines of “unconscionability” and “contract of
37 adhesion” are unsound in theory and in fact. “Unconscionability”
38 depends on subjective notions of fairness and therefore constitutes a
39 rule of indeterminacy. “Contract of adhesion” is an obsolete mode
40 of analysis incapable of reacting to developments in the
41 marketplace. The doctrines of “unconscionability” and “contract of
42 adhesion” restrict a court’s ability to handle the diversity of
43 standard form contract terms by creating simplistic legal categories
44 that do not reflect commercial reality. A court’s ability to deal with
45 problems posed by standard form contracts is restricted by common
46 law doctrines.

1 f. The lack of definite rules governing standard form contracts
2 prevents parties to these contracts from knowing in advance
3 whether the rules regulating their private conduct are enforceable,
4 and leaves judicial decision-making to the vagaries of
5 individualized judgment.

6 g. Existing law does not provide uniform and flexible standards
7 to determine the validity of terms in standard form contracts. It has
8 neither protected consumers against the opportunism of certain
9 sellers nor has it provided sellers with legal rules based on the logic
10 of the mass market. Courts require flexibility and uniform rules to
11 determine the validity of non-negotiated terms in standard form
12 contracts. Buyers and sellers require certainty and clarity with
13 respect to the rules governing their market transactions.

14
15 3. As used in this act:

16 “Buyer” means a natural person or legal entity that buys, leases,
17 licenses, or otherwise acquires an interest in, or incurs an obligation
18 with respect to, a product in an open market.

19 “Product” means a good, service, license, or other right to
20 personal property, whether tangible or intangible, or extension of
21 credit offered in an open market.

22 “Open market” means a market where a seller offers its product
23 to a buyer or class of buyers.

24 “Sale” means a purchase, lease, license, or other disposition of a
25 product in an open market.

26 “Seller” means a natural person or legal entity using a standard
27 form contract to regulate legal obligations with a buyer and
28 regularly engaged in the business of manufacturing, distributing, or
29 offering to sell a product.

30 “Standard form contract” means a written or other record of legal
31 terms used by a seller offering to sell a product to a buyer in an
32 open market for the purpose of specifying the rights and obligations
33 of buyer and seller in a sale.

34
35 4. a. Except as provided in subsection b. of this section, P.L. ,
36 c. (C.) (pending before the Legislature as this bill) governs
37 standard form contracts used in an open market.

38 b. This statute does not apply to any term of a standard form
39 contract that is required to be filed with and subject to approval or
40 disapproval by a federal or State regulatory agency prior to the sale
41 of a product in an open market.

42
43 5. a. Except as provided in subsection b. of this section, P.L. ,
44 c. (C.) (pending before the Legislature as this bill) supersedes
45 any law that:

46 (1) conflicts with the provisions of P.L. , c. (C.)
47 (pending before the Legislature as this bill); or

- 1 (2) makes a term in a standard form contract unenforceable
2 because the term is unfair, unconscionable, or the result of unequal
3 bargaining power.
- 4 b. The provisions of P.L. , c. (C.) (pending before
5 the Legislature as this bill) do not supersede other statutes that:
- 6 (1) require the inclusion of specific terms in standard form
7 contracts;
- 8 (2) prohibit the inclusion of specific terms in standard form
9 contracts;
- 10 (3) impose formal requirements, other than those specified in
11 this act, to make a contract effective; or
- 12 (4) regulate consumer fraud.
- 13
- 14 6. A standard form contract becomes effective when the sale
15 occurs and the seller either transfers the contract to the buyer or
16 makes the contract accessible to the buyer.
- 17
- 18 7. The buyer may cancel a standard form contract if:
- 19 a. The terms of the contract are accessible only after the buyer
20 has already purchased the product;
- 21 b. The buyer does not open the package more than necessary to
22 access the terms of the contract;
- 23 c. The buyer does not use the product; and
- 24 d. The buyer returns the product in its original condition and
25 packaging within a reasonable time not to exceed 30 days.
- 26
- 27 8. a. A term in a standard form contract is either a primary or
28 secondary term.
- 29 b. A primary term is a term that:
- 30 (1) establishes the price, financing, product specifications and
31 options disclosed at the time of sale;
- 32 (2) identifies the product; or
- 33 (3) is negotiated by the buyer and the seller at or prior to the
34 sale.
- 35 A buyer is bound by the primary terms of a standard form
36 contract unless the contract is unenforceable because of fraud,
37 illegality, duress, or mutual mistake.
- 38 c. A secondary term is any other term of a standard form
39 contract. A buyer is bound by secondary terms of a standard form
40 contract only as permitted by the provisions of P.L. , c. (C.)
41 (pending before the Legislature as this bill).
- 42
- 43 9. a. A secondary term is enforceable unless, at the time of
44 sale, the term would have caused a reasonable buyer to reject the
45 sale.
- 46 b. Notwithstanding subsection a. of this section:

1 (1) a secondary term governed by another section of P.L. ,
2 c. (C.) (pending before the Legislature as this bill) is
3 enforceable as provided in that section; and
4 (2) a secondary term is not enforceable if the term conflicts with
5 a primary term, or is prohibited by statute.
6 c. The determination of whether a secondary term is
7 enforceable is a question of law.
8
9 10. A secondary term requiring arbitration of disputes arising
10 under the contract is enforceable if the system of arbitration is
11 designed to be impartial and the fee associated with arbitration is
12 reasonably related to disputes likely to arise under the contract.
13
14 11. A secondary term placing a risk of loss on the buyer is
15 enforceable if:
16 a. The amount of potential loss does not exceed the sale price
17 of the product;
18 b. The seller makes available to the buyer insurance at a
19 commercially reasonable price and the buyer refuses to purchase the
20 insurance; or
21 c. The loss is caused by the fault of the buyer.
22
23 12. a. A secondary term is unenforceable if it:
24 (1) disclaims a warranty that a product matches its description;
25 (2) disclaims a warranty that a product is free from defects
26 unless the disclaimer is prominently placed and the defects are
27 disclosed in the disclaimer or would be disclosed by inspection of
28 the product;
29 (3) limits the liability of a seller for risk of physical injury to
30 any person or damage to real or tangible personal property caused
31 by a defect in the product existing at the time of sale;
32 (4) requires the buyer to waive his substantive rights under the
33 New Jersey consumer fraud act, P.L.1960, c.39 (C.56:8-1 et seq.),
34 the used car lemon law, P.L.1995, c.373 (C.56:8-67 et seq.), or any
35 other consumer protection laws, or the right to contact any other
36 consumer protection agency, State, county or municipal department
37 or agency, or any other entity for the purposes of reporting a
38 consumer complaint; or
39 (5) chooses the law of a jurisdiction unrelated to the parties or to
40 the subject matter of the transaction.
41 b. A secondary term is enforceable if it:
42 (1) limits the liability of the seller for consequential damages
43 related to economic losses of the buyer as a result of a defect or
44 non-conformity in the product; or
45 (2) limits a buyer's right of refund of the purchase price in the
46 case of a defective or non-conforming product, provided the term:

1 (a) does not limit a buyer's rights to cancel the contract pursuant
2 to section 7 of P.L. , c. (C.) (pending before the Legislature
3 as this bill);

4 (b) provides the option of replacement or repair;

5 (c) sets a time limit for submitting a claim provided the time
6 limitation is reasonable in relation to the nature of the product; and

7 (d) requires the buyer to produce reasonable proof of purchase
8 of the product.

9

10 13. a. Except as provided in subsection b. of this section, a
11 secondary term that shifts to the buyer the obligation to pay the
12 seller's attorneys fees and costs of litigation shall operate to allow a
13 buyer who prevails to recover attorney's fees and costs of litigation
14 from the seller.

15 b. Notwithstanding any other law to the contrary, a secondary
16 term requiring the buyer to indemnify or hold harmless the seller
17 for damages arising out of bodily injury to persons or damage to
18 property caused by or resulting from the sole negligence of the
19 seller, his agents, or employees, is against public policy and is void
20 and unenforceable; provided that this section shall not affect the
21 validity of any insurance contract issued by an authorized insurer.

22

23 14. a. The terms of a standard form contract may not be
24 contradicted by evidence of a prior, contemporaneous or subsequent
25 oral agreement. A court may use evidence extrinsic to the contract
26 only to interpret an ambiguous term.

27 b. A seller may change a term of a standard form contract after
28 the term has become effective if:

29 (1) the standard form contract may be terminated by either seller
30 or buyer at any time without penalty;

31 (2) the seller gives written notice of the change;

32 (3) the seller instructs the buyer how to cancel the contract; and

33 (4) the change of terms applies prospectively.

34

35 15. This act shall take effect on the 120th day after enactment
36 and shall be applicable to standard form contracts entered into on or
37 after that date.

38

39

40

STATEMENT

41

42 This bill would implement provisions governing standard form
43 contracts. Standard form contracts are pre-printed forms used in the
44 mass distribution, marketing and sale of a product to buyers.
45 Examples include parking lot receipts, theater tickets, software
46 licenses, user agreements for websites, and department store charge
47 slips.

1 Ordinarily, contract terms are enforced because they are the
2 subject of consent and the result of bargaining between the parties.
3 By contrast, the formation of standard form contracts is not based
4 on consent and does not result from bargaining. Usually these
5 terms are set beforehand by the seller.

6 The courts have deemed certain terms in standard form contracts
7 to be unfair and have refused to enforce such terms. The courts
8 reason that, because there was unequal bargaining power in the
9 formation of the contract, the buyer cannot be said to have
10 consented to all contract terms. Courts have utilized concepts such
11 as “unconscionability,” “reasonable expectations,” and “contract of
12 adhesion” in support of their refusal to enforce such terms.

13 However, the judicial approach does not provide predictability as
14 to which terms in a standard form contract are enforceable. The
15 judicial approach assumes “unequal bargaining power” on the part
16 of one of the parties, which may not be the case. The buyer is
17 usually considered to be the victim in an unfair transaction because
18 the buyer is assumed to be a consumer and the seller is assumed to
19 be a large retail dealer or manufacturer. However, in reality the
20 economic power of the buyer may exceed that of the seller.

21 This bill provides rules to determine the enforceability of
22 standard form contract terms, replacing the family of judicially-
23 created concepts with legislatively-defined rules to measure the
24 validity of non-negotiated terms. The objective is to introduce
25 greater degrees of certainty, predictability, and clarity into the law
26 governing standard form contracts.

27 Under the bill, terms found in standard form contracts are
28 divided into primary terms and secondary terms. Primary terms,
29 those that are negotiated or based on consent, are enforced only as
30 provided in the bill. Secondary terms include such provisions as
31 arbitration clauses, risk of loss, remedies for defective products, and
32 limitations on damages.

33 Section 5 of the bill provides that it does not supersede other
34 statutes that: require the inclusion of specific terms in standard form
35 contracts; prohibit the inclusion of specific terms in standard form
36 contracts; impose formal requirements, other than those in the bill,
37 to make a contract effective; or regulate consumer fraud.

38 Section 7 of the bill governs the cancellation of standard form
39 contracts. Under this section, a buyer may cancel a standard form
40 contract if the terms of the contract are accessible only after the
41 buyer has purchased the product; the buyer does not open the
42 package more than necessary to access the terms of the contract; the
43 buyer does not use the product; and the buyer returns the product in
44 its original condition and packaging within a reasonable time, not to
45 exceed 30 days.

1 Section 9 provides that a secondary term is enforceable unless, at
2 the time of sale, the term would have caused a reasonable buyer to
3 reject the sale.

4 Section 10 provides that a secondary term requiring arbitration of
5 disputes arising under the contract is enforceable if the system of
6 arbitration is designed to be impartial and the fee associated with
7 arbitration is reasonably related to disputes likely to arise under the
8 contract.

9 Section 11 provides that a secondary term placing a risk of loss
10 is enforceable if the amount of potential loss does not exceed the
11 sale price of the product, or the seller makes available to the buyer
12 insurance at a commercially reasonable price and the buyer refuses
13 to purchase the insurance, or the loss is caused by the fault of the
14 buyer.

15 The enforceability of secondary terms is governed by section 12
16 of the bill. Under this section, a secondary term is unenforceable if
17 it disclaims a warranty that a product matches its description;
18 disclaims a warranty that a product is free from defects, unless the
19 disclaimer is prominently placed and the defects are disclosed;
20 limits the liability of the seller for risk of injury caused by a product
21 defect existing at the time of sale; requires the buyer to waive the
22 substantive right to sue the seller under any consumer protection
23 law or to report a consumer complaint to any consumer protection
24 agency; or chooses the law of a jurisdiction unrelated to the parties
25 or to the subject matter of the transaction.

26 Under section 13 of the bill, a secondary term that shifts to the
27 buyer the obligation to pay the seller's attorney's fees and costs of
28 litigation would operate to also allow a buyer who prevails to
29 recover attorney's fees and costs of litigation from the seller.
30 However, a secondary term requiring the buyer to indemnify or
31 hold harmless the seller for damages caused by or resulting from the
32 sole negligence of the seller would be void and unenforceable as
33 against public policy.

34 This bill is based in part on a 1998 report by the New Jersey Law
35 Revision Commission.