

**SENATE, No. 1531**

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**STATE OF NEW JERSEY**

**219th LEGISLATURE**

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**Sponsored by:**  
**Senator JAMES BEACH**  
**District 6 (Burlington and Camden)**

**SYNOPSIS**

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

**CURRENT VERSION OF TEXT**

As introduced.



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.

47 f. The lack of definite rules governing standard form contracts  
48 prevents parties to these contracts from knowing in advance

1 whether the rules regulating their private conduct are enforceable,  
2 and leaves judicial decision-making to the vagaries of  
3 individualized judgment.

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

12  
13 3. As used in this act:

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

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

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

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

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

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

32  
33 4. a. Except as provided in subsection b. of this section,  
34 P.L. , c. (C. ) (pending before the Legislature as this bill)  
35 governs standard form contracts used in an open market.

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

40  
41 5. a. Except as provided in subsection b. of this section,  
42 P.L. , c. (C. ) (pending before the Legislature as this bill)  
43 supersedes any law that:

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

46 (2) makes a term in a standard form contract unenforceable  
47 because the term is unfair, unconscionable, or the result of unequal  
48 bargaining power.

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

1 (2) a secondary term is not enforceable if the term conflicts with  
2 a primary term, or is prohibited by statute.

3 c. The determination of whether a secondary term is  
4 enforceable is a question of law.

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

10  
11 11. A secondary term placing a risk of loss on the buyer is  
12 enforceable if:

13 a. The amount of potential loss does not exceed the sale price  
14 of the product;

15 b. The seller makes available to the buyer insurance at a  
16 commercially reasonable price and the buyer refuses to purchase the  
17 insurance; or

18 c. The loss is caused by the fault of the buyer.

19  
20 12. a. A secondary term is unenforceable if it:

21 (1) disclaims a warranty that a product matches its description;

22 (2) disclaims a warranty that a product is free from defects  
23 unless the disclaimer is prominently placed and the defects are  
24 disclosed in the disclaimer or would be disclosed by inspection of  
25 the product;

26 (3) limits the liability of a seller for risk of physical injury to  
27 any person or damage to real or tangible personal property caused  
28 by a defect in the product existing at the time of sale;

29 (4) requires the buyer to waive his substantive rights under the  
30 New Jersey consumer fraud act, P.L.1960, c.39 (C.56:8-1 et seq.),  
31 the used car lemon law, P.L.1995, c.373 (C.56:8-67 et seq.), or any  
32 other consumer protection laws, or the right to contact any other  
33 consumer protection agency, State, county or municipal department  
34 or agency, or any other entity for the purposes of reporting a  
35 consumer complaint; or

36 (5) chooses the law of a jurisdiction unrelated to the parties or to  
37 the subject matter of the transaction.

38 b. A secondary term is enforceable if it:

39 (1) limits the liability of the seller for consequential damages  
40 related to economic losses of the buyer as a result of a defect or  
41 non-conformity in the product; or

42 (2) limits a buyer's right of refund of the purchase price in the  
43 case of a defective or non-conforming product, provided the term:

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

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

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

3 (d) requires the buyer to produce reasonable proof of purchase  
4 of the product.

5  
6 13. a. Except as provided in subsection b. of this section, a  
7 secondary term that shifts to the buyer the obligation to pay the  
8 seller's attorneys fees and costs of litigation shall operate to allow a  
9 buyer who prevails to recover attorney's fees and costs of litigation  
10 from the seller.

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

18  
19 14. a. The terms of a standard form contract may not be  
20 contradicted by evidence of a prior, contemporaneous or subsequent  
21 oral agreement. A court may use evidence extrinsic to the contract  
22 only to interpret an ambiguous term.

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

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

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

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

29 (4) the change of terms applies prospectively.

30  
31 15. This act shall take effect on the 120th day after enactment  
32 and shall be applicable to standard form contracts entered into on or  
33 after that date.

## STATEMENT

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37  
38 This bill would implement provisions governing standard form  
39 contracts. Standard form contracts are pre-printed forms used in the  
40 mass distribution, marketing and sale of a product to buyers.  
41 Examples include parking lot receipts, theater tickets, software  
42 licenses, user agreements for websites, and department store charge  
43 slips.

44 Ordinarily, contract terms are enforced because they are the  
45 subject of consent and the result of bargaining between the parties.  
46 By contrast, the formation of standard form contracts is not based  
47 on consent and does not result from bargaining. Usually these  
48 terms are set beforehand by the seller.

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

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

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

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

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

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

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

44       Section 10 provides that a secondary term requiring arbitration of  
45 disputes arising under the contract is enforceable if the system of  
46 arbitration is designed to be impartial and the fee associated with  
47 arbitration is reasonably related to disputes likely to arise under the  
48 contract.

1       Section 11 provides that a secondary term placing a risk of loss  
2 is enforceable if the amount of potential loss does not exceed the  
3 sale price of the product, or the seller makes available to the buyer  
4 insurance at a commercially reasonable price and the buyer refuses  
5 to purchase the insurance, or the loss is caused by the fault of the  
6 buyer.

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

18       Under section 13 of the bill, a secondary term that shifts to the  
19 buyer the obligation to pay the seller's attorney's fees and costs of  
20 litigation would operate to also allow a buyer who prevails to  
21 recover attorney's fees and costs of litigation from the seller.  
22 However, a secondary term requiring the buyer to indemnify or  
23 hold harmless the seller for damages caused by or resulting from the  
24 sole negligence of the seller would be void and unenforceable as  
25 against public policy.

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