



NEW JERSEY LAW REVISION COMMISSION

Updated Revised Draft Final Report Regarding Standard Form Contracts (Original Report Released 10/98)

October 11, 2021

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes in order to determine the law of the State.

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Project Summary

The Commission recommends the inclusion of a new Act in New Jersey's body of statutes. The purpose of this Act is to provide a framework of legislatively defined rules to determine the enforceability of standard form contract terms. The goal is to introduce a greater degree of certainty, predictability, and clarity into the law governing standard form contracts.

Background

The New Jersey Law Revision Commission released a Final Report on Standard Form Contracts in 1998. That Report recognized that the overwhelming majority of contracts are not negotiable, and recommended replacing the law applicable to those contracts with an Act that more accurately reflected their nature.

The 1998 Report rejected the practice of determining the enforceability of standard form contracts based on concepts of mutual consent or constructive consent, mitigated by the notion of unconscionability resulting from a disparity in the bargaining power of the parties.

In standard form contracts, consent is often viewed as fictional, since neither party generally has the power to vary the contract terms at the time the contract is formed, regardless of their bargaining power. Historically, the merchant was perceived to be in a more powerful position than the consumer. It may be, however, that a customer of a dry cleaner or parking lot is more financially powerful than the dry cleaner or lot owner, but neither party can vary the terms on the back of the receipt. Instead, the contract is effectively part of the purchased product.

As a result, the Report treated the contract like any other aspect of the product. Terms are enforced generally unless commercially unreasonable as provided by current law. The approach is different, but not radically so, and the results are more predictable and consistent. The approach also avoids issues that are the subject of other statutes.

While the Commission's 1998 Report gained some academic recognition, a bill to enact it was not introduced until many years after it was released. Bills have since been reintroduced in the last several legislative sessions. With these introductions, the issues in the Report assumed renewed importance.

Moreover, in the last 20 years, the common law context has changed. Much of what seemed innovative in 1998, now reflects the better rules of judicial authority as recognized by the American Law Institute in its proposed Restatement of the Law of Consumer Contracts. That is particularly true with regard to the distinction between primary and secondary terms and their differing legal treatment. Accordingly, the Commission decided to reconsider and update its Report.

The goal of the Act is to provide a legislative solution to the legal problem posed by standard form contracts. These contracts represent the overwhelming majority of contracts used in commerce, and their use has only increased in the years since the Commission's initial Report was released. They pose the legal question of whether their terms, established before the transaction and usually unread by the non-authoring party, are enforceable. Ordinarily, contract

terms are enforced because they are the subject of consent and the result of mutual give and take between the parties. The formation of standard form contracts, however, is not based on consent and does not result from bargaining. Further, it has been widely recognized that to negotiate and to read standard form contracts prior to their formation would be impractical and wasteful.

Analysis

The Commission's initial work in this area noted that scholars and courts alike have expressed concern about the enforceability of terms that are not subject to the typical contract bargaining process.

Courts have used a variety of concepts, including the doctrines of "unconscionability," "reasonable expectations," and "contract of adhesion," to justify refusing to enforce terms in standard form contracts that are deemed unfair. The courts reason that because there was unequal bargaining power in the formation of the contract, the buyer cannot be said either to have consented to the contract terms or to have expected them to be included in the contract.

One significant concern about reliance on the judicial approach is that it does not provide predictability regarding which standard form contract terms in a particular contract are enforceable, and which are not. Relying exclusively on judicial solutions to the challenges posed by standard form contracts means that any assistance or guidance is available only well after a problem arises, and it assumes that the injured party has the means and inclination to litigate.

The draft Act establishes the enforceability of standard form contracts by providing a framework of legislatively defined rules to measure the validity of non-negotiated terms. The objective is to introduce a greater degree of certainty, predictability, and clarity into the law governing standard form contracts.

In the draft Act, standard form contract terms are divided into primary terms and secondary terms. Primary terms, those that are negotiated or based on consent, are largely enforced according to traditional contract law principles. Secondary terms, those that are neither negotiated nor based on consent, are enforced only as provided in the draft Act. This is intended to facilitate more predictable judicial determinations. Additionally, drafters of standard form contracts should be able to predict judicial reaction to secondary terms, potentially reducing litigation regarding terms.

The draft Act applies only to consumer transactions, and does not replace or supersede consumer protection statutes.

The Commission began work to update the previously-released Report in 2018, and considered the ongoing work at meetings in April 2018, May 2018, July 2018, April 2019, May 2019, July 2019, October 2019, February 2020, and October 2020.

Outreach and Comments Received in Response

The Commission was fortunate to hear, during the course of its work, from a number of interested commenters, including: David McMillin, Esq., Director of Legal Services of New Jersey; Professor Jacob Hale Russell of Rutgers Law School; Professor Jon Romberg of Seton Hall University School of Law; Professor Charles Sullivan of Seton Hall University School of Law; and Margaret Jurow, Esq., Resident Practitioner at Seton Hall University School of Law.

These commenters, who provided extensive feedback over a lengthy period of time, expressed concerns about the project in several areas. The concerns that they raised throughout the work of the Commission in this area are summarized below and divided for ease of review into the categories of: anti-consumer, unconscionability, primary vs. secondary terms, parole evidence rule, effectiveness of contract, and attorney's fees. Not every comment received is shown below. Instead, the comments included below are intended to be representative of the concerns expressed and, whenever possible, are included in the commenters' own words. The comments are shown in chronological order in each category.

As explained at the end of each section below, significant revisions were made throughout the Commission's work on the draft to incorporate and address the concerns raised by commenters.

“Anti-consumer”

Professor Jon Romberg and Professor Charles Sullivan of Seton Hall University School of Law provided a written submission in October 2019, in which they stated that

[w]hile there are some useful suggestions in the statute proposed in the Commission's October 7, 2019 *Revised Draft Final Report Regarding Standard Form Contracts* and we appreciate some recent efforts to address our concerns in this version, we believe that recommending this statute to the New Jersey Legislature would be a major step backward for a state justly recognized as a leader in consumer protection.

Written submission of Professors Romberg and Sullivan, October 2019.

The Minutes of the Commission's October 2019 meeting, reflect that

Professor Romberg advised the Commission that... the Draft Final Report is based upon a proposition that is unconvincing. The proposition is that standard form contract terms are irrelevant. He continued that it is not necessarily true that neither party has the power to change the contract in the typical standard form contract setting. Professor Romberg noted that the imbalance of power is an important element to understand and resolve these disputes.

Minutes of October 2019 Commission meeting. “The Draft Final Report, Professor Romberg continued, conflicts with current New Jersey law and the work of the American

Law Institute (ALI). Professor Romberg stated that the Draft Final Report favors clarity, certainty and business interests over the interests of the consumers. The common law, according to Professor Romberg, does not support this dynamic.” *Minutes of October 2019 Commission meeting.*

The October 2019 written submission of Professor Romberg and Professor Sullivan said that they “believe the most sensible course for New Jersey would be to wait for the completion of the ALI’s project before deciding what changes, if any, to propose under New Jersey law.” It suggested that “[e]ven if that course of action is rejected, better the status quo than a statute that, admittedly with some notable exceptions, presents as much confusion as under current law and is generally hostile to consumers rights.” *Written submission of Professors Romberg and Sullivan, October 2019.* Their written submission added that:

... in 2019 parking lots and dry cleaners are increasingly characterized by large, multi-location organizations, undoubtedly represented by sophisticated legal counsel. Much of the proposal seems driven by a desire to render irrelevant the relative bargaining power of the parties, apparently grounded on a belief that any such variation is in fact irrelevant, with both parties helpless to alter the terms of the contract, a presumption that does not seem to us consistent with reality.

Written submission of Professors Romberg and Sullivan, October 2019.

“Section 9, dealing with risk of loss, is one of the few apparently consumer-oriented provisions in the proposed statute to the extent that it will insulate consumers from any harm beyond losing the full value of the purchase. But even this provision is qualified by the right of the seller to offer the buyer, at her cost, insurance for the excess risk.” *Written submission of Professors Romberg and Sullivan, October 2019* (noting also that Section 10 is divided between pro-consumer and pro-business sections and Section 11 is consumer-protective).

At the February 2020 meeting of the Commission, Professor Romberg began his comments by “stating that the instant project was both unnecessary and misguided. He said that in the contractual context, the balance of power continues to be relevant. The modifications made to this Report render consumer consent irrelevant and weaken other important consumer protections. As a result, Professor Romberg opined that the project was anti-consumer.” *Minutes of February 2020 Commission meeting.*

The Commission began, and continued, work on this project in response to the recognized inadequacy of the law to deal with issues raised by the increasing ubiquity of standard form contracts. The goal of the project was, and remains, to be consumer protective while achieving consistency and predictability.

As more fully explained below, considerable redrafting was done in response to the concerns raised by project commenters, including the substantial reintroduction of the unconscionability standard, and the elimination of the need for consumers to prove procedural unconscionability. The goal was to allow the focus to be on whether the terms of the contract

were substantively unconscionable, rather than requiring a consumer to prove that the contract was a contract of adhesion.

Unconscionability

In an early comment on the issue of unconscionability, Professor Jacob Hale Russell of Rutgers Law School, in a written submission in July 2019, said

I admire the idea of the project, particularly because as I understand it, it identified many [of] these issues well ahead of others, and I agree with many aspects of the framing and backdrop to the project. However, I have a number of serious concerns about several aspects of the most recent draft, many of which are informed by my recent research into unconscionability. My project convinced me that much of what I thought I knew, and taught, about how courts apply unconscionability is wrong; contemporary unconscionability doctrine is both more alive, and more thoughtful, than I had previously recognized. In addition, consumer contracting has experienced a sea-change over the past several decades, including more market segmentation and contract complexity, which scholars — and policymakers — have not come to grips with.

Written submission of Professor Russell, July 2019. Professor Russell also said

I am concerned that the draft would severely dismantle aspects of New Jersey contract law in ways that are both unworkable and undesirable. As one example, I have serious doubts about Section 7's elimination of unconscionability with respect to price terms, or about the advisability and workability of the distinction between "primary" and "secondary" terms. Although I had always understood unconscionability to be primarily about secondary terms, my review of recent cases suggests that many recent unconscionability cases focus on price. This is perhaps less surprising given that [] prices have become more complex and opaque — a fact extensively documented in information economics literature, but less dealt with in law — and given issues around market segmentation.

Id.

A July 2019 written submission by Professor Romberg raised concerns that "secondary terms can't even be challenged on the basis of fraud, illegality, duress or mutual mistake? The only basis is a newly defined 'unconscionability' that an objectively reasonable consumer, as defined by the court, would have rejected the sale. Not, as the comment makes clear, the disputed term, but the entire contract." *Written submission of Professor Romberg, July 2019.*

At the July 2019 Commission meeting, the Minutes indicate that "Professor Romberg... disagreed with the Report's treatment of primary terms, noting that just because a term is 'primary' does not mean it should not be subject to an unconscionability analysis. He voiced concern regarding the issue of negotiating over a term of a contract, and stated that this too

should not negate an unconscionability analysis.” *Minutes of the Commission’s July 2019 meeting.*

Current law divides determinations of unconscionability into a procedural and a substantive component. As noted above, after changes in response to the concerns raised by commenters, the draft Act eliminates the need for consumers to prove procedural unconscionability. The goal was to allow the focus to be on whether the terms of the contract were substantively unconscionable, rather than requiring a consumer to prove that the contract was a contract of adhesion.

Professor Romberg indicated that he did not believe it was necessary to reinstate the requirement to prove procedural unconscionability, and added that he was concerned with people not being able to afford attorneys. *Id.* The Minutes of that same July meeting reflect that

Margaret Jurow, a Resident Practitioner at Seton Hall who maintains a private practice in this area of the law... observed that the current model of unconscionability and equitable defenses works well. She stated that most unconscionability clients are elderly, otherwise vulnerable, or stressed and under pressure, and that under the current law, their cases are not causing problems in the system... She found the handling of attorney’s fees troubling and noted that the unconscionability cases that are litigated traditionally focused on primary terms of the contract.

Id.

Professors Romberg and Sullivan, in their written submission in October 2019, stated that

... §3(a)(3) does away with unconscionability of every stripe; even if it were thought appropriate to reject an unconscionability defense based on an argument of unequal bargaining power, a contract of adhesion precluding meaningful opportunity to negotiate, and a grossly substantively unfair term-and we do not believe it appropriate-the proposal goes beyond eliminating that form of unconscionability. It would also reject unconscionability defenses predicated on, e.g., a grossly substantively unfair term, introduced by a misrepresentation that was actually but *unreasonably* relied upon. There is no basis even offered for eliminating such forms of unconscionability.

Written submission of Professors Romberg and Sullivan, October 2019. They added, in that same written submission,

Section 8(a)(1) preserves standard contract defenses but as to "terms," which is odd because the defenses traditionally applied to entire contracts. Section 8(a)(4) allows a court to invalidate a secondary term as "unconscionable" but provides no example other than to rule out disparities in bargaining power as a basis for so declaring. An earlier draft spoke in terms of a reasonable consumer rejecting the sale, but this was removed. While the partial resurrection of an unconscionability

defense as to secondary terms is a slight improvement over the original proposal, it must be defined in terms that a court can administer. To the extent the commentary endorses the "no man in his senses and not under a delusion" test, it opts for a very, very narrow view of the defense, reducing it to basically a fig leaf.

Written submission of Professors Romberg and Sullivan, October 2019.

“The relationship of the proposed statute to other enactments remains unclear. Section 3(a)(3) of the proposal does away with unconscionability as a defense to a contract or primary term of a contract.” *Written submission of Professors Romberg and Sullivan, October 2019.*

While the proposal contains a savings clause for "consumer fraud" legislation, § 3(b)(4), does that include the New Jersey Consumer Fraud Act's prohibition of unconscionable commercial practices (and if so, how is that to be reconciled with § 3(a)(3))? Moreover, the proposal's effect on other laws, such as the Uniform Commercial Code, is uncertain. The commentary is clear, for example, that this act does away with § 2-302, the Article 2 provision on unconscionability, but what about § 2-207? If that is to fall (and it has played a major role in this area), it would be because of § 3(a)(1), which provides that the proposed statute trumps any other law. But the commentary does not address this important question, leaving it to the courts to so decide. The commentary is clearer as to implied warranties, or at least the "total exclusion" of them. That would no longer be permitted, but the merchant could limit the consumer's remedies to a right of refund.

Written submission of Professors Romberg and Sullivan, October 2019.

The Minutes of the Commission's October 2019 meeting reflect that "Professor Romberg advised the Commission that this Report does not retain the present concept of unconscionability but instead defines a term and calls it unconscionability, fundamentally changing the law." *Minutes of the Commission's October 2019 meeting.* The Minutes of that same meeting reflect comments from Professor Romberg and David McMillin, Esq., Director of Legal Services New Jersey as follows:

Professor Romberg discussed the case of *Ahern v. Knecht*, 563 N.E.2d 787 (1990), with the Commission. In *Ahern*, the plaintiff was dramatically overcharged for the repair of her air conditioning unit during dire circumstances. This case brought to the fore the issue of unconscionability. The extreme power imbalance in this case demonstrates that an extreme power imbalance might rise to the level of unconscionability. According to Professor Romberg, the current sliding scale approach for dealing with standard form contract cases works. Professor Romberg then asked the Commission to wait for the ALI to act on this subject, even if it takes several years.

David McMillin advised the Commission that this project represents a radical change to the doctrine of unconscionability and will adversely affect low income

individuals. As discussed in this Report, the term “fully negotiated” is a term that Mr. McMillin believes will have to be litigated to determine its meaning. In addition, contracts involving health care, negative amortization, and personal installment loans will all be affected by the changes made in the Draft Final Report.

Minutes of the Commission’s October 2019 meeting. “Although the Report preserves the traditional, common law defenses, Professor Romberg advised the Commission that this Report will overturn the current common law promulgated by the New Jersey Supreme Court. Since 1992, courts have examined several factors in order to determine whether a contract is unconscionable.” *Id.* “Mr. McMillin then read to the Commission correspondence that he received from Professor Jacob Hale Russell, who supports the current use of unconscionability in standard form contract disputes.” *Id.*

The Commission recognized the possibility that unconscionability may serve as a deterrent, even if it is not generally a successful argument. Price gouging cases represent one such example. The Commission acknowledged that removing the deterrent could result in an increase in predatory sellers and tactics.

After additional drafting by Staff, Professor Romberg explained at the February 2020 Commission meeting that the Report “appears to be moving to a classical, more conservative, position that is anti-consumer. The benefit of the current state of the law is that it compels merchants to think about their behavior at the risk of running afoul of an unconscionability standard – this implicit act of self-policing benefits the consumer.” *Minutes of the Commission’s February 2020 meeting.*

Mr. McMillin stated that “unconscionability” is the key to the transactions set forth in this Report and the Commission’s proposed modifications represent a major change in search of a problem. He said that the doctrine of unconscionability is essential to protecting vulnerable consumers. In 1992, the New Jersey Supreme Court addressed the issue of unconscionability in *Rudbart v. North Jersey District Water Supply Comm’n*, 127 N.J. 344 (1992), and set forth a four-part test to determine whether a contract is unconscionable.

Mr. McMillin replied that... [S]ection 7(b)...creates a new test regarding unconscionability because it eliminates the four-factor test. He said that since unconscionability is used in other areas of the law (the UCC; consumer fraud; family law; and landlord tenant law) this project creates an inconsistency by diverging from the existing common law standard for unconscionability. Professor Romberg concurred with David McMillin’s comments.

Minutes of the Commission’s February 2020 meeting.

During the course of the Commission’s work in this area, substantial changes were made to the Commission’s draft language in 2020 based on the understanding that commenters who expressed concerns about the impact of this project on consumers might support the then-current draft if it was modified in three ways:

1. it removed the limit on unconscionability for price terms;
2. it did not limit unconscionability for secondary terms; and
3. it identified a subset of secondary terms that are subject to enhanced scrutiny (in areas known to be problematic for consumers).

Those modifications were made.

In response, commenters said that they continued to believe that the project is misguided because they do not see the problem that it was intended to resolve and because its provisions appeared to be inconsistent with consumer-protective principles regarding consent and unconscionability.

The issue that remains of significant concern to the project commenters seems to be the defense of “unconscionability,” and whether it should be available against primary terms *other* than price. “Primary term” is defined in Section 1 of the Act as “a standard form contract term that:

- (1) establishes the basic price;
- (2) identifies the product and its specifications; or
- (3) is a negotiated term as defined in this section.”

“Negotiated term” is defined by the Act as “a standard form contract term that is subject to adjustment by the parties after discussion and agreement. A contract term is not negotiated simply because it is separately signed by a consumer.”

Although considerable redrafting was done in response to the concerns raised by project commenters, including the substantial reintroduction of the unconscionability standard and the elimination of the need for consumers to prove procedural unconscionability, the commenters have indicated that they do not, and will not, support the draft Act.

As a result of the recently revisions, a standard form contract may be unenforceable as a result of the unconscionability of the primary term of price, and with regard to all secondary terms.

Primary vs. secondary terms

Professor Russell, in his July 2019 submission, explained that he had “serious doubts about... the advisability and workability of the distinction between “primary” and “secondary” terms. Although I had always understood unconscionability to be primarily about secondary terms, my review of recent cases suggests that many recent unconscionability cases focus on price.” *Written submission of Professor Russell, July 2019.*

In his July 2019 submission, Professor Romberg said “unilateral mistake, undue influence, impracticability, impossibility, frustration of purpose, minority, mental incapacity, and (the next two grounds are actually intended to be unavailable...) unconscionability and the doctrine of reasonable expectations (e.g., under the Second Restatement s. 211(3) and cmt. f) are

no longer viable bases for the primary terms of a consumer adhesion contract to be unenforceable?” *Written submission of Professor Romberg, July 2019*. “[S]econdary terms can’t even be challenged on the basis of fraud, illegality, duress or mutual mistake? The only basis is a newly defined “unconscionability” that an objectively reasonable consumer, as defined by the court, would have rejected the sale. Not, as the comment makes clear, the disputed term, but the entire contract. *Id.* “So commercial reasonableness, and good faith and fair dealing, are no longer relevant. And NJ’s Consumer Fraud Act prohibits unconscionable commercial practices, not at all limited to this meaning of unconscionability. Does this alter the meaning of unconscionability under the CFA?” *Id.*

At the July 2019 Commission meeting, “Professor Romberg... said that the treatment of secondary terms does not protect the average consumer nearly enough and could permit businesses to target certain consumers.” *Minutes of the Commission’s July 2019 meeting*.

In an October 2019 written submission, Professor Romberg and Professor Sullivan said that the

proposed distinction between "primary" and "secondary" terms in § 6 at the core of the proposal seems to us nebulous, malleable, and unworkable. It is likely to generate as much uncertainty, confusion, and litigation as exists under current law, with the potential to be far less fair. What makes a price or product specification term "basic" rather than not? Does "clearly and explicitly disclosed at the time of sale" refer only to written disclosures? Written disclosures in an integrated contract provided at the time of sale? Before the time of sale? Oral disclosures at the time of sale? What does it take for a term to be "fully negotiated"? Is a separately initialed term necessary or sufficient for full negotiation? Is a thirty second discussion of a simple term sufficient? An hour-long discussion of a term beyond the customer's understanding sufficient? Does the fullness of negotiation depend on the complexity of the term? The importance of the term to the overall value of the contract? The customer's sophistication? The overall value of the contract? Would "full negotiation" of a simple term in a low-value contract with a sophisticated customer require less than full negotiation of a complex and highly significant term in a high-value contract with an unsophisticated customer? If not, the proposal seems highly unfair; if so, the proposal seems no more certain than current law.

Written submission of Professors Romberg and Sullivan, October 2019. “Section 6 defines ‘primary terms,’ and that necessarily includes only ‘basic price’ and ‘product specifications.’ Section 7 says the consumer is bound by such terms, but it does not say that the seller is so bound. Assuming an intent to bind both parties, the extent of the merchant's obligation is unclear.” *Written submission of Professors Romberg and Sullivan, October 2019*.

At the February 2020 Commission meeting, Professor Romberg indicated that “he would like to see changes to the secondary terms to include those recognized in contract law, and work done to make ‘reasonable expectations’ more robust.” *Minutes of the Commission’s February 2020 meeting*. He also suggested that “Section 8(a)(1) should include all the common law

contractual defenses. In addition, the phrase ‘irrespective of the relative bargaining power of the parties’ should be removed from Section 8(a)(4).” *Minutes of the Commission’s February 2020 meeting*.

Guiding the Commission’s work in this area was the widely-accepted recognition of the difference between standard form contract terms concerning things like product and price, and terms that are described as “standard” or “boilerplate.” That gave rise to the distinction between primary and secondary terms.

Contract terms are ordinarily enforced because they are the subject of consent and the result of mutual give and take between the parties. Typically, standard form contracts are not based on consent nor do they result from bargaining between the parties. Further, it is generally accepted that to negotiate and to read standard form contracts prior to their formation would be impractical and wasteful.

With regard to the contract law defenses suggested for inclusion by the project commenters, the Commission incorporated those whose inclusion appeared to be supported by New Jersey case law, as more fully explained in the comments to Sections 7 and 8 in the Appendix. The incorporation of those defenses did not, however, limit the defenses that might be raised by a consumer, since both Sections 7 and 8 make clear that an enforceability determination could be based on “one, or more, principles of law and equity, including...” ultimately leaving room for judicial discretion.

The draft language concerning the impact of the bargaining power of the parties on unconscionability in Section 8 was modified to clarify that a finding of unconscionability is not dependent on the bargaining power of the parties, and that consumers do not have to prove procedural unconscionability.

Parol evidence rule

Commenters also raised questions about the fact that

Section 12(a) imposes by statute a classical approach to the parol evidence rule, directly conflicting with the modern approach applicable under current New Jersey law. This radical revision is entirely unjustified and has no obvious relation to the remainder of the proposal. First, § 12 would allow explanatory parol evidence only as to “ambiguous” contract terms, an approach favored under the classical approach to the parol evidence rule but not adopted in the Restatement of Contracts (Second) or in New Jersey. It would also appear to preclude finding a contract not to be completely integrated (thus rendering contradictory evidence admissible) upon review of the written agreement *along with* parol evidence of a prior or contemporaneous oral agreement—again, sharply changing the modern approach applicable under current New Jersey parol evidence law. Moreover, the proposal reaches not just prior and contemporaneous oral agreements but also “subsequent” ones, a subject matter outside the scope of New Jersey’s parol evidence rule. The consumer, say, who calls up to complain about a product and

is promised some remedy cannot, therefore, put that conversation into evidence, and that would be true even if the conversation was recorded.

Written submission of Professors Romberg and Sullivan, October 2019.

§ 12(b) is also unjustified and also with no obvious relation to the remainder of the proposal. The merchant may change the terms of a standard form contract (no limit here to secondary terms) under certain conditions. It's true that the conditions are restrictive -the merchant must give written notice of the change (notice that, given the predicates of this proposal, the consumer will not read), it must be prospective only, and it must give the consumer instructions how to cancel. It is also true that such a clause may operate only if the consumer also has the right to cancel, but what does that mean? Take the usual cell-phone service contract: an original contract that specifies \$40 a month but allows seller to modify. Seller raises the price to \$60. The consumer may cancel, but would apparently have to pay the remaining costs of the device itself, which means he would end up losing the "deal" that enticed him into his purchase in the first place.

Id.

Prior Section 12, which contained, among other things, the provision pertaining to the use of parole evidence, has been stricken from the draft Act in response to commenter recommendations.

Effectiveness of contract

Also of concern to commenters was the question of when a standard form contract becomes effective.

Section 4 provides that "a standard form contract becomes effective when the sale occurs and the merchant either transfers the contract to the consumer or makes the contract accessible to the consumer." The statutory provision is quite murky about the problems that have bedeviled courts on this question: does an internet order become effective when the consumer hits the "place order" button and does it depend on whether the customer clicks an "I accept terms and conditions" button ("clickwrap") or when the place order button is sufficiently conspicuous to the consumer to be satisfied by a visible hyperlink ("browserwrap")? Do "shrinkwrap" terms and conditions bind the buyer only when she fails to respond within a given time and how long is sufficient for the buyer to make that determination? None of these terms is found in the commentary (although the Introduction does mention "click wrap" in passing).

Whether this matters under the proposal needs further analysis. The contract becomes effective when it is transferred or made accessible, but § 5(a) allows the consumer to cancel the contract if the terms are accessible "only after the

consumer has purchased the product" (presumably that means has paid for it). This right is subject to several conditions, one of which seems entirely unjustified: the consumer can open the package "not more than necessary to access the terms of the contract." § 5(b). Removing the packing to see whether the shipment is in fact the product ordered, or if the product is defective, would apparently disqualify the right to return. Why should the customer be precluded from reasonably inspecting-or even using-the product while considering the contract terms?

Then § 5(d) requires the consumer who wishes to cancel to return the product "within a reasonable time not to exceed 30 days." Why the statute sets an outer limit on a reasonable time is not clear, but, in any event, the proposed statute effectively encourages businesses to give less not more time. Why does the proposed law not simply provide a 30-day period? In that regard, the statute is less protective of consumers than were *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) and *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997), both cases that have been heavily criticized as probusiness and anticonsumer.

Written submission of Professors Romberg and Sullivan of October 2019.

Section 5, concerning the cancellation of standard form contracts, was revised in response to the concerns expressed by commenters, and the comments to that section reflect additional research regarding the available New Jersey case law concerning the point at which a standard form contract becomes effective.

Attorney Fees

Professor Romberg took issue with the Report's handling of attorney's fees, contending that it gives attorneys leverage. *Minutes of the Commission's July 2019 meeting*. Ms. Jurow found the handling of attorney's fees troubling as well. *Id.*

The Commission recognized that the attorney fee provisions might be problematic in multi-state cases, and modified the drafting accordingly and in response to commenter recommendations. The language contained in Section 10 (formerly Section 11) was changed to provide that the fee cap applies equally to both plaintiffs and defendants.

Work of the ALI

In April of 2019, the American Law Institute (ALI) released a Tentative Draft of the Restatement of the Law of Consumer Contracts, a project it began in 2012. The work of the ALI in this area recognizes the prevalence of standard form contracts in modern society, and a basic principle that informed the work of the Commission as well – that consumers frequently do not read the standard terms in consumer contracts.

Generally speaking, the goal of an ALI Restatement is to capture and describe the law as it currently exists while changing it in order to achieve a more comprehensive and

comprehensible body of law. Restatements usually focus on common law. Their value is immense, and the Commission’s statutory mandate calls for consideration of the suggestions and recommendations of the ALI. The promulgation of a Restatement, however, does not have any immediate or predictable impact on the law of any particular jurisdiction.

The work of the ALI in the area of standard form contracts took a different approach from the work of the Commission. Among other things, the ALI did not impose any limits on the defense of unconscionability, while the Commission proposed a limit to unconscionability for terms that identify the product and its specifications or a negotiated term of the contract. Both the ALI and the Commission, however, recognize the distinction between terms like product and price and “standard” or “boilerplate” terms.

Commenters noted that in May of 2019, 23 State Attorneys General, including the Attorney General of the State of New Jersey, requested that the ALI reject the Draft Restatement. The State Attorneys General expressed concerns about the draft’s reliance on unconscionability to protect consumers while weakening the doctrine of mutual assent, its introduction of a new test for procedural unconscionability, and its reliance on litigation as a consumer-protection mechanism.

After what is described on the ALI website as a “spirited discussion at its 2019 Annual Meeting,” ALI Membership approved Section 1 (of nine sections) subject to meeting discussion and “editorial prerogative.”¹ No further updates or information is available on the ALI website regarding the Consumer Contracts project.

Conclusion

As explained above, and in the comments following the sections of the draft Act in the Appendix, significant changes were made to the drafting in response to commenter concerns. Substantial changes were made to the Commission’s draft language in 2020 based on a summarized and distilled understanding of the essence of the comments - that commenters who expressed concerns about the impact of this project on consumers might support the then-current draft if it was modified in three ways:

1. it removed the limit on unconscionability for price terms;
2. it did not limit unconscionability for secondary terms; and
3. it identified a subset of secondary terms that are subject to enhanced scrutiny (in areas known to be problematic for consumers).

Those modifications were made.

In response, commenters said that they continued to believe that the project is misguided because they do not see the problem that it was intended to resolve and because its provisions appeared to be inconsistent with consumer-protective principles regarding consent and

¹ American Law Institute, Restatement of the Law, Consumer Contracts; <https://www.ali.org/projects/show/consumer-contracts/> (last visited August 11, 2021).

unconscionability. Underlying those concerns is the characterization of the project as “consumer-unfriendly.”

The issue of concern most significant to the project commenters seems to be the defense of “unconscionability,” and whether it should be available against primary terms other than price. “Primary term” is defined in Section 1 of the Act as “a standard form contract term that:

- (1) establishes the basic price;
- (2) identifies the product and its specifications; or
- (3) is a negotiated term as defined in this section.”

“Negotiated term” is defined by the Act as “a standard form contract term that is subject to adjustment by the parties after discussion and agreement. A contract term is not negotiated simply because it is separately signed by a consumer.”

The Commission, as always, appreciates the willingness of the project commenters to share their experience and expertise. The Commission recognizes the particular challenges associated with participating in lengthy discussions, over a period of years, about a project that the commenters do not – and will not – support.

Although they do not support the draft Act, the participation of the commenters resulted in a much-improved draft, and a valuable update to the decades-old work that represented the Commission’s initial effort in this area. That initial work gave rise to bills that have been introduced in recent Legislative sessions, and the Commission respectfully recommends that any subsequent bills be based on this updated Report.

The Commission continues to recommend the addition of a new Act to New Jersey’s body of statutory law. The purpose of this Act is to provide a framework of legislatively defined rules to determine the enforceability of standard form contract terms. The goal is to introduce greater degrees of certainty, predictability, and clarity into the law governing standard form contracts.

Appendix

NOTE: The draft language in this Appendix contains underlining and strikeout so that those familiar with the various drafts during the course of this project can most easily follow along with changes.

With the exception of Section 5, the following language is identical to that considered by the Commission in October 2020. Section 5 was modified as explained in the comment following that section to address potential ambiguity in the language as previously drafted.

When the document is released by the Commission as a Final Report, the underlining and strikeout will be removed to finalize this document before distribution and uploading to the Commission's website since this is not a modification of existing statutory language, but a proposal for a new area of the law.

Section 1. Definitions

For purposes of this act:

a. “Basic price” means the net price of a product immediately payable and ~~It does not include payments due in the future, or rebates,~~ added fees or costs associated with delivery, insurance, ~~or financing,~~ or similar items.

b. “Consumer” ~~is~~ means a person that buys, leases, licenses or otherwise acquires an interest in, or incurs an obligation with respect to, a product in an open market not for resale but as an ultimate user of the product.

c. “Merchant” ~~is~~ means a person:

(1) regularly engaged in the business of offering to sell a product;

(2) that uses a standard form contract to ~~regulate legal obligations with a consumer.~~ define specify the rights and duties of the parties.

d. “Negotiated term” means ~~refers to~~ a standard form contract term that is subject to adjustment by the parties after discussion and agreement. ~~modified by the parties, or for which a modification is discussed and clearly rejected by the parties, at or prior to sale.~~ A contract term is not ~~deemed~~ negotiated simply because it is separately signed by a consumer.

e. “Open market” ~~is~~ means a market ~~where~~ in which a merchant offers its product to consumers or classes of consumers.

f. “Primary term” means ~~refers to~~ a standard form contract term that:

(1) establishes the basic price;

(2) identifies the product and its specifications; ~~and~~ or

(3) ~~any~~ is a negotiated term as defined in this section.

g. “Product” ~~is~~ means a good, service, license or other right to personal property, tangible or intangible, or an extension of credit offered in an open market.

h. “Sale” includes a purchase, lease, license or other disposition of a product in an open market.

i. “Secondary term” ~~means~~ refers to any standard form contract term other than a primary term as defined in this section.

j. “Standard form contract” ~~is~~ means ~~refers to~~ a record of legal terms used by a merchant offering to sell a product to a consumer in an open market ~~for the purpose of~~ to specifying the rights and obligations of ~~consumer and merchant in a sale~~ both the parties.

COMMENT

The definition section sets forth terms that are used throughout the Act. For purposes of consistency and ease of use, the following definitions have been moved from Section Six to this section: primary term; secondary term; basic price; and negotiated term. This section was also rearranged to place the defined terms in alphabetical order. The definition of “primary term” was refined in response to commenter suggestions.

The Commission began, and continued, work on this project in response to the recognized inadequacy of the law to deal with issues raised by the increasing ubiquity of standard form contracts. The goal of the project was, and remains, to be consumer protective while achieving consistency and predictability.

The terms in this section are commonly used in the law and in commerce, but there are instances in which the meaning of the terms in this Act differs from their commonly understood meanings.

The term “consumer” includes anyone who takes the product for consumption rather than for resale. The use of the word, “consumer” makes it clear that the act would regulate only consumer transactions. The definition is designed to be the same as that used for consumer transactions for purposes of consumer fraud acts. The phrasing of the definition is derived from *Hundred East Credit Corp v. Eric Schuster*, 212 N.J. Super 350 (App. Div. 1986) construing the commercial fraud acts.

The term “merchant” means any person, regularly engaged in the business of selling products, that sets or adopts the record of uniform legal terms governing the relationship between itself and the consumer and that enters into the contract relationship with the consumer. The breadth of the definitions of “product” and “sale” means that a merchant could include any party in the chain of distribution if that party uses a standard form contract.

“Open market” means the public sale of a product. If the merchant makes the product available to a large population of consumers having the money to buy it, the transaction is an open market sale. The use of the phrase “classes of consumers” recognizes that some merchants do not offer to sell their products to every potential consumer. For example, car leasing companies cannot enter into contracts with just anyone; by law, the consumer must have a license and have attained a certain age. Limitations of this sort do not change the public nature of the sale. Additionally, the market itself need not be a physical place like a retail store. It can be a mail order system, an Internet market, or the like.

The term “product” covers not only goods and services, but also licenses and certain financial products. The category of “licenses or other rights to personal property” includes the purchase of intellectual property or rights to information contained in software and databases. The category of “extension of credit” includes financial products such as bank loans, credit card agreements and store charge accounts. The rationale for expanding the definition of “product” beyond goods recognizes that the issue of a contract’s enforceability transcends product differences and justifies treatment of diverse contracts under a single statute.

This Act defines the term “sale” beyond its generally accepted meaning in the law. The statutory definition covers not only sales but also leases, licenses, or other dispositions of a product in an open market. The broad

definition of the term “sale” establishes that the method of contract formation, not the form of the transaction, triggers application of the Act. If a merchant uses a standard form contract, then any disposition of the product in the open market is a sale.

A “standard form contract” is a contract used in an open market transaction to govern the legal relationship between the parties. These contracts are forms used by the merchant and offered to the consumer on a “take it or leave it” basis. Merchants and consumers routinely enter into standard form contracts. Examples of these contracts are parking lot and theater tickets, software licenses, and department store charge slips.

Standard form contracts are ancillary to the acquisition of goods and services; the contract terms are not the focus of the transaction. Most people do not read the contract terms since the terms are not negotiable. They concentrate only on price, financing, and product characteristics. The purpose of the contract is to standardize terms for mass distribution, marketing, and sale of a product to consumers. The contract is offered to any person or class of persons intending to purchase the product, that is, the contract is offered to consumers in the market whose identity is not usually known in advance by the merchant. The uniformity and standardization of the contract are analogous to the uniformity and standardization of the mass manufactured product to which the contract is attached. The merchant selling the product does not intend that the pre-set contract be altered as a result of individualized negotiations at the point of sale. Rather, the merchant expects the consumer to accept or reject the contract as a whole.

Negotiation of central terms does not exclude a contract from this Act. The central terms of a standard form contract, such as price, are negotiated in a large number of transactions. Consumers tend to focus on this and terms concerning the item description, and they are treated as primary terms governed by ordinary contract rules and not subject to the Act’s special rules for secondary terms.

Standard form contracts have been referred to as “contracts of adhesion.” Supplemental research regarding the treatment of contracts of adhesion in New Jersey is set forth below.

The first case in which the New Jersey Supreme Court discussed contracts of adhesion in any detail was *Henningsen v. Bloomfield Motors, Inc.*² In that 1960 case, the Court stated that “[u]nder the broad terms of the Uniform Sale of Goods Law any affirmation of fact relating to the goods is an express warranty if the natural tendency of the statement is to induce the buyer to make the purchase.” *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 371 (1960). “And over the years since the almost universal adoption of the act, a growing awareness of the tremendous development of modern business methods has prompted the courts to administer that provision with a liberal hand.” *Id.*

“True, the Sales Act authorizes agreements between buyer and merchant qualifying the warranty obligations. But quite obviously the Legislature contemplated lawful stipulations (which are determined by the circumstances of a particular case) arrived at freely by parties of relatively equal bargaining strength.” *Id.* at 404. “The lawmakers did not authorize the automobile manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer, who in effect has no real freedom of choice, the grave danger of injury to himself and others that attends the sale of such a dangerous instrumentality as a defectively made automobile.” *Id.*

“[I]s there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice?” *Id.* at 389 (citing *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 326 (1942)).

“Just as the community has an interest in insuring (usually by means of the legislative process) that credit financing contracts facilitating sales of consumer goods conform to community-imposed standards of fairness and decency, so too the courts, in the absence of controlling legislation, in applying the adjudicatory process must endeavor, whenever reasonably possible, to impose those same standards on principles of equity and public policy.” *Unico v. Owen*, 50 N.J. 101, 111–12 (1967).

² Argued for the Plaintiff by Bernard Chazen, former Commissioner of the New Jersey Law Revision Commission.

New Jersey courts have looked not just at the terms of a contract of adhesion, but also at the “subject matter of the contract the parties’ relative bargaining positions, the degree of economic compulsion motivating the ‘adhering’ party, and the public interests affected by the contract.” *Rudbart v. N. Jersey Dist. Water Supply Comm’n*, 127 N.J. 344, 356 (1992).

“[T]he essential nature of a contract of adhesion is that it is presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the adhering party to negotiate except perhaps on a few particulars.” *Id.* at 353. “Such a contract ‘does not result from the consent of that party.’” *Id.* Consequently, a “distinct body of law surrounding contracts of adhesion” has developed “to determine whether and to what extent such nonconsensual terms will be enforced.” *Id.* at 353–54.

New Jersey courts have noted, however, that “[e]ven if an agreement constitutes a contract of adhesion, the contract is not automatically void.” *Rodriguez v. Raymours Furniture Co., Inc.*, 225 N.J. 343, 366-67 (2016).

Section 2. Scope

a. Except as provided in subsections b. and c. of this section, this act governs standard form contracts used in an open market.

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

c. This statute does not apply to contracts for:

(A) insurance,

(B) the sale or purchase of securities;

(C) the sale or purchase of real estate; or

(D) the mortgage of real estate.

COMMENT

This section defines the class of contracts to which the Act applies, and was refined in response to commenter suggestions to clarify the contracts to which it does not apply.

“Open market” is defined as a market where a merchant offers its product to consumers or classes of consumers. The Act applies to market transactions in which the merchant uses a standard form contract to set the legal terms of the transaction. The nature of the contract, not the identity of the parties, triggers the application of the Act. There are three essential elements to the Act’s breadth. First, the transaction must take place in an open market. This excludes transactions where the merchant closes the market by predefining the identity of potential consumers. Second, the object of the transaction must be a product. While the definition of product is broad, it specifically excludes contracts governed by subsection b. and c., and other types of contracts such as franchise agreements. Third, the contract must qualify as a standard form contract.

Subsection b. removes from the scope of the Act any term of a standard form contract required to be filed, prior to the marketing of the product, with a federal or state agency. For example, state insurance boards exercise substantial supervisory authority over insurance companies and the standard form contracts used in their business. The Act excludes these contracts to avoid the effect of having the judicial branch second guess the judgment of the executive branch on how to regulate terms contained in these contracts.

Subsection c. removes contracts relating to insurance, securities, and real estate from the scope of the Act. Those transactions present particular issues, and the Act’s provisions do not apply well to those issues.

Courts that have analyzed insurance contracts seemed to be sensitive to the complexity of contractual provisions as a reason for subjecting them to heightened scrutiny. “Because of the substantial disparity in the sophistication of the parties, and because of the highly technical nature of insurance policies, we have long “assume[d] a particularly vigilant role in ensuring their conformity to public policy and principles of fairness.” *Id.* at 669–70... (quoting *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 175...(1992)).” *Pizzullo v. New Jersey Mfrs. Ins. Co.*, 196 N.J. 251, 270 (2008). The mere fact that an insurance contract is a contract of adhesion does not render the contract provisions void. Instead, the court will look at the plain meaning of the contract and “[w]hen there is ambiguity in an insurance contract, courts interpret the contract to comport with the reasonable expectations of the insured, even if a close reading of the written text reveals a contrary meaning.” *Id.* at 270–71. Nonetheless, courts “should not write for the insured a better policy of insurance than the one purchased.” *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 175 (1992).

“When members of the public purchase policies of insurance they are entitled to the broad measure of protection necessary to fulfill their reasonable expectations. They should not be subjected to technical encumbrances or to hidden pitfalls and their policies should be construed liberally in their favor to the end that coverage is afforded ‘to the full extent that any fair interpretation will allow.’” *Linden Motor Freight Co. v. Travelers Ins. Co.*, 40 N.J. 511, 525 (1963). Yet, when the terms are clear, “particular provisions of an insurance contract may not be disregarded at will and a new contract judicially made for the parties.” *Id.*

Section 3. Effect on other laws

a. Except as provided by subsection b. of this section, this act provides comprehensive provisions for the enforcement of standard form contracts and supersedes ~~any~~ law that:

~~(1) conflicts with this act; or,~~

~~(2) makes a term in a standard form contract unenforceable because the term is the result of unequal bargaining power, or~~

~~(3) makes a whole contract or a primary term in a standard form contract unenforceable because it is unconscionable except as provided in this act.~~

b. This act does not supersede statutes that:

(1) require the inclusion of specific terms in standard form contracts;

(2) prohibit the inclusion of specific terms in standard form contracts;

(3) impose formal requirements, other than those specified in this Act, to make a contract effective, or

(4) regulate consumer fraud.

COMMENT

Project commenters’ suggested revisions were incorporated into this section.

This section clarifies how this Act modifies existing decisional and statutory law governing standard form contracts. The Act co-exists with statutes that prohibit or require the inclusion of specific terms in contracts.

Effect on decisional law. This Act is intended to supplement, clarify, and codify the common law of contract developed in response to standard form contracts. The goal is to achieve certainty and predictability with legislatively defined rules.

Effect on statutory law. This Act supersedes any statute providing rules for the formation, enforcement, and cancellation of standard form contract terms that conflicts with it. Because this Act and the UCC may apply to the same contracts, it is useful to discuss in some detail the interaction of the two statutes in the context of standard form contracts.

The interaction of the Uniform Commercial Code and this Act. The UCC is applicable to sales, leases, negotiable instruments, bank deposits, fund transfers, letters of credit, bulk transfers and bulk sales, warehouse receipts, bills of lading and other documents of title, investment securities and secured commercial transactions. Since the UCC applies to terms of standard form contracts, it overlaps with this Act. Overlapping provisions include Article 2 (involving sales of goods contracts); Article 2A (involving lease contracts); Article 9 (involving security agreements in personal property). In many cases, the contract or agreement covered by the UCC may constitute a standard form contract subject to this Act. In any given case, a court must determine (1) when this Act supersedes the UCC, and (2) when the UCC supersedes this Act. The following examples illustrate these two categories.

Example of when this Act supersedes the UCC. This Act limits the doctrine of unconscionability applied to standard form contracts, so there will be situations where consumers cannot bring a cause of action for damages and attorneys' fees under N.J.S. 12A:2-302(1) and N.J.S. 12A:2A-108(1). In some cases, this Act also is intended to preclude a court from finding that a provision is "unconscionable" because it is the product of "unconscionable conduct" under N.J.S. 12A:2A-108(2). The court will apply the relevant provisions of this Act to determine whether a secondary term is enforceable against the consumer.

Likewise, this Act supersedes the provisions of Articles 2 and 2A permitting the total exclusion of implied warranties of merchantability. N.J.S. 12A:2-316 (allowing a merchant to exclude the implied warranty of merchantability in a sales contract) and N.J.S. 12A:2A-214(2) (allowing a merchant to exclude the implied warranty of merchantability in a lease contract) in so far as those provisions apply to consumer transactions. This Act fuses the contract and tort obligations of a merchant to produce merchantable products, that is, goods that work for their intended purpose. The Act permits merchants to alter this warranty only with respect to the right of refund. A merchant may require a consumer to give the merchant an opportunity to replace or repair a defective product.

Where inconsistent, the provisions of this Act, and not the UCC, apply to govern a standard form contract between a merchant and a consumer. For example, the Act gives a New Jersey consumer the right to bring an action in New Jersey against the merchant. By contrast, N.J.S. 12A:2A-106(2) limits the choice of forum selection in consumer leases to the jurisdiction where the consumer resides, the jurisdiction where the consumer will use the goods or the jurisdiction in which the lease is executed if the goods are used in more than one jurisdiction none of which is the residence of the consumer. In a choice of forum dispute involving a standard form lease, the Act would apply and would displace the UCC rule to the extent of any inconsistency.

Example of when the UCC supersedes this Act. Revised Article 5 allows a bank to choose any law to govern a letter of credit. N.J.S. 5-116(a). A letter of credit is usually a standard form contract and its secondary terms are subject to this Act where the transaction involves a consumer either as a service or extension of credit. In the overwhelming majority of cases, a choice of law term would be considered a secondary term under this Act and subject to the rule making unenforceable a choice of law clause unrelated to the parties. However, the Legislature permits banks to include any choice of law term in their credit letters. Consequently, the Act's rule is superseded by the specific rule of Art. 5-116(a), and a choice of law term in an Article 5 letter of credit is not subject to review under this Act. The UCC also supersedes this Act when it forbids parties from varying legal obligations by contract. For example, N.J.S. 12A:9-501(3) (giving rights to consumers who have defaulted under a security agreement and prohibiting the secured party from varying these rights by contract).

Co-existence of this Act and the UCC. This Act regulates the time when a standard form contract becomes effective and the enforcement of primary and secondary terms. It thus addresses fewer issues than does the UCC. Both Acts may, however, apply to any particular standard form contract.

Effect of other statutory law on this Act. Other statutes, containing provisions that forbid or require the inclusion of certain terms in standard form contracts, supersede this Act. The default rule to measure the enforceability of secondary terms does not apply to contract terms that are required to be included in standard form contracts, or are forbidden to be included in them as a matter of law.

Illustrations of effect of other law on this Act. Subsection (b) clarifies that this statute is intended to provide a general rule for the enforcement of contract terms, but it is not intended to be the exclusive rule on that subject. The Legislature has enacted a large number of statutes forbidding the inclusion of particular terms in contracts, or requiring the inclusion of particular terms in contracts. Each statute embodies an individual judgment as to a particular kind of term and is more precise in effect than any general rule can be. As such, they should continue in effect notwithstanding the general rule for enforcement of statutory terms provided by this statute. The general rule controls the overwhelming majority of cases that are not affected by individualized statutes.

Examples of statutes that require particular terms are: N.J.S. 17:11C-26 and N.J.S. 17:16C-26 (requiring a term making payments on a mortgage or a retail installment contract substantially equal); N.J.S. 56:8- 69 and 70 (requiring a minimum warranty term for used cars); N.J.S. 56:8-42(f), (g) and (h) (requiring terms on cancellation of health club contracts).

Examples of statutes that bar particular terms are: N.J.S. 17:10-13 (prohibiting wage assignments and real estate liens for small loans); N.J.S. 17:11C-27 (prohibiting terms: assigning wages; requiring the payment of anything but the loan and permitted charges; limiting liability of lender); N.J.S. 56:12-11 (prohibiting waivers of the plain language act); N.J.S. 56:12-15 (prohibiting certain warranty terms); N.J.S. 56:8-42(d) (prohibiting duration of health club contract beyond three years); and N.J.S. 56:8-43 (prohibiting terms that limit rights of action against third parties or assignees of health club contracts).

Other statutes regulate the content of particular kinds of contract terms. These statutes have the effect of allowing terms in a particular form or in particular circumstances but otherwise of forbidding terms on that subject. For example, N.J.S. 17:10-14 (regulating variable rate of interest provisions); N.J.S. 17:10-14.1 (restricting life, health and disability insurance on borrowers); N.J.S. 17:10-14.3 et seq. (placing specific limits on terms of open-ended loans); N.J.S. 17:11A-53 (establishing conditions as to when terms providing for payment of attorney fees for collection of loans may be enforced); and N.J.S. 56-73 (regulating disclaimers of warranty on used cars).

Special formation requirements. Subsection b.(3) pertains to the small class of contracts for which the Legislature imposes special formal requirements for the valid formation of contracts. For example, the Door-to-Door Home Repair Sales Act of 1968 requires the home repair contractor to provide the consumer with a receipt that conspicuously sets forth terms specified by the statute, N.J.S. 17:16C- 100(a). The latter statute also gives the consumer a three-day cancellation period. N.J.S. 17:16C-99(a)(1). The Door-to-Door Home Repair Sales Act thus contains formal requirements related to the validity of a contract that the Act does not require for the formation of a standard form contract. Consequently, a contract covered by the Door-to-Door Act is enforceable under this Act only if the contract meets the formal requirements of the Door-to-Door Home Repair Sales Act. The same reasoning applies to similar statutes imposing special formal formation requirements on certain contracts.

Consumer protection statutes. Subsection b.(4) clarifies that this Act does not disturb the scheme of consumer protection statutes in this State, including the Consumer Fraud Act, N.J.S. 56:8-1 et seq.

Section 4. Time of Effectiveness of Standard Form Contracts

The terms of a A standard form contract becomes effective when:

- (1) the sale occurs; and
- (2) the merchant ~~either transfers the contract to the consumer or~~ makes the contract accessible to the consumer.

COMMENT

Project commenters' revisions were modified and incorporated into this section.

This section defines when a standard form contract becomes effective and enforceable. A standard form contract becomes effective when two events occur. First, the consumer purchases the product. Second, the merchant makes the contract accessible to the consumer. The question of when a sale occurs is left to case law.

Generally, a sale occurs when payment is made in exchange for a product. The formation of a standard form contract is strictly a function of a sales transaction. The contract arises solely out of the act of buying a product in an open market and the act of making the contract accessible, both of which are measurable. The formation of the contract tracks the ordinary sequence of events surrounding the purchase of most products. The acts of purchase and delivery of the contract are typical events in the process of acquiring goods and services as cases are beginning to recognize. See, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing choice of forum clause attached to passenger ticket for cruise); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (enforcing list of terms contained in box along with computer equipment); and *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), rev'g 908 F.Supp. 640 (W.D. Wis. 1996) (enforcing shrinkwrap license). Formation does not depend on inquiries into the consumer's mental state at the time of sale.

The facts of *Hill v. Gateway 2000, Inc.*, *supra*, provide an illustration of this buying process. In *Hill*, the consumers placed a telephone order for a Gateway 2000 computer by giving the Gateway representative their credit card number. Later, they received a box containing the computer and a list of terms governing the purchase. Under the Act, a standard form contract was formed and became effective upon the act of charging the purchase on a credit card and delivery of the contract terms. The contract is formed regardless of whether the consumer has read the contract terms and consented to them. This result follows from the presumption that the enforcement of non-negotiated terms does not depend on the consumer's consent.

This Act assumes that the consumer has not deliberated or read the terms of the contract even though the consumer has signed the contract or manifested consent in some other way prior to purchase. These assumptions are based on marketplace realities. Consumers order airline tickets over the phone or internet, and pay for them by giving a credit card account number. The consumer does not sign a document and usually, after receipt of the ticket, the consumer does not read the standard terms found on the ticket or on accompanying documentation. Other transactions, like purchases of theater tickets and computer software, fit this pattern. In these cases, the act of purchase and accessibility of the standard form contract result in contracts under the Act. The same pattern is followed in the resale market. See, *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2D 91 (5th Cir. 1991) (demonstrating the practice that commercial merchants of software relied on standard form contract inserted in the box).

The "formation" definition goes beyond the rule set forth by Judge Easterbrook in *Hill v. Gateway 2000, Inc.*, *supra*, and *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), rev'g 908 F.Supp. 640 (W.D. Wis. 1996) (requiring an opportunity to read and to reject the contract as a necessary element of contract formation). This Act does not use the "read and reject" criterion to measure whether a contract is formed and has become effective. To depend on the "read and reject" rule imposes uncertainty on the status of contracts prior to the time when this "read and reject" right expires. It is preferable to define a specific point in time when the contract comes into existence.

The United States Supreme Court stated in *Carnival Cruise Lines*: "In this context, it would be entirely unreasonable for us to assume that respondents – or any other cruise passenger – would negotiate with petitioner the terms of a forum selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line."³ The Court concluded that it "stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued."⁴

³ *Carnival Cruise Lines, supra* at 591.

⁴ *Id.* at 593.

Under this Act, accessibility of the contract is completed based on the conduct of the merchant. It does not depend on a consumer's knowledge of the contract's terms or awareness of the contract's existence.

Concerns expressed regarding this section focus on the meanings and possible ambiguity of "transfers" and "accessible". Concern has also been expressed that a temporal lag may exist between the formation of the contract and its effectiveness, as well as questions regarding electronic accessibility to terms that may require an affirmative action to view.

Supplemental research done regarding electronic contracts, in response to comments received - such as those found in clickwrap and its subsequent iterations - indicated that references to terms and conditions, such as a hyperlink that directs the user to another electronic page, is sufficient to support the existence of a contract with integrated terms.⁵ Even if the consumer has not checked a box indicating that he or she had an opportunity to review the terms, performance, such as purchase of a product, implies as much.⁶ This echoes the classic law of contracts that conduct can substitute for explicit agreement to terms.⁷

The notion that consumer conduct is a proxy for assent is also applicable to any real-time, in-store purchase or transaction.⁸

The less clear question is the meaning of the terms "transfer" and "accessible," at least from a caselaw perspective. This is probably because these terms are given their plain meaning, based on the context in which they

⁵ *Home Source Indus., LLC v. Freightquote.com, Inc.*, No. CIV.A. 14-2001 SRC, 2014 WL 6609051, at *4 (D.N.J. Nov. 19, 2014). ("The Court concludes that Defendant has indeed demonstrated that the forum selection clause applies to the transaction at issue. The Court so finds based on the enrollment email sent to Home Source on August 9, 2012, confirming that Home Source had opened an account for purchasing shipment services offered by Freightquote. That document directs the recipient to "view our *terms & conditions*," with "terms & conditions" underlined in the email to signal that it is a hyperlink to additional pages. Though the terms of doing business are not set forth in the email itself, the additional content is clearly identified in the email, such that the recipient cannot claim surprise or hardship in ascertaining the terms. The terms and conditions are thus incorporated by reference into the agreement between the parties for the purchase and sale of shipment services. *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 447 (3d Cir.2003).")

⁶ Timothy J. Maun, *Ihack, Therefore Ibrick: Cellular Contract Law, the Apple iPhone, and Apple's Extraordinary Remedy for Breach*, 2008 Wis. L. Rev. 747, 775-78 (2008). ("The original iPhone contracts were click-wrap contracts of adhesion which the consumer accepted by activating and using the iPhone. As such, they were a classic example of the "money now, terms later" principle of contract formation upheld in ProCD.")

⁷ Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 Harv. L. Rev. 1135, 1219 (2019). ("See *id.* § 19(2) (allowing conduct to manifest the assent required for contract formation, so long as the person "intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents"); see also *id.* § 22 cmt. b ("Assent by course of conduct"); U.C.C. § 2-207(3) ("Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract."))

⁸ Wayne Barnes, *The Objective Theory of Contracts*, 76 U. Cin. L. Rev. 1119, 1152 (2008). ("From the origins of Llewellyn's theory to the development of principles governing standard form contracts in the ensuing decades, several doctrines have been developed to govern their creation and use. Professor Rakoff described the following aspects of contract law's treatment of form contracts:

- (1) The adherent's signature on a document clearly contractual in nature, which he had an opportunity to read, will be taken to signify his assent and thus will provide the basis for enforcing the contract.
- (2) It is legally irrelevant whether the adherent actually read the contents of the document, or understood them, or subjectively assented to them.
- (3) The adherent's assent covers all the terms of the document, and not just the custom-tailored ones or the ones that have been discussed.
- (4) Exceptions to the foregoing principles are narrow. In particular, failure of the drafting party to point out or explain the form terms does not constitute an excuse. Instead, in the absence of extraordinary circumstances, the adherent can establish an excuse only by showing affirmative participation by the drafting party in causing misunderstanding.

are used. Thus, “transfer” can mean the transfer of securities, in the context of securities transactions, as it did in *Rudbart v. North Jersey Dist. Water Supply Com’n* (one of the leading New Jersey cases that discusses standard form contracts),⁹ or transfer as in electronic funds transfer, such as those made by gyms,¹⁰ or the transfer of risk from a business owner to a customer.¹¹

There is less discussion in the case law of contract accessibility, particularly beyond what is discussed in context of the online realm. The word “accessible” does appear in the context of an insurer making policy language accessible to the average insured.¹² It is also used in relation to consumers in one unpublished case involving a forum selection clause.¹³ Beyond these cases, “accessible” is used in a variety of ways, again according to a court’s view of its plain meaning.

Regarding the “transfer” or “accessibility” of a contract from a merchant to a consumer, there is no authority or precedent that would imbue either of those words with anything other than their plain meanings. A contract’s “effectiveness” depends either on the existence of an actual contract, or a consumer’s conduct; once either of these situations occur, an enforceable contract is formed.

Section 5. Cancellation of Standard Form Contracts

The consumer may cancel a standard form contract if the terms of the contract are accessible only after the consumer has purchased the product and:

~~a. the terms of the contract are accessible only after the consumer has purchased the product;~~

a. ~~b.~~ the consumer does not open the package more than is necessary to access the terms of the contract;

b. ~~e.~~ the consumer does not use the product; ~~and~~

c. ~~d.~~ the consumer has not yet received the product or there has not yet been substantial performance by the merchant; ~~and~~ or

⁹ *Rudbart v. North Jersey Dist. Water Supply Com’n*, 127 N.J. 344 (1992).

¹⁰ *Ardino v. Retrofitness, LLC*, 2019 WL 2181906 (App. Div. 2019).

¹¹ *Stelluti v. Casapenn Enterprises, LLC*, 203 N.J. 286 (2010).

¹² *Zacarias v. Allstate Ins. Co.*, 168 N.J. 590, 603 (2001).

¹³ *Kowalski v. YellowPages.com, LLC*, No. CIV.A. 09-2382 PGS, 2010 WL 3323749, at *4 (D.N.J. Aug. 18, 2010). (“Courts also have recognized transactions where consumers made purchases prior to getting the detailed terms of the contract, noting that an insurance buyer pays the premium prior to getting the policy; a traveler pays for airplane or cruise tickets before receiving and being bound by the terms of the ticket; and a purchaser is bound by the terms located inside a product packaging which are **accessible** [emphasis added] after the sale has been consummated. See *In re Samsung Electronics America, Inc. Blu-Ray Class Action Litig.*, No. 08-0663, 2008 WL 5451024, at *3-4 (D.N.J. Dec.31, 2008) (enforcing terms and conditions included with product packaging); *Pollstar v. Gigmania Ltd.*, 170 F.Supp.2d 974, 981-82 (E.D.Cal.2000) (holding that sometimes entering into a contract by using a service without first seeing the terms and browser wrap license agreement may be valid and enforceable); see also *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449-51 (7th Cir.1996) (finding that a buyer who fails to reject the terms of a computer software shrinkwrap license contained inside the packaging after having an opportunity to review it has effectively accepted the contract by using the software).”)

d. the consumer returns the product in its original condition and packaging within a ~~reasonable time not to exceed 30 days~~ or the time stated in the contract, whichever is longer.

COMMENT

Project commenters' proposed revisions were modified and incorporated. The section was reorganized for clarity and to eliminate an apparent inconsistency between the use of "and" and "or" in the subsections.

The former subsection a. was shifted to the initial line of the section, as applicable in all of the following circumstances, and (now) subsection c. was modified to eliminate a potential inconsistency between products and services, and to address the impact of deficient performance. To streamline the subsection, "consumer has not yet received the product" has been removed, with the expectation that "there has not yet been substantial performance by the merchant" will cover such a scenario.

This section gives the consumer a limited right to rescind the contract when the consumer did not have access to the contract until the contract became effective.

Determining whether a product is used is obvious in most cases. However, in some cases, this determination may be difficult. For example, it is difficult to determine whether intellectual property is used. Subsection b. provides a special rule for this class of products. Some books are sealed to prevent the book from being read and returned. Subsection b. allows a merchant to protect its copyright.

Standard form contracts such as clickwrap, shrink-wrap and box-term agreements are commonly found in consumer transactions.¹⁴

Clickwrap agreements are terms that appear on a consumer's computer screens and to which a consumer can manifest assent by clicking on an icon indicating agreement prior to purchasing the product.¹⁵

Shrink-wrap agreements, also known as "in the box contracts" are terms included in a document inside the box that contains the purchased product.¹⁶ Although consumers agree to purchase the product prior to reviewing the terms of the shrink-wrap agreements, the consumer has the opportunity to reject it by returning the product.¹⁷ The failure to return the product after removing the plastic shrink-wrap from the box and unpacking the product may constitute assent to the terms of the agreement.¹⁸

These types of standard form contracts have generally been considered valid and enforceable. There is, however, limited case law in New Jersey and, of the limited cases available in this area, some are not discussed below because the analysis contained therein was not based on New Jersey law.

¹⁴ Kevin W Grierson, *Enforceability of "Clickwrap" or "Shrinkwrap" Agreements Common in Computer Software, Hardware, and Internet Transactions*, 106 A.L.R.5th 309 (Originally published in 2003).

¹⁵ *Hoffman v. Supplements Togo Management, LLC.*, 419 N.J. Super. 596 (App. Div. 2011). (Consumer brought action against a seller of dietary supplements for false representation. On appeal, the court reversed the lower court's determination and held that the forum selection clause was unenforceable because the clause was unreasonably masked from the view of the consumer).

¹⁶ *Schnabel v. Trilegiant Corp.*, 697 F.3d 110 (2d. Cir. 2012). (Class action suit brought against a business that provides programs offering discounts on goods and services in exchange for membership fee. The Second Circuit upheld district court's denial of defendant's motion to compel arbitration. The Court held that an email did not provide enough notice to plaintiffs of arbitration provisions. Furthermore, consumers could not have assented to it solely as result of their failure to cancel their enrollment in the corporation's service.)

¹⁷ Mark A. French, *Hill v. Gateway 200, Inc.*, 12 Ohio St. J. on Disp. Resol. 811 (1997)

¹⁸ *Schnabel v. Trilegiant Corp.*, 697 F.3d 110 (2d. Cir. 2012).

New Jersey case law indicates that courts will uphold clickwrap, shrink-wrap, and box term agreements if the consumer has reasonable notice of the terms of the agreement, even if they fail to read them.¹⁹ Courts have declined enforce the terms of these agreements if they are inconspicuous.²⁰

New Jersey Appellate Division and Clickwrap Agreements

In the 1999 case of *Caspi v. Microsoft Network, L.L.C.*, the subscribers to an on-line computer service brought an action against an internet service provider (MSN) to recover for the way it rolled-over their service into more expensive plans.²¹

Before the plaintiff became an MSN member, he was prompted by MSN software to view various screens of information, including a subscriber agreement.²² Plaintiff had the option to click “I Agree” or I Don’t Agree” while scrolling through the on-line subscriber agreement.²³ Plaintiff did not incur any charges until he had the opportunity to review the agreement and clicked on the “I Agree” button.²⁴

The case focused on the validity and enforceability of a forum selection clause contained in an on-line subscriber agreement of MSN.²⁵ The clause required all disputes arising out of MSN membership to be brought in the MSN’s local court in the state of Washington.²⁶

The trial court held that the forum selection clause was valid and enforceable.²⁷ It relied on the reasoning of the United States Supreme Court in *Carnival Cruise Lines v. Shute*.²⁸ “In *Carnival*, cruise ship passengers were held to a forum selection clause which appeared in their travel contract. The clause enforced in *Carnival* was very similar in nature to the clause in question here, the primary difference being that the *Carnival* clause was placed in small print in a travel contract while the clause in the case *sub judice* was placed on-line on scrolled computer screens.”²⁹ The Court further stated that MSN was not the only available server and that the plaintiff had choices as to which internet services provider to subscribe to if they did not like the terms of service of MSN.³⁰

The Appellate Division upheld the trial court’s decision and dismissed the action against the MSN, holding that the forum selection clause contained in the clickwrap agreement for services provided adequate notice to the plaintiff.³¹ The Court noted that in order to subscribe to the service, the subscribers installed software from the service provider that required assent to the terms of the clickwrap agreement before accessing the service and before

¹⁹ *Noble v. Samsung Electronics America, Inc.*, 682 Fed. Appx. 113, 116 (3d. Cir. 2017) citing *Specht v. Netscape Coom’ns Corp.*, 306 F.3d 17, 30 (2d. Cir. 2002).

²⁰ *Hoffman v. Supplements Togo Management, LLC.*, 419 N.J. Super. 596 (App. Div. 2011).

²¹ *Caspi v. Microsoft Network, L.L.C.*, 323 N.J. Super. 118, 120 (App. Div. 1999).

²² *Id.* at 122.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 120.

²⁶ *Id.* at 121.

²⁷ *Id.*

²⁸ *Id.* at 122 citing *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991). (Cruise ship passenger brought action against a cruise line seeking damages for injuries sustained in a slip and fall. United States Supreme Court held that the forum selection clause in the back of cruise line’s ticket, requiring all disputes to be litigated in Florida was reasonable and enforceable).

²⁹ *Id.*

³⁰ *Id.* at 123.

³¹ *Id.* at 124.

any charges were incurred.³² It further indicated that the “forum selection clause was [not] proffered unfairly, with a design to conceal or de-emphasize its provisions.”³³

The Third Circuit and Shrink-wrap Agreements

An arbitration clause in a shrink-wrap agreement was at issue in the 2017 consumer class action suit against Samsung Electronics. In *Noble v. Samsung Electronics America, Inc.*, Noble purchased a Samsung Smartwatch accompanied by a shrink-wrap agreement in its box.³⁴ The watch was allegedly defective and was exchanged by the plaintiff three times because of poor battery life.³⁵ The agreement that accompanied the watches was titled “Health and Safety and Warranty Guide” (the “Guide”).³⁶ The Guide consisted of 143 pages and the relevant arbitration agreement appeared approximately ninety-seven pages into the Guide.³⁷ The Guide gave consumer 30 calendar days from the date of the purchase to opt-out of the dispute resolution procedure.³⁸

Noble filed a Complaint in the District Court of New Jersey on behalf of himself and a class claiming “fraudulent and deceptive marketing and pricing” related to the battery life of the Smartwatch.³⁹ Samsung moved to compel arbitration, citing the arbitration clause.⁴⁰ The District Court determined that the plaintiff-consumers were not bound by an arbitration clause that was buried within a shrink-wrap agreement because they were not reasonably made aware of the existence of the clause.⁴¹

On Appeal, the Third Circuit affirmed the lower court’s decision. The Court held that “[u]nder New Jersey Law, a binding contract requires four things: an offer an acceptance, consideration, a meeting of the minds, and sufficiently definite terms.”⁴² The issue on appeal was whether Noble and Samsung had a meeting of the minds as to the arbitration clause of the shrink-wrap agreement.⁴³ The Court maintained that “[h]ere the document in which the [arbitration clause] was included did not appear to be a bilateral contract, and the terms were buried in a manner that gave no hint to a consumer than an arbitration provision was within.”⁴⁴ It further stated that the outside of the Guide did not indicate that contractual terms were inside and that neither the table of contents nor the index made reference to the arbitration clause or waiver of legal rights.⁴⁵

³² *Id.* at 122.

³³ *Id.* at 125.

³⁴ *Noble v. Samsung Electronics America, Inc.*, 682 Fed. Appx. 113 (3d. Cir. 2017).

³⁵ *Id.* at 114.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 115.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 116.

⁴³ *Id.*

⁴⁴ *Id.* at 116 citing *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d. Cir. 2002). (A consumer class action brought against a computer software producer, alleging that “plug-in” software program invaded plaintiff’s privacy by secretly transmitting personal information to the software provider. Justice Sotomayor for the Second Circuit upheld lower court’s decision of invalidating the arbitration clause. The court reasoned that users did not assent to terms of software license, including arbitration clause because there was no manifestation of agreement between the parties. The terms of the agreement were inconspicuous, and the defendants did not provide reasonable notice of the license terms. Hence, the mere act of plaintiff downloading the software did not manifest assent to the arbitration provision in the license terms.)

⁴⁵ *Id.* at 117-118.

The Third Circuit found that the arbitration clause in the Guide contained in the Smartwatch package was not a valid contractual term due to lack of mutual assent between Nobel and Samsung Electronics under New Jersey law.⁴⁶

Although there is not a large body of case law on point in New Jersey dealing with the consumer's right to cancel a standard form contract, New Jersey courts have maintained that clickwrap, shrink-wrap, and box term agreements are enforceable as long as the terms are conspicuous and the consumer had reasonable notice of the terms of the agreement.

Section 6. Primary and Secondary Terms

a. A term in a standard form contract is either a primary or secondary term, as defined in Section 1 of this act.

b. ~~A primary term is a term that:~~

~~(1) establishes the basic price or product specifications clearly and explicitly disclosed at the time of sale;~~

~~(2) identifies the product; or~~

~~(3) is negotiated by the consumer and the merchant at or prior to sale.~~

~~c. As used in this section:~~

~~(1) The basic price term is one that is the net price of a product and does not include added fees or costs of such things as delivery, insurance, financing and the like;~~

~~(2) A term is negotiated if the wording of the term is subject to adjustment by the parties after discussion and agreement. A term is not negotiated simply because it is separately signed by a consumer/~~

~~d. A secondary term is any other term of a standard form contract.~~

~~b. Whether a standard form contract term is a primary term or a secondary term is a question of law.~~

~~b. e. A merchant is bound by the terms of a standard form contract unless the contract has been cancelled.~~

~~c. A consumer is bound by the primary and secondary terms of a standard form contract only as permitted by this act.~~

⁴⁶ *Id.* at 118.

COMMENT

This section is streamlined by transition of definitions to Section 1, which contains a “Definition Section.” The following definitions have been moved to Section One: primary term; secondary term; basic price; and, negotiated term. The balance of the subsections were reorganized.

The distinction between primary terms and secondary terms reflects the widely-accepted recognition of the difference between standard form contract terms concerning things like product and price, and the terms that are described as “standard” or “boilerplate.” Contract terms are ordinarily enforced because they are the subject of consent and the result of mutual give and take between the parties. Typically, standard form contracts are not based on consent nor do they result from bargaining between the parties. Further, it is generally accepted that to negotiate and to read standard form contracts prior to their formation would be impractical and wasteful.

This section recognizes that terms of a standard form contract differ in the degree to which they are supported by the consent of the consumer. Some terms, such as price, are supported by the consumer’s consent; other terms, such as choice of law, are not supported by the consumer’s consent. This distinction justifies treating one class of terms differently from another class of terms. Subsection a. divides contract terms into two groups: primary and secondary terms. The distinction determines which rules apply to different classes of terms contained in a single contract.

Section 7. Primary Terms

a. Except as provided by subsection b. of this section, a consumer is bound by primary terms of a standard form contract unless the contract is determined to be unenforceable on the basis of one, or more, of the following principles of law and equity, including:

1. the doctrine of reasonable expectations;
2. duress;
3. fraud;
4. frustration of purpose;
5. illegality;
6. impracticability or impossibility of performance; or
7. misrepresentation;
8. mutual mistake; or
9. undue influence.

b. A consumer is bound by the price term of a standard form contract unless the price term is unconscionable:

(1) is unconscionably excessive; and
(2) was agreed to by the consumer as a result of the particular circumstances surrounding the sale when, without those circumstances, a reasonable consumer would have rejected the sale.

~~a. the contract is unenforceable because of defenses such as fraud, illegality, duress or mutual mistake; or~~

~~b. a price term is unconscionably excessive and was agreed to by an unknowledgeable a consumer under circumstances that unfairly encouraged acceptance.~~

COMMENT

This Section was modified in response to project commenter input.

The Act presumes that the consumer expressly consents to the basic price and product identity disclosed to the consumer. Terms that the consumer and merchant negotiate and reduce to writing also are primary terms. The term “negotiation” implies a process of genuine give and take. Each party must have the authority to bargain for terms; a negotiated term must result from a mutual exchange of promises. While negotiated terms are rare in standard form contracts, they do occur in some markets. Primary terms bind the consumer whether or not they are advantageous to the consumer. Enforcement of these terms is justified by ordinary contract law.

The defenses to primary terms are contract defenses that negate the existence or formation of the contract itself. The principal ordinary contract defenses are those listed. In some circumstances, other ordinary contract defenses apply, so the Section contains the phrase, “principles of law and equity, including.” The “principals of law and equity, including” language included in subsection a. is taken from language contained in the UCC.

Unconscionability is available in regard to a price term in certain limited circumstances. See, subsection b.

During the course of work on this project, commenters suggested that the identified defenses contained in the Act should be expanded.

Additional research was conducted concerning both the defenses originally included in the draft Act, and the defenses suggested by commenters to determine the applicability of the suggested defenses to this Act, and the propriety of including them in the statute. The research is summarized below.

Doctrine of Reasonable Expectations

In New Jersey, “the doctrine of reasonable expectations has long been a part of our law.”⁴⁷ In interpreting an insurance policy, for example, the Court has determined that “coverage provisions are to be read broadly, exclusions are to be read narrowly, potential ambiguities must be resolved in favor of the insured, and the policy is to be read in a manner that fulfills the insured’s reasonable expectations”⁴⁸

Although recommended for inclusion here, the doctrine of reasonable expectations is generally applied in the insurance context. Since contracts pertaining to insurance are specifically excluded from coverage by this Act, this defense does not appear to be broadly applicable in this context.

Duress

A conveyance that is procured by means of duress is inoperative and voidable.⁴⁹ Consent is the very essence of a contract and, if there is compulsion, then there is no actual consent.⁵⁰ Actual violence is not an essential element of duress of the person, even at common law.⁵¹ Moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, are regarded as sufficient in law to destroy free agency, indispensable to the consent without which there can be no contract.⁵²

⁴⁷ *Zacarias v. Allstate Ins. Co.*, 168 N.J. 590, 595 (2001).

⁴⁸ *Sosa v. Mass. Bay Ins. Co.*, 458 N.J. Super. 639, 646 (App. Div. 2019) quoting *Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt. Osteopathic Med.*, 210 N.J. 597, 605 (2012).

⁴⁹ *Rubenstein v. Rubenstein*, 20 N.J. 359, 365 (1956).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

Duress means “that degree of constraint or danger, either actually inflicted or threatened and impending, sufficient in severity or in apprehension to overcome the mind or will of a person of ordinary firmness.”⁵³

The legal concept of duress is essentially subjective.⁵⁴ New Jersey Courts have held that:

‘The test of duress is not so much the means by which the party was compelled to execute the contract as it is the state of mind induced by the means employed—the fear which made it impossible for him to exercise his own free will ***. The threat must be of such a nature and made under such circumstances as to constitute a reasonable and adequate cause to control the will of the threatened person, and must have that effect; and the act sought to be avoided must be performed by such person while in such condition.’⁵⁵

Moral compulsion or psychological pressure may constitute duress if the subject of the pressure is overborne and deprived of the exercise of free will.⁵⁶

Fraud and Misrepresentation

It is well-settled in New Jersey that “a knowing misrepresentation by one party as to the contents of a contract amounts to fraud.”⁵⁷ Such a contract may be voided on the theory that the defrauded party never agreed to the terms of the contract.⁵⁸

The New Jersey Supreme Court held that “[e]very fraud in its most general and fundamental conception consists of the obtaining of an undue advantage by means of some act or omission that is unconscientious or a violation of good faith.”⁵⁹ A “misrepresentation amounting to a legal fraud consists of a material representation of a presently existing or past fact, made with the knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment.”⁶⁰ The equitable doctrine, however, goes farther and includes instances of fraudulent misrepresentations which “do not exist in law.”⁶¹

Illegality

“Any contract made in consideration of an act forbidden by law or against public policy is unenforceable.”⁶² The illegality of the contract will constitute a good defense at law as well as in equity.⁶³ Illegality of consideration renders the contract invalid and unenforceable between the immediate parties as well as third-party beneficiaries.⁶⁴

⁵³ *Id.*

⁵⁴ *Id.* at 366.

⁵⁵ *Id.* citing *Fountain v. Bigham*, 235 Pa. 35, 84 A. 131 (Sup.Ct.1912). See also *Williamson-Halsell, Frazier Co. v. Ackerman*, 77 Kan. 502, 94 P. 807, 20 L.R.A.,N.S., 484 (Sup. Ct. 1908); *Wolff v. Bluhm*, 95 Wis. 257, 70 N.W. 73 (Sup. Ct. 1897).

⁵⁶ *Id.* at 366.

⁵⁷ *Id.* at 502; citing *McDonald v. Central Railroad Co. of N.J.*, 89 N.J.L 251 (E & A 1916); see *Sitogum Holdings, Inc., v. Ropes*, 352 N.J. Super. 555, 565 (Ch. Div. 2002).

⁵⁸ *Id.*

⁵⁹ *Jewish Cntr. Of Sussex Cnty v. Whale*, 86 N.J. 619, 624 (1981). Depending on the remedy sought, an action for fraud may be either “legal” or “equitable” in nature. *Id.* See *Commercial Cas. Ins. Co. v. Southern Sur. Co.*, 100 N.J.Eq. 92, 96, 135 A. 511 (Ch.1926), *aff'd*, 101 N.J.Eq. 738, 138 A. 919 (E. & A.1927); and, 3 J. Pomeroy, A Treatise on Equity Jurisprudence 419 (5th ed.1941).

⁶⁰ *Id.* at 624-25.

⁶¹ *Id.* at 625.

⁶² *Naimo v. La Fianza*, 146 N.J. Super. 362 (Ch. Div. 1976).

⁶³ *Id.* at 372.

⁶⁴ *Id.* See *Marx v. Jaffe*, 92 N.J. Super. 143, 146, (App. Div.) (citing the established rule that “the law will not assist either party to an illegal contract” but “will leave them where it finds them”; if the contract is executory, it will not

Impracticability or Impossibility of Performance and Frustration of Purpose

One commenter suggested that the term “impracticability” be added to the list of defenses to primary terms. It is unclear whether the stakeholder intended to use the term “impossibility.”

The concepts of impossibility of performance and frustration of purpose are considered doctrinal siblings within the law of contracts.⁶⁵ “Both doctrines may apply to certain situations in which a party’s obligations under a contract can be excused or mitigated because of the occurrence of a supervening event. The supervening event must be one that had not been anticipated at the time the contract was created, and one that fundamentally alters the nature of the parties’ ongoing relationship.”⁶⁶

Both doctrines, impossibility and frustration, involve an extraordinary circumstance that may make performance of a contract so vitally different from what was reasonably expected as to alter the essential nature of that performance.⁶⁷

Frustration of purpose occurs “when the obligor’s performance can still be carried out, but the supervening event fundamentally has changed the nature of the parties’ overall bargain.”⁶⁸ The frustration must be so severe that it is not fairly to be regarded as the risks that the party invoking the doctrine assumed under the contract.⁶⁹ Frustration of purpose, however, is not commonly found in New Jersey’s case law, or particularly well-developed when it is mentioned. See the discussion in *JB Pool Mgmt., LLC v. Four Seasons at Smithville Homeowners Ass’n, Inc.* as follows:

Although the New Jersey Supreme Court has not yet analyzed the doctrine in depth, principles of frustration of purpose have long been recognized, if not frequently discussed, in our state. *See, e.g., Toll Bros. v. Bd. of Chosen Freeholders*, 194 N.J. 223, 249... (2008) (observing that a developer’s agreement with a municipality may be nullified if the governing body repeals a resolution that is an implied condition of that agreement and captures the “fundamental purpose” of the agreement); *A-Leet Leasing, supra*, 150 N.J. Super. at 397–98... (recognizing the frustration doctrine but remanding the case to the trial court to develop the record more on that concept); *Edwards, supra*, 20 N.J. Super. at 55–59... (similarly recognizing the doctrine, but finding it factually inapplicable to exonerate a labor union from its contractual duty to remit its member dues to a national labor organization which had lost its affiliation with the CIO); *see also Nye v. Ingersoll Rand Co.*, 783 F.Supp.2d 751, 766 (D.N.J. 2011) (likewise recognizing the frustration doctrine in a case involving the application of New Jersey law); *Unihealth v. U.S. Healthcare, Inc.*, 14 F.Supp.2d 623, 634 (D.N.J. 1998) (same).

JB Pool Mgmt., LLC v. Four Seasons at Smithville Homeowners Ass’n, Inc., 431 N.J. Super. 233, 247–48 (App. Div. 2013). As a result, it seems less appropriate to incorporate this concept in the statute as it does to refer to more widely-used defenses.

The doctrine of impossibility – or impracticability – of performance excuses a party from having to perform their contractual obligation where performance has literally become impossible, or at least inordinately more difficult, because of the occurrence of a supervening event that was not within the original contemplation of the contracting parties.⁷⁰

enforce it), *certif. denied*, 48 N.J. 140 (1966); and *Paley v. Barton Sav. and Loan Ass’n*, 82 N.J. Super. 75, 82, (App.Div.) (same), *certif. denied*, 41 N.J. 602, 198 A.2d 446 (1964).

⁶⁵ *Capparelli v. Lopatin*, 459 N.J. Super. 584, 606 (App. Div. 2019), citing *JB Pool Mgmt., LLC v. Four Seasons at Smithville Homeowners Ass’n*, 431 N.J. Super. 233, 245 (App. Div. 2013).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 606-607.

⁷⁰ *Id.*

Mistake

The doctrine of mistake may be available to a litigant when the contract cannot be rescinded.⁷¹ Reformation of the contract may, in those instances, be available as an equitable remedy.⁷² “The traditional grounds justifying reformation of an instrument are either mutual mistake or unilateral mistake by one party and fraud or unconscionable conduct by the other.”⁷³

Where required by principles of equity, reformation will be granted to provide relief to either a contractor or a public body.⁷⁴ To rectify a mutual mistake, a court will grant the reformation of a contract.⁷⁵ The typical situation occurs when an agreement fails to correctly specify the terms that the parties agreed upon (i.e. when a deed absolute on its face was actually intended as a mortgage).⁷⁶ Under certain circumstances, a contractor subject to the public bidding laws may be relieved for even a unilateral mistake if it is of a serious nature.⁷⁷

The nuances of the doctrine of mistake, and its variations (mutual mistake, unilateral mistake, mistake of law, mistake of fact), however, do not seem to lend themselves to treatment by way of a single statutory reference, so this may be an area it is more appropriate to leave to the common law.

Price

In New Jersey, N.J.S. 12A:2-302 has been used to void the price term of a contract.⁷⁸ An excessively high price may constitute an unconscionable contract provision within the meaning of N.J.S. 12A:2-302.⁷⁹ Where the conscience of the court is shocked by the price term, the court may hold that the price term in the contract is unconscionable.⁸⁰

Unconscionability

In this draft, the Commission recommends modifying the traditional unconscionability analysis to focus on the primary term of price, as explained in the Act, and on secondary terms.

Historically, the word “unconscionable” has defied lawyer-like definition.⁸¹ It is a term that was borrowed from moral philosophy.⁸² The Uniform Commercial Code (“UCC”) utilizes the term unconscionability in §2-302(1), which provides:

⁷¹ *Dugan Constr. Co., Inc. v. N.J. Turnpike Auth.*, 398 N.J. Super. 229, 242 (App. Div. 2008).

⁷² *Id.*

⁷³ *Id.* at 242-243 citing *St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden*, 88 N.J. 571, 577 (1982).

⁷⁴ *Id.* at 243.

⁷⁵ *Id.* at 243 citing *Dover Farms, Inc. v. American Air Lines, Inc.*, 111 N.J. Super. 276, (App.Div.1970), certif. denied, 57 N.J. 140 (1970); *Brodzinsky v. Pulek*, 75 N.J. Super. 40, 47-48 (App.Div.1962), certif. denied, 38 N.J. 304, (1962); cf. *Heake v. Atlantic Cas. Ins. Co.*, 15 N.J. 475, 481 (1954).

⁷⁶ *Id.*

⁷⁷ *Id.* citing *Cataldo Constr. Co. v. Essex Cty.*, 110 N.J. Super. 414 (Ch. Div. 1970); *Conduit & Foundation Corp. v. Atlantic City*, 2 N.J. Super. 433 (Ch.Div.1949); see Annotation, “Rights and remedies of bidder for public contract who has not entered into a contract, where bid was based on his own mistake of fact or that of his employees,” 52 A.L.R.2d 792 (1957); cf. *Edelstein v. Asbury Park*, 51 N.J. Super. 368, 389-392 (App. Div. 1958).

⁷⁸ *Toker v. Perl*, 103 N.J. Super. 500, 504 (Law Div. 1968). See *In re Fleet*, 95 B.R. 319 (E.D. Pa. 1989) (citing *Kugler v. Romain*, 58 N.J. 522, 547 (1971) (contract was invalid because the sales price was unconscionable).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS*, § 9-40 (3d. ed. 1987); see UCC §2-201 which contains the definition of 43 terms; and, see N.J.S. 12A:1-201 setting forth 43 terms and phrases in the context of New Jersey’s Uniform Commercial Code.

⁸² *Id.*

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. [***]

The official comment to this section says:

This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable [.] This section is intended to allow the court to pass directly on unconscionability of the contract or particular clause therein and to make a conclusion of law as to unconscionability... The principle is one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.”

The Uniform Commercial Code defines numerous terms but refrains from defining unconscionability.⁸³ In 1961, New Jersey enacted the Uniform Commercial Code section regarding unconscionable contract clauses.⁸⁴ This statute is identical to UCC §2-302.

Critics of the UCC have observed that the official comments to UCC §2-302 “do not lend any great insight into what constitutes an unconscionable contract.”⁸⁵ In no sense is the comment an objective definition of the word.⁸⁶ The lack of a definition has lead commenters to characterize §2-302 as “a string of hopelessly subjective synonyms laden[] with heavy value burden: “oppression,” “unfair,” or “one-sided.”⁸⁷

While the absence of a definition for unconscionability has been viewed by some as a weakness, the New Jersey judiciary has declined to adopt this position.⁸⁸ The absence of a definition for unconscionability is not a sign of vulnerability in the statute; rather, it is a sign of wisdom.⁸⁹ Even those who are critical of the ambiguity of UCC §2-302 have acknowledged the difficulty of defining unconscionability. These individuals recognize that, “[i]t is not possible to *define* unconscionability. It is not a *concept*, but a determination to be made in light of a variety of factors not unifiable into a formula.”⁹⁰

The omission of a definition “points to a legislative intent to utilize a term in the same general sense in which it has been employed in the legal system in the past.”⁹¹ Since its enactment in 1961, the New Jersey Legislature has not formally defined unconscionability. “Lawmakers have undoubtedly anticipated that the skeletal unconscionability framework would be filled out through case-by-case determinations.”⁹² The risk of restraint and consistency that may result with this approach is outweighed by a method in which the particular circumstances of each case is measured against the experiences of past and present judges – “the lifeblood of the common law.”⁹³ In New Jersey, the judiciary has emphasized that a “case-by-case approach would pour content into the meaning of unconscionability.”⁹⁴

⁸³ *Id.* at § 9-38.

⁸⁴ N.J.S. 12A:2-302.

⁸⁵ *Sitogum Holdings, Inc., v. Ropes*, 352 N.J. Super. 555, 562 (Ch. Div. 2002).

⁸⁶ *Id.* at 563, quoting White & Summers, *Uniform Commercial Code* *206 (4th ed., 1995).

⁸⁷ *Id.* See also, John A. Spanogle, “Analyzing Unconscionability Problems,” 117 U. PA. L.REV. 931, 942 (1969) (“The terms ‘unfair surprise’ and ‘oppression’ are no more concretely definable than the term ‘unconscionable’ so the Comment seems to offer slogan words rather than an explanation of the purposes behind the statute”)

⁸⁸ *Sitogum*, 352 N.J. Super. at 563.

⁸⁹ *Id.*

⁹⁰ *Id.* n. 12, quoting White & Summers, *Uniform Commercial Code* at*206

⁹¹ JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS*, § 9-38 (3d. ed. 1987), citing Ralph A. Newman, “Renaissance of Good Faith in Contracting in Anglo-American Law,” 54 CORNELL L.REV. 553 (1969).

⁹² *Sitogum*, 352 N.J. Super. at 563-564.

⁹³ *Id.* at 564.

⁹⁴ *Id.* at 567; see *Kugler v. Romain*, 58 N.J. 522 (1971); *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 472 (1988); *Associates Home Eq. Servs. v. Troup*, 343 N.J. Super. 254, 278 (App. Div. 2001).

In traditional unconscionability cases, the Court examined two factors: (1) the unfairness in the formation of the contract; and, (2) excessively disproportionate terms.⁹⁵ These two elements have become commonly referred to as “procedural” and “substantive” unconscionability.⁹⁶ Procedural unconscionability can result from a variety of factors such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting that existed during the contract formation process.^{97,98} The exchange of obligations that are so one-sided as to “shock the court’s conscience” is commonly referred to as substantive unconscionability.⁹⁹

The draft Act eliminates the need for consumers to prove procedural unconscionability. The goal was to allow the focus to be on whether the terms of the contract were substantively unconscionable, rather than requiring a consumer to prove that the contract was one of adhesion.

The Commission recognized the possibility that unconscionability may serve as a deterrent, even if it is not generally a successful argument. Price gouging cases represent one such example. The Commission acknowledged that removing the deterrent could result in an increase in predatory sellers and tactics.

The issue that remains of significant concern to the project commenters seems to be the defense of “unconscionability,” and whether it should be available against primary terms *other* than price. “Primary term” is defined in Section 1 of the Act as “a standard form contract term that:

- (1) establishes the basic price;
- (2) identifies the product and its specifications; or
- (3) is a negotiated term as defined in this section.”

“Negotiated term” is defined by the Act as “a standard form contract term that is subject to adjustment by the parties after discussion and agreement. A contract term is not negotiated simply because it is separately signed by a consumer.”

Undue Influence

The term “undue influence” is not a concept that is subject to a single definition.¹⁰⁰ The subversion of another person’s free will to obtain assent to an agreement forms the basis of this defense.¹⁰¹ A transaction is the result of undue influence if a party in whom another places confidence misuses that confidence gain a contractual advantage because the other has been mollified to believe that the party in question will not act against his, or her, welfare.¹⁰²

If undue influence is raised as a defense to a contract, the particular transaction must be scrutinized to determine whether the agreement was truly the product of a free and independent mind.¹⁰³

⁹⁵ *Id.* at 564.

⁹⁶ *Id.* citing Arthur Allen Leff, “Unconscionability and the Code—The Emperor’s New Clause,” 115 U. PA. L.REV. 487 (1967).

⁹⁷ *Id.* at 564. See *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, (1988); *Complete Interiors, Inc. v. Behan*, 558 So.2d 48 (Fla.App.), *review denied*, 570 So.2d 1303 (Fla.1990).

⁹⁸ Often, non-procedural factors are decisive on the issue of unconscionability leading to the suggestion that the phrase “non-substantive” unconscionability replace the term procedural unconscionability. See JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS, § 9-38 (3d. ed. 1987) adopting this naming convention.

⁹⁹ *Id.* at 565. See, e.g., *State ex rel. Lefkowitz v. ITM, Inc.*, 52 Misc.2d 39 (Sup. Ct.1966) (purchase price/market value ratio approximately 2 ½ times); *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435 (1964) (2 ½ times); *Toker v. Perl*, 103 N.J. Super. 500 (Law Div. 1968), *aff’d on other grounds*, 108 N.J. Super. 129, 260 A.2d 244 (App.Div.1970) (2 ½ times).

¹⁰⁰ *Francois v. Francois*, 599 F.2d 1286 (3d Cir. 1979).

¹⁰¹ *Id.* at 1292.

¹⁰² *Id.* citing Williston on Contracts, §1625 at 776-777 (3d. ed. 1970).

¹⁰³ *Id.* at 1292-1293.

It is of concern, however, that a brief review of some of New Jersey's case law suggests that undue influence is found most frequently in cases involving estates, transfers of real property, divorce, and criminal matters. As a result, it does not appear that it is appropriate for inclusion in this act.

The incorporation of the defenses that appeared to be most appropriate as discussed above does not, however, limit the defenses that might be raised by a consumer, since both Sections 7 and 8 make clear that the enforceability determination could be based on "one, or more, principles of law and equity, including..." ultimately leaving room for judicial discretion.

Section 8. Secondary Terms: Default Rule

a. A secondary term of a standard form contract is unenforceable if, at the time of sale, the term:

- (1) is unconscionable; or
- (2) would have caused a reasonable consumer in the circumstances of the consumer to reject the sale.

b. A finding of unconscionability under this section may be made regardless of whether the bargaining power of the parties to the standard form contract is equal or unequal.

c. In addition to the provisions of subsection a. above, a secondary term of a standard form contract is unenforceable if it conflicts with a primary term, or violates a statute or regulation.

d. In addition to the provisions of subsections a. and c. above, a secondary term in a standard form contract is unenforceable if it is determined to be unenforceable on the basis of one, or more, principles of law and equity, including:

- (1) duress;
- (2) fraud;
- (3) illegality;
- (4) impracticability or impossibility of performance; or
- (5) misrepresentation.

e. In addition to the foregoing, a secondary term is unenforceable if it:

- (1) disclaims a warranty that a product matches its description;
- (2) disclaims a warranty that a product is free from defects unless the disclaimer is prominently placed and the defects are disclosed in the disclaimer or would be disclosed by inspection of the product;
- (3) limits the liability of a merchant for risk of physical injury to any person or damage to real or tangible personal property caused by a defect in the product existing at the time of sale; or
- (4) chooses the law of a jurisdiction unrelated to the parties or to the subject matter of the transaction.

f. A secondary term is subject to enhanced scrutiny if it:

- (1) pertains to financing for the sale;
- (2) limits the manner of dispute resolution in a manner inconsistent with New Jersey law;
- (3) requires a dispute under the contract to be addressed in a venue remote from the consumer; or
- (4) limits the remedies available to the consumer pursuant to New Jersey law.

g. A secondary term is enforceable if it:

- (1) limits the liability of the merchant for consequential damages related to economic losses of the consumer as a result of a defect or non-conformity in the product unless the limit is inconsistent with another provision of this act; or
- (2) limits a consumer’s right of refund of the purchase price in the case of a defective or non-conforming product, provided the term:
 - (A) does not limit consumer rights under this section ~~Section 6-8~~;
 - (B) provides the option of replacement or repair;
 - (C) sets a time limit for submitting a claim provided the time limitation is reasonable in relation to the nature of the product; or
- (D) requires the consumer to produce reasonable proof of purchase of the product.

COMMENT

See the detailed Comments that follow Section 7, as applicable.

This section consolidates provisions pertaining to secondary terms and was revised in response to commenter input.

Secondary terms are defined as all non-primary terms in the standard form contract. The consumer has not expressly consented to them. In fact, the consumer may not have read them. Secondary terms generally are enforceable only as permitted in this section, which codifies an unconscionability standard.

This section contains the default rule to determine the enforceability of secondary terms. It preserves the ordinary common law contract defenses. As provided in Section 7, those defenses apply even to primary terms. The incorporation of the defenses that appeared to be most appropriate does not limit the defenses that might be raised by a consumer, since both Sections 7 and 8 make clear that the enforceability determination could be based on “one, or more, principles of law and equity, including...”

Subsection a.(1) states the residual principle that a secondary term is unenforceable if it is unconscionable. Subsection b. states that unconscionability does not turn on the relative bargaining power of the parties. The standard form term is drafted by one party and is not subject to negotiation by the other. The party that is subject to a standard term, whether rich or poor, powerful or not, may well not read them, and almost certainly does not focus on them, since there is no way he or she can alter them.

Unconscionability has been defined in various ways by courts. One common definition is that an unconscionable provision is one that no one in their senses and not under delusion would accept.¹⁰⁴ Many legal

¹⁰⁴ See, e.g. *Hume v. United States*, 132 U.S. 406, 411 (1889).

definitions are variants of that. Dictionary definitions have included “shockingly unfair or unjust.”¹⁰⁵ None of these definitions is sufficiently precise to provide clear guidance to courts. As a result, the determination as to whether a term is unconscionable is a fact-sensitive decision. This Act does not attempt to give a more specific definition of the term.

Subsection c. clarifies that, if there is an inconsistency between a primary and secondary term, the primary term governs. A term that is inconsistent with a primary term is not enforceable. Subsection c. also states the obvious rule that a provision that violates a law or regulation is not enforceable.

Subsections e.(1) and (2) codify New Jersey case law regarding product liability warranties. These warranties arise by operation of law and do not depend for their existence on contract relationships. Even though these warranties resemble contract type warranties, they cannot be altered or limited by contract. These warranties also ignore the impediments of privity of contract. They are stated to clarify the zone of fixed liability for a maker, distributor or merchant of a defective new product. This civil obligation has never been harmonized with the Uniform Commercial Code, which establishes an entirely different set of rules for warranties. The Code speaks of an implied warranty of merchantability to refer to the fact that a product should work according to the way it is expected to be normally used. This can mean nothing less than the *Henningsen* duty of a manufacturer or merchant to make a product free from defects. However, the Code allows a merchant to exclude or modify this implied warranty of merchantability by disclaiming it. The Code also makes it hard for a consumer to state a claim for breach of this warranty by setting up procedural hurdles, such as notice of the defect. It is contrary to the fundamental purpose of the sale to allow the merchant to disclaim its implied promise that its product will work according to the way it is expected to be normally used.

With one exception, subsections e.(1) and (2) establish that, as a matter of law, the merchant cannot disclaim its two fundamental duties: (1) to place a product in commerce free of defects and (2) to deliver a product matching the description of the sale. The exception allows merchants to sell defective products provided the merchant discloses the defects to the consumer or provided the defects would have been discovered upon inspection.

Subsection e.(3) establishes that, as a matter of law, the merchant cannot enforce a term that limits its liability for damage to property or to persons caused by a product defect attributable to the merchant.

Subsection e.(4) limits choice of law to a place having a reasonable relationship to the parties or to the transaction. The limitation is based on the policy that individuals cannot choose their sovereigns in the abstract but are held to the law where they reside or have conducted their business.

Subsection f. was added after discussion with project commenters, who suggested it could help clarify that the Act is not intended to impair consumer protections. The commenters noted that certain categories of terms have been recognized as inherently problematic for consumers, and that subjecting them to a higher level of scrutiny – and making it clear that they would be treated in this way – could clarify the role of the statute with regard to consumer protection and put merchants on notice.

Subsection g.(1) permits a merchant to limit its liability for consequential damages related to the consumer’s economic losses. This limitation is an important risk control for the merchant. An old example is that of a merchant of a roll of film limiting its liability for economic loss to the value of the roll of film. This limitation of liability is an important factor in establishing the price of film. To allow recovery for consequential damages in claims seeking economic loss would subject merchants, such as film manufacturers, to an unpredictable level of liability that would affect the price of the product. Subsection g.(1) follows the reasoning in *Alloway v. General Marine Industries*, 149 N.J. 620 (1997) (holding that the law of tort does not apply to an action for recovery of economic loss due to a defect in a product), and rejects the holding in *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 64-65 (1965) (finding that a consumer may recover economic loss based on product liability).

Subsection g.(2) authorizes merchants to limit the refund of price remedy in three narrowly defined ways. First, a merchant may require a consumer to return the product and to give the merchant an opportunity to repair the product. Alternatively, a merchant may replace the product instead of providing a price refund. Second, a merchant

¹⁰⁵ Merriam Webster Dictionary

may stipulate a reasonable time period in which the consumer must submit a claim. Third, a merchant may require the production of reasonable proof that the product was purchased from the merchant. Cases of cover are governed by the UCC. This is consistent with the “Refund Policy Disclosure Act.” N.J.S. 56:8-2.14 et seq. (requiring retail stores to post notice of return policy that varies presumptive right of return within 20 days of purchase date. Additionally, this subsection does not affect rights that a consumer may have as to motor vehicles under the “Lemon Law.” N.J.S. 56:12-29 through 49. Rights under the “Lemon Law” are separate from any rights under contractual agreements. See N.J.S. 56:12-47.

Section 9. Secondary Terms: Risk of Loss

- A secondary term ~~placing~~ imposing a risk of loss on the consumer is enforceable only if:
- a. the amount of potential loss does not exceed the sale price of the product;
 - b. the merchant makes insurance available to the consumer ~~insurance~~ at a commercially reasonable price, and the consumer refuses to purchase the insurance; or
 - c. the loss is caused by the fault of the consumer.

COMMENT

This section applies to standard form contract provisions covering risk of loss. An example of a transfer of a risk of loss is a clause indemnifying the merchant against claims for damages. In general, a risk of loss provision is unenforceable if it would impose on the consumer a financial obligation exceeding the cash price of the product. A provision of this sort effectively destroys the economic value of the purchase.

However, a risk of loss provision is enforceable if it does not transfer a financial obligation exceeding this threshold. It also is enforceable if the merchant makes insurance available to the consumer to cover a risk, and the consumer rejects that insurance. The term is enforceable against the consumer on the ground that the consumer voluntarily assumed this obligation. A consumer also is liable for risks generated by the consumer’s intentional acts or negligence.

~~Section 10. Specific Provisions Regarding Secondary Terms: Remedies for Non-Conforming and Defective Products; Choice of Forum; Damage Limitations~~ {the language of this section was consolidated with Section 8}

- a. ~~A secondary term is unenforceable if it:~~
- ~~(1) disclaims a warranty that a product matches its description;~~
 - ~~(2) disclaims a warranty that a product is free from defects unless the disclaimer is prominently placed and the defects are disclosed in the disclaimer or would be disclosed by inspection of the product;~~
 - ~~(3) limits the liability of a merchant for risk of physical injury to any person or damage to real or tangible personal property caused by a defect in the product existing at the time of sale; or~~
 - ~~(4) chooses the law of a jurisdiction unrelated to the parties or to the subject matter of the transaction.~~
- b. ~~A secondary term is enforceable if it:~~

~~(1) limits the liability of the merchant for consequential damages related to economic losses of the consumer as a result of a defect or non-conformity in the product unless the limit is inconsistent with another provision of this act; or~~

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

~~(A) does not limit consumer rights under Section 6 8;~~

~~(B) provides the option of replacement or repair;~~

~~(C) sets a time limit for submitting a claim provided the time limitation is reasonable in relation to the nature of the product; or~~

~~(D) requires the consumer to produce reasonable proof of purchase of the product.~~

COMMENT

Consolidated with Section 8 pertaining to secondary terms.

Section ~~11-10~~. Attorney fees

A secondary term that shifts to the consumer the obligation to pay the merchant's reasonable attorneys' fees and costs of litigation shall be enforceable only if it provides that consumer who prevails recovers attorneys' fees and costs of litigation from the merchant. Recovery of fees and costs is limited to twice the basic price provided in the contract.

COMMENT

The language of this section was changed in response to the suggestion of a project commenter.

This section provides that a term shifting the merchant's legal fees and expenses of litigation to the consumer shall not be valid unless it imposes the "English" rule reciprocally so that either prevailing party is entitled to the payment of attorney's fees and litigation expenses. The section further limits the amount of that obligation.

Section ~~12~~. Interpretation of Contract; Unilateral Change of Contract Terms

~~a. Terms of a standard form contract may not be contradicted by evidence of a prior, contemporaneous or subsequent oral agreement. A court may use evidence extrinsic to the contract only to interpret an ambiguous term.~~

~~b. A merchant may change a term of a standard form contract after the term has become effective if:~~

~~(1) the standard form contract may be terminated by either merchant or consumer at any time without penalty;~~

~~(2) the merchant gives written notice of the change;~~

~~(3) the merchant instructs the consumer how to cancel the contract; and~~

~~(4) the change of terms applies prospectively.~~

COMMENT

Section was removed as a result of discussion with commenters regarding the impact of the parole evidence rule and in view of New Jersey's existing body of law.