

**To: New Jersey Law Revision Commission**  
**From: John M. Cannel**  
**Re: Standard Form Contracts**  
**Date: April 4, 2018**

## MEMORANDUM

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### Background

The New Jersey Law Revision Commission published a Report on Standard Form Contracts in 1998. The Report recognized that the overwhelming majority of contracts are not negotiable and recommended replacement of the current law applicable to those contracts with a statute that more accurately reflects their nature.

The Report rejected the common approach based on mutual consent or constructive consent mitigated by amorphous concepts of unconscionability based on differing bargaining power of the parties. Any consent is entirely fictional as neither party has the power to vary the contract terms, regardless of the perceived bargaining power the party has. The customer of a dry cleaner or parking lot may be 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 part of the product purchased. As a result, the Report treated the contract like any other aspect of the product. Terms are enforced generally unless commercially unreasonable as provided in current law. The approach is entirely different, but the results are more predictable and consistent and not radically different. The approach avoids issues that have been the subject of some statutes. Can the consumer really be said to have consented to the “click wrap” that was in use at the time the initial Report was released, or to changes in terms of the contract after the relationship is established?

While the Report gained some academic recognition, a bill to enact it was not introduced until a number of years after it was released. A bill to do so has been reintroduced in the current legislative session. With this introduction, the issues in the Report assume renewed importance. A copy of the 1998 Report is appended to this memorandum. However, Staff was concerned that after 20 years, the Report should be re-examined by the Commission and revised to bring it up to date. As a first step in that process, I have proposed some changes to the substantive provisions and made some stylistic changes. After the Commission has made some preliminary decisions about the 1998 Report and the proposed changes, I can proceed with updating the comments to each section.

Section 1, Findings. While there does not seem to be substantive objection to their content, the Commission does not now propose legislative findings. It was my intention to re-work and supplement the 1998 findings as an introduction to the Report.

Section 2, Definitions. I have replaced the terms, “seller” and “buyer” with “merchant” and “consumer”. Those terms seem more natural given that the act would apply to many transactions that are not commonly considered sales. Those changes and the addition to the definition of “consumer” would also make it clear that the act would regulate *only* consumer transactions, as consumer transactions are defined for purposes of consumer fraud acts. See, e.g. *Hundred East Credit Corp v. Eric Schuster*, 212 N.J. Super 350 (App. Div. 1986). I have left the use of the word “sale” and its definition alone only because I could not come up with a better alternative.

Section 3, Scope. The only change proposed for the section is the addition of a few words at the end of subsection (a). The change is for emphasis and not substantive.

Section 4, 5 and 6 are substantively unchanged.

Section 7, Primary and Secondary Terms. This section has been re-arranged and a Section 7.5 has been added. This change is for clarity; it is not substantive.

Section 8, Secondary Terms: Default Rule. A subsection (b) has been added. That change is part of an effort to deal with arbitration clauses. *Atalese v. U.S. Legal Services Group*, 219 N.J. 430 (2015) makes certain requirements for the enforceability of arbitration clauses. However, that case recognizes that under The Federal Arbitration Act (FAA), 9 U.S.C.A. §2 arbitration clauses “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” As a result, subsection (b) is stated in general terms as in *Atalese, supra*, so as to apply more generally than to only arbitration clauses.

Section 9, Secondary Terms: Arbitration Clauses. This section raises some of the same issues as those discussed above. However, it is well established and based on a general principle of fundamental fairness. I am not sure what to do with it.

Section 10 and 11. I have not proposed changes to these sections.

Section 12. Attorney fees. The 1998 provision allows attorney fees provisions but makes them reciprocal as in the English rule. The other approach would be to forbid them.

Section 13. Interpretation of Contract; Unilateral Change of Contract Terms. No change is proposed to this section.

## **Draft Language**

### **Section 2. Definitions**

a. “Consumer” is 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*.

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

c. “Open market” is a market where a merchant offers its product to *consumers* or *classes* of consumers.

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

e. “Merchant” is 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.

f. “Standard form contract” is 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 specifying the rights and obligations of consumer and merchant in a sale.

### **Section 3. Scope**

a. Except as provided in subsection (b), 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.

### **Section 4. Effect on other laws**

a. Except as provided by subsection (b), this act supersedes any law that:

(1) conflicts with this act; or

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

b. This Act does not supersede other 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.

### **Section 5. Time of Effectiveness of Standard Form Contracts**

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

### **Section 6. Cancellation of Standard Form Contracts**

The consumer may cancel a standard form contract if:

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

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

c. the consumer does not use the product; and

d. the consumer returns the product in its original condition and packaging within a reasonable time not to exceed 30 days.

### **Section 7. Primary and Secondary Terms**

a. A term in a standard form contract is either a primary or secondary term.

b. A primary term is a term that:

(1) establishes the price, financing, product specifications and options 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. A secondary term is any other term of a standard form contract. A consumer is bound by secondary terms of a standard form contract only as permitted by this Act.

### **Section 7.5 . Primary Terms**

A consumer is bound by primary terms of a standard form contract unless the contract is unenforceable because of fraud, illegality, duress or mutual mistake.

### **Section 8. Secondary Terms: Default Rule**

a. A secondary term is enforceable unless:

(1) the term conflicts with a primary term;

(2) the term is prohibited by statute; or

(3) at the time of sale, the term would have caused a reasonable consumer to reject the sale.

*b. To be enforceable, a secondary term that constitutes waiver of a constitutional or statutory right by a consumer must be clear and put the consumer on notice of that waiver.*

c. Notwithstanding subsection (a), a secondary term governed by another section of this Act is enforceable as provided in that section.

d. The determination of whether a secondary term is enforceable is a question of law.

### **Section 9. Secondary Terms: Arbitration Clauses**

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

## **Section 10. Secondary Terms: Risk of Loss**

A secondary term placing a risk of loss on the consumer is enforceable if:

- a. the amount of potential loss does not exceed the sale price of the product;
- b. the merchant makes 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.

## **Section 11. Secondary Terms: Remedies for Non-Conforming and Defective Products; Choice of Forum; Damage Limitations**

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; 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;

(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.

***Section 12. Attorney fees***

*A secondary term that shifts to the consumer the obligation to pay the merchant's attorneys' fees and costs of litigation shall operate to allow a consumer who prevails to recover attorneys' fees and costs of litigation from the merchant.*

**Section 13. 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.