

**To: New Jersey Law Revision Commission**  
**From: John Cannel**  
**Re: Standard Form Contracts**  
**Date: February 10, 2020**

## M E M O R A N D U M

There are a few key issues that the Commission left open at the end of the October meeting. I have attempted to reconsider them and suggest language for the Commission's consideration.

The first concerns the distinction between Primary and Secondary Terms in Section 6. Commenters have stated that the distinction is insufficiently precise. Past drafts have changed the terms that described primary terms or added modifiers to those descriptive terms. Those efforts have not been found satisfactory. In place of changing modifiers, this draft adds definitions.

### **Section 6. 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 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.
- e. A consumer is bound by primary and secondary terms of a standard form contract only as permitted by this Act.

The second open issue concerns whether there are situations where even the price term is so unconscionable that it should not be enforced. To allow for these challenges to price, I have added words to subsection (e) of Section 6 and added a subsection (b) to Section 7. The draft is intended to cover only truly extraordinary situations, in response to concerns expressed by the Commission.

### **Section 7. Primary Terms**

A consumer is bound by primary terms of a standard form contract unless:

- 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 consumer under circumstances that unfairly encouraged acceptance.

After further discussion with commenters, I have again modified the standard for enforceability of secondary terms.

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

- a. A secondary term of the contract is unenforceable if:
  - (1) the term is subject to defenses such as fraud, illegality, duress or mutual mistake;
  - (2) the term conflicts with a primary term;
  - (3) the term violates a statute or regulation; or
  - (4) at the time of sale, irrespective of the relative bargaining power of the parties, the term is unconscionable. or would have caused a reasonable consumer in the situation of the claimant to reject the sale (or Alternative reject the term.)
- b. Notwithstanding subsection (a), a secondary term governed by another section of this Act is enforceable as provided in that section.
- c. The determination of whether a secondary term is enforceable is a question of law.

It appeared that there was agreement on the language of Section 11, but since that agreement is a change from the text of the last draft, it is included.

### **Section 11. 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 price provided in the contract.