To: Commenters on NJLRC Standard Form Contracts Project
From: John M. Cannel, Laura C. Tharney
Re: Collected information re: issues pertaining to Standard Form Contract Report
Date: November 26, 2019

Pursuant to the direction of Chairman Vito A. Gagliardi, Jr., Esq., at the October 2019 meeting of the New Jersey Law Revision Commission, the following excerpts have been culled from comments submitted to the Commission in writing and provided at the Commission meetings at which this project was discussed. The goal was to create a single document containing the pertinent substance of the comments shared to this time for purposes of discussion.

CONCERNS RAISED REGARDING THE PROJECT TO THIS TIME

I. "Anti-consumer"

> While 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.

Jon Romberg and Charles Sullivan (SH Law) – written submission 1019.

> 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 NJLRC meeting – 1019.

"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 NJLRC meeting – 1019*.

"We 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." *Jon Romberg and Charles Sullivan (SH Law) – written submission 1019. "*Even 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." *Jon Romberg and Charles Sullivan (SH Law) – written submission 1019.*

> … 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.

Jon Romberg and Charles Sullivan (SH Law) – written submission 1019.

"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." *Jon Romberg and Charles Sullivan (SH Law) – written submission 1019* (noting also that Section 10 is divided between pro-consumer and pro-business sections and Section 11 is consumer-protective.).

II. Unconscionability

> 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.

Jacob Hale Russell (RU Law) – written submission 0719.

"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 NJLRC meeting – 0719.* "…[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." *Jon Romberg (SH Law) - written submission 0719*

"Commissioner Bell explained that unconscionability is divided into a procedural standard and a substantive standard. He asked Professor Romberg whether there was any reason to reinstate the procedural aspect. Professor Romberg stated that he did not think it would be necessary to do so and noted that he was more concerned with people not being able to afford attorneys." *Minutes of NJLRC meeting – 0719.*

> 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.

Minutes of NJLRC meeting – 0719.

> Professor Romberg discussed the case of *Ahern v. Knecht*, 563 N.E.2d 787 (1990), with the Commission. In *Ahern*, the plaintiff was dramatically over-charged 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.

Minutes of NJLRC meeting – 1019.

> 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 NJLRC meeting – 1019.

"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." *Minutes of NJLRC meeting – 1019*. "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." *Minutes of NJLRC meeting – 1019*.

> 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 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.

Jacob Hale Russell (RU Law) – written submission 0719

> … § 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.

Jon Romberg and Charles Sullivan (SH Law) – written submission 1019.

> Section 8(a)(l) 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.

Jon Romberg and Charles Sullivan (SH Law) – written submission 1019.

"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." *Jon Romberg and Charles Sullivan (SH Law) – written submission 1019*. "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 NJLRC meeting – 0719*

> 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)(l), 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.

Jon Romberg and Charles Sullivan (SH Law) – written submission 1019.

"Commissioner Rainone commented that unconscionability serves as a deterrent, even if it is not a successful argument. The problem in these types of cases is typically price gouging. He questioned whether the removal of this deterrent would open the floodgates to predatory sellers." *Minutes of NJLRC meeting – 1019*.

"Commissioner Bell questioned why a plaintiff should have to prove a contract of adhesion. Instead, he continued, the focus of the litigation should be whether the terms were substantively unconscionable.

Commissioner Bell noted that he would like to think about the "price term" and whether medical services should be excluded from standard from contracts." *Minutes of NJLRC meeting – 1019*.

III. Primary vs. secondary terms

> 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.

Jon Romberg and Charles Sullivan (SH Law) – written submission 1019.

"I have 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." *Jacob Hale Russell (RU Law) – written submission 0719*.

"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 NJLRC meeting – 0719*.

"…[U]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?" *Jon Romberg (SH Law) – written submission 0719.* "…[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. *Jon Romberg (SH Law) – written submission 0719*. "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?" *Jon Romberg (SH Law) – written submission 0719.*

"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. *Jon Romberg and Charles Sullivan (SH Law) – written submission 1019*.

IV. Parol evidence rule

> Section 12(a) imposes by statute a classical approach to the parol evidence rule, directly conflicting with the modem 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 modem 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.

Jon Romberg and Charles Sullivan (SH Law) -written submission 1019

> § l2(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.

Jon Romberg and Charles Sullivan (SH Law) -written submission 1019

V. Effectiveness of contract

> 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?
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> 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.3 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.

Jon Romberg and Charles Sullivan (SH Law) – written submission 1019:

VI. Other

Professor Romberg took issue with the Report's handling of attorney's fees, contending that it gives attorneys leverage. *Minutes of NJLRC meeting – 0719*. Ms. Jurow found the handling of attorney's fees troubling as well. *Minutes of NJLRC meeting – 0719*.

> Commissioner Bunn also stated that the terms in section 11, dealing with attorney fees, might not work in multistate use. John Cannel advised Commissioner Bunn that this problem can be fixed. Commissioner Bell asked Staff to take out the word secondary. Commissioner Rainone asked Staff to consider using parallel language by adding the term "reasonable" before the phase "attorney fees." Finally, Commissioner Bunn asked Staff ensure that the fee cap is drafted to apply equally to both plaintiffs and defendants.

Minutes of NJLRC meeting – 1019.

"Chairman Gagliardi…noted that this project involves significant issues where the Commission's scholarship adds value to the debate...[and]…that the Legislature may benefit from the work of the Commission thus far. Therefore, he is not in favor of terminating this project." *Minutes of NJLRC meeting – 1019*. "Chairman Gagliardi asked Mr. Cannel to draft a Memorandum setting forth the 'talking points" raised by the commenters and the Commissioners. After the Commission has had the opportunity to review this Memorandum, the Commission will provide him with guidance. Commissioner Bell asked Mr. Cannel to address the facts in *Ahern v. Knecht*." *Minutes of NJLRC meeting – 1019.*