

**To: New Jersey Law Revision Commission**  
**From: John M. Cannel**  
**Re: Standard Form Contracts – Update Memorandum Showing Modifications to the Proposed Statutory Language in Response to the Most Recent Feedback From Commenters**  
**Date: October 5, 2020**

## **MEMORANDUM**

The Memorandum includes an updated version of the draft statutory language for the Standard Form Contracts project. The commenters on this project graciously provided additional comment over the summer, and in September as well. Modifications to the proposed statutory language made in response to that input are contained on the following pages.

For ease of review, the draft sections of statutory text are shown below as “Staff Draft” and “Commenter Draft” where two versions exist – and, in this document - a third draft of the proposed statutory language has been added called “September Staff Draft”.

The “Staff Draft” language below was included in the Draft Report and Memorandum provided to the Commission in advance of the February 2020 meeting.

The “Commenter Draft” language is taken from the Memo submitted to the Commission in advance of that meeting as well. Comments received from LSNJ were also layered in as comments on the Staff Draft language so that all comments are collected in one document.

The “September Staff Draft” is language that was added in September after additional input provided on behalf of the commenters.

Changes were made to the draft language based on Staff’s understanding – greatly summarized and distilled to what Staff understood to be its essence - that commenters who expressed concerns about the impact of this project on consumers could support it 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).

The draft statutory language below was modified to be consistent with those requests. Additional limited modifications were made to clarify some of the draft language as a result of issues identified during ongoing Staff review.

In response to the changes, commenters provided preliminary feedback clarifying that they continue to believe that the project is misguided because they do not see the problem that it was intended to resolve, noting that unconscionability and consent serve a meaningful role in New Jersey in protecting consumers. They also suggested that the proposal is misguided because its provisions appeared to be inconsistent with consumer-protective principles as those concern

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

The feedback mentioned above was preliminary in nature, and may change – to some extent - after a more detailed review of the changes to the draft. The commenters who have participated in the process to this time have been notified that the project is on the Commission’s agenda for October.

To streamline this document to highlight the changes to the proposed statutory language, it is not in Final Report form, and it does not include the revised Introduction or the revised section comments. These will be updated as necessary and restored to the document after any Commission direction regarding the revised language has been received by Staff, and before submission to the Commission in formal Final Report form.

## ***Staff Draft - Section 1. 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.

## ***No Commenter Draft Submitted***

## ***September Staff Draft - 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 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.

**\*\*NOTE:** There is a disagreement among Staff regarding the definitions of “basic price”, “negotiated term”, “primary term”, and “secondary term”.

On one hand, it has been suggested that these terms are too substantive to be separated from the material to which they relate, and that the terms “basic price” and “negotiated term” need to be emphasized. As a result, it was suggested that those terms should be returned to the statutory sections in which they originally appeared (Section 6 for primary and secondary term, for example).

On the other hand, it was suggested that removing certain terms from the definitions section assumes that someone accessing the statute will read the entire Act, and in order. It also assumes that the defined term is used only in the section in which it is defined. That is not the case here, so the question is whether removing the terms from the definition section would result in a structure for the act that would impair its functionality if enacted.

Staff seeks feedback regarding the placement of the definitions of those terms.\*\*

***Staff Draft - Section 2. 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.

c. This statute does not apply to contracts for the sale or purchase of securities or real estate or for the mortgage of real estate.

***No Commenter Draft Submitted***

***Revised Staff Draft - 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<sub>2</sub> and subject to approval or disapproval by<sub>2</sub> 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.

**Staff Draft - Section 3. 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 the result of unequal bargaining power, or
  - (3) makes a whole contract or a primary term unenforceable because it is unconscionable.
- 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.

**Commenter Draft**

- a. Except as provided by subsection (b), this act supersedes ~~any~~ law that:  
conflicts with this act; or

 **September Staff Draft - 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.

***Staff Draft - Section 4. 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.

***Commenter Draft***

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.

***Revised Staff Draft - Section 4. Time of Effectiveness of Standard Form Contracts Terms***

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.



**Staff Draft - Section 5. 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.

**Commenter Draft**

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 30 days or the time stated in the contract, whichever is longer.

**Revised Draft - Section 5. 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 has not yet received the product or there has not yet been substantial performance; and
- e. ~~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.



## **Staff Draft - 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.

## **Commenter Draft**

- b. A primary term is a term that:
  - (1) establishes the basic price or product specifications clearly and explicitly specified in the written contract 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 rebates or added fees or costs of such things as delivery, insurance, financing and the like;
  - (2) A term identifies the product if it clearly and explicitly states what the product is;
  - (3) A term is negotiated if the wording of the term is clearly and explicitly subject to adjustment by the parties after discussion and agreement, and if such adjustment has been made by or has been clearly and explicitly rejected by the parties. 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. The determination of whether a term is a primary or secondary term is a question of law.
- f. A merchant is bound by primary and secondary terms of its standard form contract.

g. A consumer is bound by primary and secondary terms of a standard form contract only as permitted by this Act.

### ***September Staff Draft - 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.~~

e. 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.

### *Staff Draft - 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.

### *Commenter Draft*

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

- a. the contract is unenforceable because of defenses such as fraud, misrepresentation, illegality, duress, undue influence, impracticability, frustration of purpose, the doctrine of reasonable expectations, unconscionability, or mistake; or
- b. a price term is unconscionably excessive and was agreed to by an unknowledgeable consumer under circumstances that unfairly encouraged acceptance.

### *September Staff Draft - 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.~~



**Staff Draft - 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, alternatively: reject the .)
- 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.

**Commenter Draft –**

- a. A secondary term of the contract is unenforceable if:
- (1) the term is subject to defenses such as fraud, misrepresentation, illegality, duress, undue influence, impracticability, frustration of purpose, the doctrine of reasonable expectations, unconscionability, or mistake;
  - (2) the term conflicts with a primary term;
  - (3) the term violates a statute or regulation;
  - (4) at the time of sale  the term is unconscionable or would have caused a reasonable consumer in the situation of the consumer to reject the term; or
- 

**September Staff Draft - 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.

***Staff Draft - Section 9. Secondary Terms: Risk of Loss***

A secondary term placing 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 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.

***No Commenter Draft Submitted***

***Revised Staff Draft - 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.

**Staff Draft - Section 10. 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.

**Commenter Draft –**

- 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 that limit would violate an otherwise-available contract defense; 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:

**~~Revised Staff Draft – 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.~~

***Staff Draft - 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.

***Commenter Draft –***

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 of the product or service provided in the contract.

***Revised Staff Draft - Section 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.

**Staff Draft - 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.

**Commenter Draft –**

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 or consumer 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 or consumer gives written notice of the change;
- (3) the merchant instructs the consumer or consumer instructs the merchant how to cancel the contract; and
- (4) the change of terms applies prospectively.

**~~Revised Staff Draft – Section 11. 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.~~