SENATE, No. 2095



STATE OF NEW JERSEY

218th LEGISLATURE



INTRODUCED MARCH 5, 2018

Sponsored by:

Senator JAMES BEACH

District 6 (Burlington and Camden)

SYNOPSIS

 Establishes procedures for determining enforceability of standard form contracts; invalidates certain indemnification clauses.

CURRENT VERSION OF TEXT

 As introduced.



An Act concerning standard form contracts and supplementing Title 56 of the Revised Statutes.

 Be It Enacted by the Senate and General Assembly of the State of New Jersey:

 1. This act shall be known and may be cited as the “New Jersey Standard Form Contracts Act.”

 2. The Legislature finds and declares that:

 a. Most contracts are standard form contracts. A standard form contract is prepared by the seller and contains some fixed terms not subject to negotiation. Standard form contracts are offered on a “take it or leave it” basis. Buyers often do not have the opportunity to consider the terms and must accept them to acquire goods and services.

 b. The use of standard form contracts eliminates the need to negotiate contracts individually for transactions taking place in the marketplace and may reduce the costs of goods and services. However, since the seller alone drafts standard form contracts, they may contain one-sided and unfair terms. The law must protect buyers from such terms without eliminating the social benefit of uniform contract terms.

 c. Standard form contracts pose a special problem for the law. Under traditional contract principles, the terms of a contract are enforced against a party because the party has consented to them. This rule cannot be applied to standard form contracts because these terms are not the product of negotiation and consent of the parties.

 d. New Jersey courts have treated standard form contracts as a class of contracts subject to special scrutiny. When a court identifies a contract as one of “adhesion,” the court subjects the contract to a judicial determination of fairness based on the doctrine of unconscionability. The use of this principle of equity has not provided a cogent response to problems posed by standard form contracts.

 e. The doctrines of “unconscionability” and “contract of adhesion” are unsound in theory and in fact. “Unconscionability” depends on subjective notions of fairness and therefore constitutes a rule of indeterminacy. “Contract of adhesion” is an obsolete mode of analysis incapable of reacting to developments in the marketplace. The doctrines of “unconscionability” and “contract of adhesion” restrict a court’s ability to handle the diversity of standard form contract terms by creating simplistic legal categories that do not reflect commercial reality. A court’s ability to deal with problems posed by standard form contracts is restricted by common law doctrines.

 f. The lack of definite rules governing standard form contracts prevents parties to these contracts from knowing in advance whether the rules regulating their private conduct are enforceable, and leaves judicial decision-making to the vagaries of individualized judgment.

 g. Existing law does not provide uniform and flexible standards to determine the validity of terms in standard form contracts. It has neither protected consumers against the opportunism of certain sellers nor has it provided sellers with legal rules based on the logic of the mass market. Courts require flexibility and uniform rules to determine the validity of non-negotiated terms in standard form contracts. Buyers and sellers require certainty and clarity with respect to the rules governing their market transactions.

 3. As used in this act:

 “Buyer” means a natural person or legal entity that buys, leases, licenses, or otherwise acquires an interest in, or incurs an obligation with respect to, a product in an open market.

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

 “Open market” means a market where a seller offers its product to a buyer or class of buyers.

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

 “Seller” means a natural person or legal entity using a standard form contract to regulate legal obligations with a buyer and regularly engaged in the business of manufacturing, distributing, or offering to sell a product.

 “Standard form contract” means a written or other record of legal terms used by a seller offering to sell a product to a buyer in an open market for the purpose of specifying the rights and obligations of buyer and seller in a sale.

 4. a. Except as provided in subsection b. of this section, P.L.    , c. (C. ) (pending before the Legislature as this bill) 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.

 5. a. Except as provided in subsection b. of this section, P.L.    , c. (C. ) (pending before the Legislature as this bill) supersedes any law that:

 (1) conflicts with the provisions of P.L. , c. (C. ) (pending before the Legislature as this bill); 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. The provisions of P.L. , c. (C. ) (pending before the Legislature as this bill) do 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.

 6. A standard form contract becomes effective when the sale occurs and the seller either transfers the contract to the buyer or makes the contract accessible to the buyer.

 7. The buyer may cancel a standard form contract if:

 a. The terms of the contract are accessible only after the buyer has already purchased the product;

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

 c. The buyer does not use the product; and

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

 8. 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 buyer and the seller at or prior to the sale.

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

 c. A secondary term is any other term of a standard form contract. A buyer is bound by secondary terms of a standard form contract only as permitted by the provisions of P.L. , c. (C. ) (pending before the Legislature as this bill).

 9. a. A secondary term is enforceable unless, at the time of sale, the term would have caused a reasonable buyer to reject the sale.

 b. Notwithstanding subsection a. of this section:

 (1) a secondary term governed by another section of P.L.    , c.    (C. ) (pending before the Legislature as this bill) is enforceable as provided in that section; and

 (2) a secondary term is not enforceable if the term conflicts with a primary term, or is prohibited by statute.

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

 10. 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.

 11. A secondary term placing a risk of loss on the buyer is enforceable if:

 a. The amount of potential loss does not exceed the sale price of the product;

 b. The seller makes available to the buyer insurance at a commercially reasonable price and the buyer refuses to purchase the insurance; or

 c. The loss is caused by the fault of the buyer.

 12. 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 seller 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;

 (4) requires the buyer to waive his substantive rights under the New Jersey consumer fraud act, P.L.1960, c.39 (C.56:8-1 et seq.), the used car lemon law, P.L.1995, c.373 (C.56:8-67 et seq.), or any other consumer protection laws, or the right to contact any other consumer protection agency, State, county or municipal department or agency, or any other entity for the purposes of reporting a consumer complaint; or

 (5) 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 seller for consequential damages related to economic losses of the buyer as a result of a defect or non-conformity in the product; or

 (2) limits a buyer’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 a buyer’s rights to cancel the contract pursuant to section 7 of P.L. , c. (C. ) (pending before the Legislature as this bill);

 (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; and

 (d) requires the buyer to produce reasonable proof of purchase of the product.

 13. a. Except as provided in subsection b. of this section, a secondary term that shifts to the buyer the obligation to pay the seller’s attorneys fees and costs of litigation shall operate to allow a buyer who prevails to recover attorney’s fees and costs of litigation from the seller.

 b. Notwithstanding any other law to the contrary, a secondary term requiring the buyer to indemnify or hold harmless the seller for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the seller, his agents, or employees, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract issued by an authorized insurer.

 14. a. The 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 seller 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 seller or buyer at any time without penalty;

 (2) the seller gives written notice of the change;

 (3) the seller instructs the buyer how to cancel the contract; and

 (4) the change of terms applies prospectively.

 15. This act shall take effect on the 120th day after enactment and shall be applicable to standard form contracts entered into on or after that date.

STATEMENT

 This bill would implement provisions governing standard form contracts. Standard form contracts are pre-printed forms used in the mass distribution, marketing and sale of a product to buyers. Examples include parking lot receipts, theater tickets, software licenses, user agreements for websites, and department store charge slips.

 Ordinarily, contract terms are enforced because they are the subject of consent and the result of bargaining between the parties. By contrast, the formation of standard form contracts is not based on consent and does not result from bargaining. Usually these terms are set beforehand by the seller.

 The courts have deemed certain terms in standard form contracts to be unfair and have refused to enforce such terms. The courts reason that, because there was unequal bargaining power in the formation of the contract, the buyer cannot be said to have consented to all contract terms. Courts have utilized concepts such as “unconscionability,” “reasonable expectations,” and “contract of adhesion” in support of their refusal to enforce such terms.

 However, the judicial approach does not provide predictability as to which terms in a standard form contract are enforceable. The judicial approach assumes “unequal bargaining power” on the part of one of the parties, which may not be the case. The buyer is usually considered to be the victim in an unfair transaction because the buyer is assumed to be a consumer and the seller is assumed to be a large retail dealer or manufacturer. However, in reality the economic power of the buyer may exceed that of the seller.

 This bill provides rules to determine the enforceability of standard form contract terms, replacing the family of judicially-created concepts with legislatively-defined rules to measure the validity of non-negotiated terms. The objective is to introduce greater degrees of certainty, predictability, and clarity into the law governing standard form contracts.

 Under the bill, terms found in standard form contracts are divided into primary terms and secondary terms. Primary terms, those that are negotiated or based on consent, are enforced only as provided in the bill. Secondary terms include such provisions as arbitration clauses, risk of loss, remedies for defective products, and limitations on damages.

 Section 5 of the bill provides that it does not supersede other statutes that: require the inclusion of specific terms in standard form contracts; prohibit the inclusion of specific terms in standard form contracts; impose formal requirements, other than those in the bill, to make a contract effective; or regulate consumer fraud.

 Section 7 of the bill governs the cancellation of standard form contracts. Under this section, a buyer may cancel a standard form contract if the terms of the contract are accessible only after the buyer has purchased the product; the buyer does not open the package more than necessary to access the terms of the contract; the buyer does not use the product; and the buyer returns the product in its original condition and packaging within a reasonable time, not to exceed 30 days.

 Section 9 provides that a secondary term is enforceable unless, at the time of sale, the term would have caused a reasonable buyer to reject the sale.

 Section 10 provides that 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 11 provides that a secondary term placing a risk of loss is enforceable if the amount of potential loss does not exceed the sale price of the product, or the seller makes available to the buyer insurance at a commercially reasonable price and the buyer refuses to purchase the insurance, or the loss is caused by the fault of the buyer.

 The enforceability of secondary terms is governed by section 12 of the bill. Under this section, a secondary term is unenforceable if it disclaims a warranty that a product matches its description; disclaims a warranty that a product is free from defects, unless the disclaimer is prominently placed and the defects are disclosed; limits the liability of the seller for risk of injury caused by a product defect existing at the time of sale; requires the buyer to waive the substantive right to sue the seller under any consumer protection law or to report a consumer complaint to any consumer protection agency; or chooses the law of a jurisdiction unrelated to the parties or to the subject matter of the transaction.

 Under section 13 of the bill, a secondary term that shifts to the buyer the obligation to pay the seller’s attorney’s fees and costs of litigation would operate to also allow a buyer who prevails to recover attorney’s fees and costs of litigation from the seller. However, a secondary term requiring the buyer to indemnify or hold harmless the seller for damages caused by or resulting from the sole negligence of the seller would be void and unenforceable as against public policy.

 This bill is based in part on a 1998 report by the New Jersey Law Revision Commission.