SENATE, No. 4061

STATE OF NEW JERSEY

219th LEGISLATURE

INTRODUCED NOVEMBER 8, 2021

Sponsored by:
Senator M. TERESA RUIZ
District 29 (Essex)

SYNOPSIS

Establishes certain protections against unconscionable terms in standard form contracts.

CURRENT VERSION OF TEXT

As introduced.

AN ACT concerning unconscionable terms in 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. As used in this act:

"Standard form contract" means a consumer contract as provided in section 1 of P.L.1980, c.125 (C.56:12-1) to which only one of the parties to the contract is an individual and that individual did not draft the contract.

"Term" means a portion of an agreement that relates to a particular matter.

2. a. There shall be a rebuttable presumption that the following contractual terms are substantively unconscionable when included in a standard form contract:

(1) A requirement that resolution of a legal claim takes place outside of the county or district where the individual resides or the contract was consummated;

(2) A waiver of the individual's right to assert a claim or seek a remedy provided by State or federal law;

(3) A waiver of the individual's right to seek punitive damages as provided by law;

(4) A requirement that the individual bring an action within a period shorter than any applicable statute of limitations;

(5) A provision that could require an individual to pay fees or costs to bring a legal claim that are in excess of the fees and costs that the State or federal courts require to bring a claim;

(6) A requirement that the individual waive a right to participate in any collective or class action to the extent permissible under the Federal Arbitration Act (9 U.S.C. s.1 et seq.);

(7) A requirement that the individual waive any statutory right to attorneys' fees and costs which might attend to a prevailing party under any action brought in any State or federal court or other forum; and

(8) A requirement that the individual waive any substantive appellate review.

b. An unconscionable contract term identified in subsection a. of this section shall not be enforced against a consumer. The common law and Uniform Commercial Code shall guide courts in determining the enforceability of any term not specifically identified in subsection a. of this section.

c. It shall be an unlawful practice in violation of P.L.1960, c.39 (C.56:8-1 et seq.) to include an unconscionable term identified in subsection a. of this section in a standard form contract to which only one of the parties to the contract is an individual and that individual does not draft the contact.

3. a. If a court finds that a standard form contract contains an unconscionable term, the court may:

(1) refuse to enforce the entire contract;

(2) refuse to enforce any part, clause, or provision of the contract containing the unconscionable term; or

(3) enforce the contract including the specific part, clause, or provision containing the term, while severing only the unconscionable term.

b. In ordering a remedy for an unconscionable term in a standard form contract, a court shall consider the following factors:

(1) whether severing the term and enforcing the contract in its absence creates an incentive for drafters to include unconscionable terms in standard form contracts;

(2) whether severing the term and enforcing the contract in its absence removes, in whole or in part, the incentive to draft enforceable standard form contracts that do not include unconscionable terms;

(3) whether the inclusion of the unconscionable term may deter a consumer from asserting any right under the contract or by deterring a consumer from challenging the enforcement of the unconscionable term;

(4) whether the drafting party acted in bad faith, for example, by including a term that is illegal or unconscionable under established precedent; and

(5) the parties' purposes in entering into the contract.

c. In deciding whether to sever unenforceable terms from a standard form contract, a court shall not consider any term in the contract that requires unenforceable terms to be severed.

d. For any standard form contract drafted by one party and presented to another party of weaker bargaining power, there shall be a rebuttable presumption that any right to opt out of the contract or any of its provisions shall not be considered when determining the conscionability of the contract.

4. a. An arbitration organization conducting an arbitration subject to the provisions of this act shall provide a consumer with a substantially equivalent opportunity to obtain a waiver of fees as available in State and federal courts.

b. The provisions of this act shall not apply to arbitrations in a forum operated or administered by a registered national securities association as defined in section 15A of the federal "Securities Exchange Act of 1934," (15 U.S.C. s.78o-3) as amended, or regulations adopted thereunder.

5. This act shall take effect on the 90th day next following enactment, and shall apply to contracts entered into or renewed after that date.

STATEMENT

This bill establishes certain protections against unconscionable terms for individuals, when those terms are used in standard form contracts. As used in the bill, a standard form contract is a consumer contract to which only one of the parties to the contract is an individual and that individual did not draft the contract.

The bill creates a rebuttable presumption that the following contractual terms are substantively unconscionable when included in a standard form contract to which only one of the parties to the contract is an individual and that individual does not draft the contract:

(1) A requirement that resolution of legal claims take place in a place other than the county or district where the individual resides or the contract was consummated;

(2) A waiver of the individual's right to assert a claim or seek a remedy provided by State or federal law;

(3) A waiver of the individual's right to seek punitive damages as provided by law;

(4) A requirement that the individual bring an within a period shorter than any of the applicable statute of limitations;

(5) A provision that could require an individual to pay fees and costs to bring a legal claim in excess of the fees and costs that the State or federal courts require to bring a claim;

(6) A requirement that the individual waive a right to participate in any collective or class action to the extent permissible under the Federal Arbitration Act (9 U.S.C. s.1 et seq.);

(7) A requirement that the individual waive any statutory right to attorneys' fees and costs which might attend to a prevailing party under any action brought in any State or federal court or other forum; and

(8) A requirement that the individual waive any substantive appellate review.

The bill provides that an unconscionable contract term identified pursuant to the bill is not to be enforced against a consumer. The bill also provides that the common law and Uniform Commercial Code are to guide courts in determining the enforceability of any term not specifically identified in the bill.

The bill provides that it is an unlawful practice in violation of the consumer fraud act, P.L.1960, c.39 (C.56:8-1 et seq.), to include an unconscionable term identified in the bill in a standard form contract to which only one of the parties to the contract is an individual and that individual does not draft the contact.

An unlawful practice under the consumer fraud act is punishable by a monetary penalty of not more than $10,000 for a first offense and not more than $20,000 for any subsequent offense. Additionally, violations may result in cease and desist orders issued by the

Attorney General, the assessment of punitive damages, and the awarding of treble damages and costs to the injured party.

The bill provides that, if a court finds that a standard form contract contains an unconscionable term, the court may:

(1) refuse to enforce the entire contract;

(2) refuse to enforce any part, clause, or provision of the contract containing the unconscionable term; or

(3) enforce the contract including the specific part, clause, or provision containing the term, while severing only the unconscionable term.

The bill provides that, in ordering a remedy for unconscionable terms in standard form contracts, a court is required to consider the following factors:

(1) whether severing the term and enforcing the contract in its absence creates an incentive for drafters to include unconscionable terms in standard form contracts;

(2) whether severing the term and enforcing the contract in its absence removes, in whole or in part, the incentive to draft enforceable standard form contracts that do not include unconscionable terms;

(3) whether the inclusion of the unconscionable term may deter a consumer from asserting any right under the contract or by deterring a consumer from challenging the enforcement of the unconscionable term;

(4) whether the drafting party acted in bad faith, for example, by including a term that is illegal or unconscionable under established precedent; and

(5) the parties' purposes in entering into the contract.

In deciding whether to sever unenforceable terms from a standard form contract, the bill provides that courts may not consider any term in the contract that requires unenforceable terms to be severed.

The bill also provides that, for any standard form contract drafted by one party and presented to another party of weaker bargaining power, there is a rebuttable presumption that any right to opt out of the contract or any of its provisions shall not be considered when determining the conscionability of the contract.

Pursuant to the bill, an arbitration organization conducting an arbitration subject to the provisions of the bill is to provide a consumer with a substantially equivalent opportunity to obtain a waiver of fees as available in State and federal courts.

The provisions of the bill are not to apply to arbitrations in a forum operated or administered by a registered national securities association as defined in section 15A of the federal "Securities Exchange Act of 1934" (15 U.S.C. s.78o-3).