



*S.105, Consumer Justice Enforcement Act, Testimony
Ashley Romeo-Boles
House Judiciary Committee
April 10, 2018*

Dear Chairperson Grad and Committee members,

As the largest statewide business organization, the Vermont Chamber of Commerce represents about 1,500 members covering all industries and sectors from tourism to manufacturing, retail to health care and construction to technology. Our mission is to help our members grow their businesses *and* the Vermont economy. Thank you for the opportunity to submit testimony.

The Vermont Chamber is concerned about the negative and unintended consequences that S.105 could pose. It could create frivolous class action lawsuits with claims that consumer agreements include technically deficient provisions prohibited by the statute. We have concerns about the effect this could have on business because it could encourage frivolous lawsuits and require burdensome and unnecessary Vermont-specific language in interstate consumer agreements.

S.105, an act relating to consumer justice enforcement, passed by the Senate and currently before your Committee, threatens numerous legitimate businesses with unjustified – and very large – monetary penalties.

The bill targets a number of common form contract provisions included in millions of consumer contracts, declaring them all to be unfair trade practices. These include: provisions waiving consequential damages or other claims or remedies available under state or federal law; limiting the time for bringing claims; specifying an “inconvenient venue” for resolving disputes; or imposing fees greater than the charge for filing an action in the Vermont courts or federal courts. The bill also improperly prohibits agreements to bring claims within statutory limitations periods and to waive the right to seek punitive damages.

To the extent that any of these provisions might be unfair to consumers, general rules of contract law already allow courts to refuse to enforce such provisions. Under the doctrine of unconscionability, which considers the overall circumstances of the particular agreement—the benefits to the customer as well as any burdensome provisions—the judge determines whether a specific provision is unenforceable and is empowered to decide these matters case-by-case, giving deference to both the Federal Arbitration Act and state law principles. This approach is preferable to the prescriptive approach reflected in S.105.

While the bill recognizes this by permitting case-by-case decision-making regarding whether a provision is unconscionable and therefore unenforceable, it would impose potentially large monetary liability on companies that could not know in advance whether their provisions would

be found unconscionable under Vermont law. For provisions that are not even unconscionable, the bill itself creates only a “rebuttable presumption” that the listed types of provisions are unconscionable (see § 6055(a)), but it makes including such provisions in a contract an automatic statutory violation (see § 6055(d))—meaning a penalty of \$1,000 in statutory damages per contract ***even if the contract provision would not be found unconscionable if challenged in a particular suit.***

The bill will give rise to of lawsuits similar to actions in New Jersey where plaintiffs’ lawyers have recently begun using the state’s “Truth in Consumer Contract, Warranty and Notice Act” (“TCCWNA”) to bring class action lawsuits over provisions in form contracts, leases, and even restaurant menus. Given that the Vermont bill provides for *twice* the amount of statutory damages available under TCCWNA, the epidemic in Vermont is likely to be even worse.

Additionally, the bill is an attempt to undermine enforcement of arbitration agreements—it makes the inclusion of these standard terms in consumer contracts a ground for invalidating arbitration agreements, even though the Supreme Court has squarely held that federal law, for example, permits arbitration agreements to provide for individualized dispute resolution and bar class actions. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

Finally, we share similar concerns regarding H.789 and whether the language in that proposal will be incorporated into S.105. We urge the Committee to consider and address these consequences as you work through this bill. Thank you for the opportunity to submit testimony.