

TESTIMONY OUTLINE RE: S.105
House Judiciary Committee/April 6, 2018
Charles Storrow, Leonine Public Affairs, LLP, on behalf of AT&T

1. AT&T's Contract With Consumers is Fair and Reasonable

- a. Contract begins with clear language in large, bolded font indicating that it requires the use of arbitration on an individual basis to resolve disputes, rather than jury trial or class actions, and that available remedies are limited by the contract.
- b. Section 2.0—Arbitration Provision
 - i. Disputes with AT&T must be resolved in small claims court (in VT--claims up to \$5,000¹) or by arbitration.
 - ii. AT&T will pay for all costs of arbitration for non-frivolous claims that do not exceed \$75,000.
 - iii. If the consumer prevails AT&T will pay his or her attorneys fees to the same extent it would have to in a court action.
 - iv. A consumer retains his or her right to seek redress through regulatory agencies such as the FCC, FTC and state attorneys general.
 - v. For claims that do not exceed \$75,000 AT&T will reimburse a consumer for his or her payment of the filing fee (usually \$200) required to initiate arbitration or, if need be, pay it on behalf of the consumer directly.
 - vi. The arbitration will take place in the county where the consumer's billing address is located.
 - vii. If the arbitrator awards the consumer more than any settlement offer by AT&T the company will pay the consumer the amount of the award or \$10,000, whichever is greater, and will pay the consumer's attorney 2X his or her fees and reimburse the attorney

¹ 12 V.S.A. §5531.

for any expenses he or she paid, such as expert witness fees.

- viii. If AT&T made no settlement offer and the consumer prevails in the arbitration proceeding the consumer and his or her attorney will be paid as aforesaid.
2. S.105 is unreasonable and excessive because it could invalidate a fair and reasonable contract such as AT&T's due to the fact AT&T's contract does not allow claims to be brought in a court of general civil jurisdiction and does not allow class action arbitration proceedings.
 3. If enacted S.105 is subject to preemption in light of the U.S. Supreme Court's decision in *AT&T Mobility, LLC, v. Concepcion*, 563 U.S. 333 (2011).
 - a. Issue was validity of the prohibition in AT&T's contract against class actions in light of a California rule of law that deemed such prohibitions unconscionable and thus unenforceable.
 - b. In its decision the U.S. Supreme Court ruled that the California rule of law was an obstacle to the Federal Arbitration Act's objective of favoring arbitration provisions in contracts and was thus preempted.
 - c. Notably, in its decision the Supreme Court referenced the fact that while the trial court (Federal District Court) invalidated the contract provision due to the California rule of law, it "described AT&T's arbitration agreement favorably, noting, for example, that the informal dispute resolution process was 'quick, easy to use' and likely to 'promptly full or . . . even excess payment to the customer *without* the need to arbitrate or litigate'; that the \$7,500 premium functioned as 'a substantial inducement for the consumer to pursue the claim in arbitration' if a dispute was not resolved informally; and that consumers who were members of a class would likely be worse off." 563 U.S. at 338.
 4. S.105 is internally inconsistent.
 - a. The proposed 9 V.S.A. § 6055(a) creates a rebuttable presumption that the specified contract provisions are unconscionable. A rebuttable presumption can be overcome with sufficient evidence and thus it is possible that one of the contract provisions could be upheld, which is

something expressly contemplated in § 6055(b).

- b. But, proposed 9 V.S.A. § 6055(d) provides that the existence of one of the contract provisions is, in and of itself, a violation of the Consumer Protection Act, and a consumer who sues over the existence of such a provision can recover \$1,000 and his or her attorneys' fees. This automatic liability for the existence of one of the contract provisions is inconsistent with the notion that the contract provisions could be upheld and deemed valid.
5. Proposed 9 V.S.A. § 6055(d) is unreasonable and unfair because it penalizes a company in situations where there is no dispute between a company and one of its customers. Instead, it will simply lead to litigation that solely benefits plaintiffs' attorneys.
6. Bill Section 2 is confusing and could render all arbitration agreements unenforceable.