

**BEFORE THE
VERMONT GENERAL ASSEMBLY HOUSE COMMITTEE ON JUDICIARY**

S.105 AN ACT RELATING TO CONSUMER JUSTICE ENFORCEMENT

**Statement of Laurie L. Banks,
on behalf of Enterprise Holdings**

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INTRODUCTION

Thank you, Chairwoman Grad and members of the committee, for allowing me the opportunity to speak to you today about the adverse impacts that S.105 would have on the citizens of Vermont and the businesses that serve to drive that wonderful State's economy.

Let me begin by saying, Enterprise does not take lightly the decision to oppose this legislation.

My name is Laurie Bangs and I am the Regional Vice President overseeing Vermont and portions of upstate New York. I have been with Enterprise Holdings for over 24 years and for the past 8 years have had the wonderful opportunity to work with our customers and employees in Vermont.

In Vermont, Enterprise Holdings operates under three rental car brands – Enterprise Rent-A-Car, Alamo Car Rental and National Rent-A-Car. Across the state, we have (13) locations and rent **approximately 1,700 vehicles daily**. We employ one hundred and fifteen (115) employees and are by far the **largest rental car company** serving Vermont.

While the rental industry is typically thought of as an airport industry, the largest portion of our rental fleet is located outside of the major airports to service NON-Airport renters. The “off airport” segment of the business is referred to as the ‘Home City’ business. In the Home City marketplace, vehicles are rented to customers who live in the towns and cities of Vermont rather than Airport tourist or the corporate travelers. Approximately **seventy (70%) of our business is with local Vermonters. The remaining 30% of our business is dedicated to the wonderful tourist** that venture to Vermont for skiing and leaf peeping.

Enterprise was founded by Jack Taylor in 1957 and to this day remains a private company. I am pleased to report that we recently celebrated our 60th anniversary and in doing so – provided \$60 million in aid to address food hunger around the globe. Similarly, we recently completed the planting of the 12 millionth tree that was part of our 50th anniversary pledge to plant 50 million trees over 50 years.

But I am not here to talk about the beautiful Vermont foliage. I'm here to discuss the proposed legislation that **would negatively impact Vermont residents and our Vermont Enterprise locations, our employees, their families, and the communities that our business supports through charitable work.**

There are lots of reasons why Enterprise cares about this legislation.

But today I want to use this opportunity to speak on behalf of:

- The customers we serve.

- The Vermont businesses that you as legislators work so hard to keep in Vermont and
- All of the companies that you want to continue to relocate to our state.

My testimony will primarily deal with the strong public policy arguments against enactment.

As for the legal arguments, that are substantial, we have coordinated with Seamus Duffy from Drinker Biddle & Reath LLP to address those arguments and for me to take up less of your time. Enterprise supports his testimony.

Vermont's Businesses Both Small and Large Will Be Affected

As a threshold issue, this proposed legislation creates **uncertainty**, will **negatively impact** Vermont business both small and large, and **provide no real benefits** to Vermont's citizens. Countless businesses in Vermont rely on standard-form contracts as part of their daily operations. This is especially true for one of the industries in which Enterprise operates, namely **tourism. Resorts, hotels, ski rentals, bed and breakfasts, bike and boat rentals** – to name just a few – are all businesses that utilize standard-form contracts and all are likely to have provisions which would be considered substantively unconscionable under this proposed statute.

For example, Zoar Adventure Center which offers tons of outdoor activities in Vermont for locals and tourists like kayaking, rafting, and biking – uses contracts that will be rendered unenforceable by the proposed bill.¹ Mountaineer Inn at Stowe, a very popular inn here in Vermont, also uses a contract which violates the proposed bill. Finally, local ski resorts – a popular destination for locals and tourists, and a key economic contributor – violate this bill; two examples being Okemo Mountain Resort² and Sugarbush³.

Moreover, **Vermont's citizens** who utilize these services will likely **face higher costs and less certainty** in their transactions. This bill claims to serve the purpose of forbidding contract terms that make it harder on individuals, but it is really an outright attack on arbitration, a form of case resolution that been used for over 100 years. The truth is **Arbitration is more efficient, faster, and less costly for businesses and consumers alike** when compared to jury trials – which can often take years and be too expensive for

¹ They have a provision that waives any and all claims that may arise in connection with the contract. A provision that requires the consumer to pay all attorney's fees and costs. It also has a provision where all lawsuits must be filed in Franklin County, Massachusetts.

² Okemo has an express waiver of the right to sue for damages/injury/death that may result from common risks associated with skiing, and also make this waiver binding on their heirs should death occur. There is also an indemnity provision where the consumer must indemnify and hold harmless Okemo for any claims that may be brought on behalf of a minor.

³ On the "Conditions of Purchase" page for season passes – it states that a Release of Liability must be signed upon purchase of that season pass. Children under the age of 18 have that Release signed by a parent or legal guardian.

the average citizen. By potentially eliminating arbitration, the bill would make it harder for individuals to vindicate their legal rights, especially if he or she cannot afford the usually high cost of litigation.

For many consumers and employees with disputes against businesses, litigation in court is not a realistic option. They have little hope of navigating the legal system without a lawyer, yet they are unlikely to obtain legal representation when their claims are only modest in size. And even if they manage to get an attorney, litigation in court usually involves significant delays and high cost.

In arbitration, by contrast, it is easier for consumers and employees with small claims to obtain relief. Arbitration uses streamlined procedures, making it possible for plaintiffs to represent themselves without a lawyer. The informality of arbitration also makes it cheaper and easier for plaintiffs to prosecute their cases; disputes can be decided over the phone or through paper or e-mail submissions, eliminating the need for plaintiffs to miss work or personal commitments to attend lengthy in-person proceedings. In addition, the rules of evidence, which oftentimes work against plaintiffs, do not apply. Finally, the costs of discovery are far less given the more informal nature of arbitration.

Despite the many benefits that arbitration has for individuals, the proposed legislation places arbitration agreements at high risk because they usually contain terms that would be deemed unconscionable under this legislation. Accordingly, they may be negated altogether, injuring not only businesses, but Vermont's citizens who stand to benefit from arbitration.

In addition, I'd like to briefly mention that Vermonters are still able to assert their claims, they are just agreeing to do so in the less expensive, more stream-lined route of arbitration. Mr. Duffy will discuss this concept in greater detail by highlighting court decisions which found that by agreeing to arbitrate, **individuals are not giving up their substantive rights**, but are just submitting to the resolution of their dispute in a different forum.

Enterprise's Arbitration Clause is not Confusing and Unfair

Contrary to what many may think, the average consumer is not taken advantage of when he or she signs a contract that contains an arbitration provision. The United States Supreme Court actually **requires** that arbitration provisions in contracts are clear so that the ordinary consumer understands exactly what they are agreeing to. All arbitration provisions must explain that the individual is giving up the ability to go to court, the procedure that takes place in arbitration, and what happens once a decision is made. In other words, contracts have to explain the details of arbitration in a simple, clear way.

Our contract does just that. It clearly explains that all claims are required to go through this process and then continues to identify the procedure.

Interestingly, proponents of the bill argue that arbitration is actually **more** expensive to consumers/Vermonters, but our contract – like many others – explicitly provide that the consumer is to pay his or her portion of the arbitration fees **up to the amount that they would have had to pay if they brought their claims in a court of law. As such, they are not paying any more than they would have to otherwise.**

Vermont's Economy Will Suffer

The proposed legislation explicitly forbids contracts with a punitive damage waiver clause. While this may seem like a wise move to protect unfair business practices, **it actually can lead to injuring Vermonters.** Indeed, by disallowing punitive damage waivers in contracts, companies – like Enterprise – will be forced to increase the cost of doing business with local and transient consumers. This is because insurance will likely **not cover punitive damage verdicts from lawsuits** and so **business will have to cover the risk of those verdicts by hiking up the price for car rentals, for example.** The obvious consequence of this is that consumers will be less inclined to do business in Vermont.

A Punitive Damage waiver is not as harmful as one may think. Consumers are still able to receive compensation for **actual damages incurred** when they have a viable claim against a Vermont business. Further, there are other incentives for companies to act in a responsible manner – a company's brand is its most important asset and there is certainly a disincentive to engage in any conduct which negatively impacts its brand.

The Proposed Legislation Will Flood the Court System With Uninjured Plaintiffs and Create An Automatic Penalty on Companies

The most devastating aspect of the proposed legislation is the near automatic statutory penalties against businesses. Proposed Section 6055(d) provides that contracts which contain any of the provisions highlighted in proposed Section 6055(a) amount to “an unfair and deceptive practice in violation of § 2543”, the consequence of which is a \$1000 fine and the award of reasonable costs and attorneys fees. The practical effect of this clause is that it exposes companies, both big and small, to **extreme financial insecurity** because they can be hauled into court over terms that have been legal up to this point and faced with potentially large statutory violations.

Specifically, the **\$1,000 penalty per violation can have devastating consequences.** For example, if a contract is found to have three of the above unconscionable terms, then a defendant is subject to a \$3,000 fine per individual. In a class action scenario, that could mean a penalty in the hundreds of thousands (or maybe millions depending on the case). **That penalty alone could put a small business, and some large ones, out of business for simply providing a venue provision that required the case to be heard in a neighboring state.** Further, **the prevailing party will be entitled to reasonable costs and attorneys.** In other words, **the plaintiff will have his or her costs of litigation paid for, and receive an automatic sum of at least \$1,000 to pocket.**

More troubling is the fact that this hypothetical can occur **even when the plaintiff has not actually incurred any injury**. All that is required for a violation under the proposed legislation is that the contract contain, for example, a clause that restricts lawsuits to the statute's definition of an "**inconvenient venue**" -- the definition of which only looks to the position of the individual, and does not consider, even remotely, the convenience of the business. If passed, a plaintiff can bring a lawsuit against the business **even if nothing has actually gone wrong yet, in an attempt to get out of the binding contract or to extract a payment. In addition, that plaintiff can have his or her costs paid for.**⁴

Here plaintiffs could recover hundreds of thousands of dollars with no actual injury. Such type of legislation provides no real benefit to consumers and in actuality only benefits the organized plaintiff's bar.

Similar Litigation Has Led to a Flood Of Baseless Lawsuits and Vermont Does Not Want to Follow New Jersey's Example:

I want to briefly touch on an example that Mr. Duffy will more fully explain later. There is a statute in New Jersey, called the Truth-in-Consumer Contract, Warranty, and Notice Act (often referred to as "TCCWNA"), which has essentially the same effect in New Jersey as this proposed bill will have in Vermont. Essentially, and again Mr. Duffy can more specifically target the legal implications, it places **an automatic penalty, a fine**, on companies who have contracts/warranties/signs that violate a "clearly established legal right" of a consumer. So in other words, so long as a company has a contract with language that takes away a legal right – just like the proposed bill here for example, when contracts eliminate a consumer's right to assert certain claims – they are in violation of that statute and have to pay a penalty, **per violation**.

Enterprise also has substantial business in New Jersey, and has seen the devastating effect that law has on other businesses. Countless baseless lawsuits and claims relating to contract provisions have been filed under New Jersey's law where there was no actual injury. The result is that New Jersey companies **have to spend a substantial amount of money and time in litigation** to defend these lawsuits when no one has any real or personal injury yet.

Enterprise fears that the very same thing will happen with this law. For smaller businesses in this State with less financial resources, this could be the end of the line for them.

The Act Would Create Uncertainty in the Enforcement of Contracts

Finally, the Act would **create uncertainty** with respect to standard-form contracts, as any

⁴ It may be worth noting that, sometimes, it is actually more convenient when the arbitration is outside of Vermont. If a Vermonter, for example, lives on the border and the drive to another state is closer for him or her than somewhere within Vermont lines. Even if this is true, a plaintiff can sue the company and get \$1,000.

violation, no matter how small, would render the entire contract unenforceable. Specifically, proposed Section 6055(c) states that if a standard-form contract contains an illegal or unconscionable term, **courts may refuse to enforce the entire contract**. Such an extreme measure runs against basic contract principles that typically sever the unenforceable provisions from the rest of the agreement. To that end, it can have the effect of rendering otherwise valid agreements unenforceable, **injuring both parties**. **Such a result would create uncertainty for businesses and individuals alike**, and would call to question the validity of every contract Enterprise enters with costumers. Businesses like Enterprise would have uncertainty because their contracts could be stricken for mere technical violations that have no bearing on the underlying basis of the bargain.

On behalf of Enterprise, our employees, and especially our customers, I thank you for allowing me to share these perspectives.

Thank you.