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S.18

Introduced by Senators Pearson, Sears, Perchlik, and Sirotkin

Referred to Committee on Judiciary

Date: January 16, 2019

Subject: Court procedure; standard-form contracts

Statement of purpose of bill as introduced: This bill proposes to create a rebuttable presumption that certain contractual terms are substantively unconscionable when included in certain standard-form contracts.

An act relating to consumer justice enforcement

It is hereby enacted by the General Assembly of the State of Vermont:

~~Sec. 1. 9 V.S.A. chapter 152 is added to read:~~

~~CHAPTER 152. MODEL STATE CONSUMER JUSTICE ENFORCEMENT~~

~~ACT; STANDARD-FORM CONTRACTS~~

~~§ 6055. UNCONSCIONABLE TERMS IN STANDARD-FORM~~

~~CONTRACTS PROHIBITED~~

~~(a) Unconscionable terms. There is 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 (1) A requirement that resolution of legal claims takes place in an  
2 inconvenient venue. As used in this subdivision, “inconvenient venue” for  
3 State law claims means a place other than the state in which the individual  
4 resides or the contract was consummated, and for federal law claims means a  
5 place other than the federal judicial district where the individual resides or the  
6 contract was consummated.

7 (2) A waiver of the individual’s right to assert claims or seek remedies  
8 provided by State or federal statute.

9 (3) A waiver of the individual’s right to seek punitive damages as  
10 provided by law.

11 (4) Pursuant to 12 V.S.A. § 465, a provision that limits the time in  
12 which an action may be brought under the contract or that waives the statute of  
13 limitations.

14 (5) A requirement that the individual pay fees and costs to bring a legal  
15 claim substantially in excess of the fees and costs that this State’s courts  
16 require to bring such a State law claim or that federal courts require to bring  
17 such a federal law claim.

18 (b) Relation to common law and the Uniform Commercial Code. In  
19 determining whether the terms described in subsection (a) of this section are  
20 unenforceable, a court shall consider the principles that normally guide courts  
21 in this State in determining whether unconscionable terms are enforceable.

1 Additionally, the common law and Uniform Commercial Code shall guide  
2 courts in determining the enforceability of unfair terms not specifically  
3 identified in subsection (a) of this section.

4 (c) Severability. If a court finds that a standard-form contract contains an  
5 illegal or unconscionable term, the court shall:

6 (1) refuse to enforce the entire contract or the specific part, clause, or  
7 provision containing the illegal or unconscionable term; or

8 (2) so limit the application of the illegal or unconscionable term or the  
9 clause containing such term as to avoid any illegal or unconscionable result.

10 (d) Unfair and deceptive act and practice.

11 (1) It is an unfair and deceptive practice in violation of section 2453 of  
12 this title to include one of the presumptively unconscionable terms identified  
13 in subsection (a) of this section in a standard-form contract to which only one  
14 of the parties to the contract is an individual and that individual does not draft  
15 the contract. Notwithstanding any other provisions to the contrary, a party  
16 who prevails in a claim under this section shall be entitled to \$1,000.00 in  
17 statutory damages per violation and an award of reasonable costs and  
18 attorney's fees.

19 (2) Each term found to be unconscionable pursuant to subsection (a)  
20 shall constitute a separate violation of this section.

1 ~~(e) Limitation on applicability. This section shall not apply to contracts to~~  
2 ~~which one party is:~~

- 3 ~~(1) regulated by the Vermont Department of Financial Regulation; or~~  
4 ~~(2) a financial institution as defined by 8 V.S.A. § 11101(32).~~

5 ~~(f) Acceptance of inherent risks. Nothing in this chapter shall be construed~~  
6 ~~to limit the application of 12 V.S.A. § 1037 (acceptance of inherent risks).~~

7 Sec. 2. LEGISLATIVE INTENT

8 The General Assembly acknowledges that outdoor recreation is an  
9 important part of Vermont's economy and culture that encourages healthy  
10 communities and individuals, increases our connection to nature, enhances the  
11 Vermont lifestyle, and supports the attraction of high quality employers and a  
12 sustainable workforce in all economic sectors. It is not the intent of the  
13 General Assembly to change the way courts allocate responsibility for the  
14 inherent risks of any outdoor recreational activity or sport.

15 Sec. 3. EFFECTIVE DATE

16 ~~This act shall take effect on October 1, 2020.~~

*Sec. 1. 9 V.S.A. chapter 152 is added to read:*

*CHAPTER 152. MODEL STATE CONSUMER JUSTICE ENFORCEMENT*  
*ACT; STANDARD-FORM CONTRACTS*

*§ 6055. UNCONSCIONABLE TERMS IN STANDARD-FORM*  
*CONTRACTS PROHIBITED*

*(a) Unconscionable terms. There is 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 takes place in an inconvenient venue. As used in this subdivision, "inconvenient venue" for State law claims means a place other than the state in which the individual resides or the contract was consummated, and for federal law claims means a place other than the federal judicial district where the individual resides or the contract was consummated. Notwithstanding this subdivision, a standard-form contract may include a term requiring that resolution of legal claims takes place in a State or federal court in Vermont.

(2) A waiver of the individual's right to assert claims or seek remedies provided by State or federal statute.

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

(4) Pursuant to 12 V.S.A. § 465, a provision that limits the time in which an action may be brought under the contract or that waives the statute of limitations.

(5) A requirement that the individual pay fees and costs to bring a legal claim substantially in excess of the fees and costs that this State's courts require to bring such a State law claim or that federal courts require to bring such a federal law claim.

(b) Relation to common law and the Uniform Commercial Code. In determining whether the terms described in subsection (a) of this section are unenforceable, a court shall consider the principles that normally guide courts in this State in determining whether unconscionable terms are enforceable. Additionally, the common law and Uniform Commercial Code shall guide courts in determining the enforceability of unfair terms not specifically identified in subsection (a) of this section.

(c) Severability.

(1) If a court finds that a standard-form contract contains an illegal or unconscionable term, the court shall:

(A) refuse to enforce the entire contract or the specific part, clause, or provision containing the illegal or unconscionable term; or

(B) so limit the application of the illegal or unconscionable term or the clause containing such term as to avoid any illegal or unconscionable result.

(2) In performing its analysis under this subsection (c), the court shall consider the actual purposes of the contracting parties and whether severing the term would create an incentive for contract drafters to include similar illegal or unconscionable terms.

(d) Unfair and deceptive act and practice.

(1) In an underlying legal dispute between the drafting and nondrafting parties in which the drafting party seeks to enforce one or more terms identified in subsection (a) of this section, and upon a finding that such terms are actually unconscionable, the court may also find that the drafting party has thereby committed an unfair and deceptive practice in violation of section 2453 of this title and may order up to \$1,000.00 in statutory damages per violation and an award of reasonable costs and attorney's fees.

(2) Each term found to be unconscionable pursuant to subsection (a) of this section shall constitute a separate violation of this section.

(e) Limitation on applicability. This section shall not apply to the following contracts:

(1) A contract to which one party is:

(A) regulated by the Vermont Department of Financial Regulation;

or

(B) a financial institution as defined by 8 V.S.A. § 11101(32).

(2) A contract for the nondrafting party's enrollment or participation in a recreational activity, sport, or competition.

**Sec. 2. EFFECTIVE DATE**

This act shall take effect on October 1, 2020.