

**OUTLINE OF TESTIMONY REGARDING S.18**  
House Judiciary Committee/March 20, 2019  
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**1. AT&T's Presence in Vermont**

- a. Acquired Vermont assets (wireless network) of RCC Atlantic d/b/a Unicel in December 2008.
- b. Since then AT&T has invested well over \$100 million in its wireless network in Vermont, including 60+ new cell sites (on top of appx. 150 sites acquired from Unicel) and hundreds of upgrades to its cell sites.
- c. As of December 2017 AT&T has 24 retail locations in Vermont (company owned stores, authorized dealers, and national stores).
- d. As of December 2017 approximately 75 employees in Vermont.

**2. AT&T's Wireless Customer Agreement**

- a. The agreement begins with clear language in large, bolded font indicating that arbitration on an individual basis is to be used to resolve disputes, rather than jury trials and/or class actions, and that available remedies are limited by the contract.
- b. Dispute Resolution Specifics-- Sections 2.0, 2.1 and 2.2
  - All disputes with AT&T must be resolved by arbitration or in small claims court (in VT--claims up to \$5,000<sup>1</sup>).
  - Arbitration to be conducted according to the rules of the American Arbitration Association, which is a well-regarded non-profit organization founded in 1926.
  - Arbitration is to take place on an individual basis—class actions are not permitted.

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<sup>1</sup> 12 V.S.A. §5531.

- A consumer retains his or her right to seek redress through regulatory agencies such as the FCC, FTC and state attorneys general.
- For claims not exceeding \$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.
- The arbitration will take place in the **county** where the consumer's billing address is located.
- AT&T will pay for all costs of arbitration for non-frivolous claims that do not exceed \$75,000.
- 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 also reimburse the attorney for any expenses he or she paid, such as expert witness fees. This creates an incentive on the part of AT&T to deal fairly with a customer who has a dispute with the company.

*The dispute resolution process provided for in AT&T's Wireless Customer Agreement is fair and reasonable and provides for the resolution of disputes without expensive litigation.*

### **3. Presumptively Unconscionable Provisions in AT&T's Wireless Customer Agreement Under S.18.**

**Section 1.4**—*Billing* disputes must be raised within 100 days of the date of the relevant bill. May be voidable under 12 V.S.A. §465.<sup>2</sup>

In California: “A contractual period of limitation is reasonable if the plaintiff has a sufficient opportunity to investigate and file an action, the time is not so short as to work a practical abrogation of the right of action, and the action is not barred before the loss or damage can be ascertained.”

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<sup>2</sup> 12 V.S.A. § 465 provides as follows: “[e]xcept as otherwise provided by statute, any provision in a contract which limits the time in which an action may be brought under the contract or which waives the statute of limitations shall be null and void.”

*Ellis v. U.S. Security Associates*, (2014) 224 Cal.App.4th 1213, 1223 (2014).

**Section 4.1—Waiver of Punitive Damages.**

Under the bill the provisions in AT&T’s Customer Wireless Agreement limiting the time in which an individual can raise a billing dispute and precluding claims for punitive damages would be presumptively unconscionable.

**4. Vermont Law Already Adequately Addresses the Issue of Unconscionable Contract Provisions and S.18 is Therefore Unnecessary.**

- Under Vermont law the terms of a contract can be avoided as unconscionable if the terms are procedurally or substantively unfair.
- A contract term can and will be deemed unconscionable and thus unenforceable if it results from unequal bargaining power coupled with lack of meaningful choice, and the contract term at issue is unreasonably favorable to the party with the superior bargaining power.

*Bergman v. Spruce Peak Realty, LLC*, 847 F.2d 653, 666 (D. Vt. 2012).

*See also Glassford v. BrickKicker*, 191 Vt. 1, 2011 VT 118, 35 A.3d 1044 (2011); *Maglini v. Tschannerl*, 174 Vt. 39, 800 A.2d 486 (2002); *Val Preda Leasing, Inc. v. Rodriguez*, 149 Vt. 129, 135, 540 A.2d 648, 652 (1987).

**5. Because Vermont Law Already Adequately Addresses the Issue of Unconscionable Contract Provisions if Enacted S.18 Will Create Confusion and Possible Unintended Consequences.**

If S.18 is enacted the courts will undoubtedly conclude that the legislature intended to make a change in the law concerning the issue of unconscionable contract provisions. This could lead to confusion, unnecessary litigation and possible unintended consequences.

**6. There is no Record of Vermonters Being Contractually Barred from Obtaining Justice.**

With respect to both S.18 and S.105 from the 2017-2018 biennium there has been no testimony by a Vermont attorney or other Vermonter concerning a

situation where a Vermonter was contractually barred from obtaining justice. There is simply no record that supports the need for the bill.

**7. Exemptions of Local Businesses from S.18 may be Unconstitutional Under the “Dormant” Commerce Clause of the U.S. constitution.**

Under the “dormant” Commerce Clause doctrine states are prohibited from discriminating against interstate commerce unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.

*Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992).