

Outline of Testimony of Tom Buchanan
Re: S.18, “An Act Related to Consumer Justice”
April 23, 2019

Attachments:

- 1) Buchanan Public Comment Letter to the House Judiciary Committee, March 5, 2019
- 2) Resort Activity, Ski School & Equipment Rental Waiver, Vail Resorts, 2 pages
- 3) Voluntary Employee Activities Waiver, Vail Resorts, 1 page
- 4) Employee & Dependent Pass Application (2018-2019), Vail Resorts, 3 pages
- 5) Scan of the back of a 2018-2019 season pass, Vail Resorts, 1 page
- 6) Uninsured United Parachute Technologies (UPT) Tandem Waiver, 2 pages

Witness Background:

I am here today as an unaffiliated private citizen testifying about S.18 based on my experience as a skydiving instructor (1983-2011), and as a ski and snowboard instructor at Stratton Mountain Resort (2002-2009) and Okemo Mountain Resort (2009-2019). I also have extensive experience as a participant in other sports and recreational activities, many of which require standard form contract waivers (for specific experiences please see Buchanan letter dated March 5, 2019, listed above as attachment 1). I am not a lawyer.

I first became aware of S.18 through a news story after it was amended on the floor of the Senate with a “strike all” on February 28, 2019, just prior to its third reading.

I filed a public comment letter with House Judiciary on March 5, 2019 including examples of three contracts used in the ski industry (listed above as attachments 2-4), and offered to testify regarding contracts in the sports/recreation industry. That letter has been listed in the “public comments” section of the House Judiciary website since about March 20, 2019.

I attended a House Judiciary hearing regarding S.18 on April 10, 2019 at which sports/recreation industry testimony was offered by Molly Mahar of the Vermont Ski Areas Association (Ski Vermont) and Brett Smith of FUSE Marketing. Intriguing and relevant testimony was also provided by Charles Storrow on behalf of AT&T, who spoke of potential unintended consequences of S.18 and how courts have interpreted standard form contract terms. That evening I emailed Committee Chair Maxine Grad and requested to testify regarding the material in my March 5, 2019 letter, and the testimony I heard earlier that day.

Overview:

S.18 is mostly a good bill that makes clear to courts that specific unconscionable contract terms should be prohibited (allowing for rebuttable presumption). S.18 then establishes mild penalties when these terms are applied (rejecting the entire contract, allowing for small statutory damage claims), which can provide a disincentive for their use in standard form contracts. Distressingly, and of greatest concern to me, S.18 completely exempts “enrollment or participation in a recreational activity, sport, or competition.”

Exempting the sports and recreation industry establishes a troubling dichotomy instructing judges that specific contract terms should be held unconscionable in most contracts, but exactly the same contract terms should be permitted in the sports and recreation industry. I believe this exemption dramatically weakens consumer protections below the status quo.

The sports and recreation industry is broad, covering an unknowable range of activities, many of which use standard form contract waivers, sometimes with unique terms that probably have not been fully anticipated by the legislature.

Sports and recreation industry operators can reduce their liability for injury by reducing hazards and thus making the activity safer; convincing participants that they do not have any state law recovery rights and thus eliminate otherwise credible claims; or by vigorously defending claims in court.

Much of the discussion about S.18 has focused on standard form consumer contracts such as those for car sales, telephone service, and general business contracts where the potential harm is financial. The recreation and sports industry is different in that potential harms include serious injury and death, and a strong safety culture requires service providers to embrace responsibility for accident prevention. Assuring clear liability on the part of the provider of services, equipment, and facilities encourages the provider to take responsibility for safety, and reduces the likelihood that participants will be exposed to unnecessary risk.

Employees within the sports and recreation industry are sometimes compelled to agree to unconscionable terms as part of employment agreements, employee manuals, and standard form contracts, including terms that release employers from some Workers Compensation obligations.

Inherent Risk:

Most recreational sports involve inherent risks, defined by legislation as “obvious and necessary” (12 V.S.A. § 1037). There are often additional unnecessary risks under the direct control of the operator and not known or avoidable by the participant.

Many operators of ski resorts and other sports and recreational activities lump activities that are under their control and not obvious to the participant or necessary into a category of “inherent risk,” and require participants to fully waive their right to recovery. Operators will often add additional language waiving risks that are clearly not inherent, including negligence on the part of the provider (see UPT waiver, paragraph 1; Vail Resort Activity Ski School & Equipment Rental Waiver, paragraph 3 and 6; Vail Season Pass).

In the event of injury, death, or property damage, a court should be able to determine if a risk is inherent or if it is under the control of the operator. A participant should not be compelled to waive traditional state law recovery rights for those risks that are exclusively under operator control.

Examples:

- a) A ski area lift attendant is using a snowmobile to travel between two base areas that are also served by ground transportation. The attendant is dressed in black and driving a black snowmobile in the middle of a trail under foggy conditions without using a headlight or warning flag.
- b) A ski patroller is responding to a medical emergency. The patroller is wearing a red jacket and driving a bright yellow snowmobile on the side of a trail using a flashing headlight and an orange warning flag positioned on a tall staff above the snowmobile.

S.18 would all but prohibit the waiver of state law rights that allow recovery from many of the listed non-inherent risks. Yet the exemption granted sports and recreation would instruct courts to treat these rights differently for standard form contract waivers in the sports and recreation industry and allow for outright waiver of all risks, whether inherent or not.

The commingling of inherent and non-inherent risks in standard form contract waivers effectively confuses participants into believing they have no ability to file for damages, even if the cause is not obvious and necessary and is completely under the control of the operator. This discourages injured participants from filing otherwise reasonable claims and discourages operators from maximizing operational safety under their control.

Granting sports and recreation operators the exemption in S.18 can discourage them from maintaining safe operations (see Vermont Supreme court ruling in *Dalury v. S-K-I, Ltd* as discussed in Buchanan letter of March 5, 2019, page 3 “Policy Rational”).

Workers Compensation:

Workers Compensation is a statutory right and is generally not waivable through contract or agreement.

S.18 makes it clear that a contract term allowing “a waiver of the individual’s right to assert claims or remedies provided by State or federal statute” should be treated as unconscionable and disallowed (rebuttable presumption), but then fully exempts the sports and recreation industry.

There is a danger that courts could read the most recent intent of the legislature as establishing a dichotomy in which statutory rights cannot be waived in general, but can be waived by contract within the sports and recreation industry.

Most Vermont ski resorts that I am familiar with only pay instructors when they are teaching a lesson and not during time between lessons. The time between lessons often includes free skiing to check variable trail and snow conditions, practice skills, prepare for certification exams, or prepare for specific lessons, always benefiting the employer in some way. This so-called “free time” may also be used to take employer sponsored training clinics or perform other tasks that enhance teaching and skiing ability or serve customers/guests. Under the Workers Compensation spilt-standard established by 21 V.S.A. § 618 following the decision in *Grather v. Gables Inn*, on-premises time between lessons is almost certainly covered by Workers Compensation. Nevertheless, Vermont ski resorts routinely provide instructors with guidance that they are only covered by Workers Compensation when teaching a lesson or otherwise directed to perform a

paid task. Most resorts that I am familiar with have listed this position in dense employee handbooks and have briefed this topic at staff training sessions for many years. That position was recently added to some standard form contracts that employees are required to sign.

Example:

*“I, the undersigned, am participating in voluntary activities that may be related to my employment, which may include ski or snowboard training clinics, employee fitness classes, ski and snowboard testing, or other voluntary recreational activities (collectively the “Activity”) and understand that the Activity **CAN BE HAZARDOUS AND PRESENTS A RISK OF PHYSICAL INJURY OR DEATH.**”*

*“I acknowledge that this agreement applies to all voluntary Activities and that I, as an employee, **AM NOT COVERED BY WORKERS’ COMPENSATION BENEFITS** while participating in voluntary activity, regardless of whether I am utilizing an employee ski pass or wearing a uniform or whether the Activity is sponsored by my employer. I agree to check with my manager if I am unsure whether an Activity is voluntary or not. I understand that participating in the Activity is not part of my employment and that **ANY INJURY I SUSTAIN WHILE TAKING PART IN THE VOLUNTARY ACTIVITY WILL NOT BE COVERED BY WORKERS’ COMPENSATION BENEFITS.**” (Vail Resorts Voluntary Employee Activities Waiver paragraph 2 and 3, emphasis in the original; see also Vail Employee & Dependent Pass Application, page 1, paragraph 4; see also Buchanan letter, March 5, 2019, page 4, “Workers Compensation”)*

Under S.18 standard form contract language such as the above would be prohibited (subject to rebuttable presumption), the entire contract could be dismissed by a court regardless of severability clauses, and the drafting party could be subject to statutory damages. But the exemption at the end of S.18 would exclude sports and recreation, and give a reviewing court the impression that the legislature intends to treat such language differently within the sports and recreation industry. A reviewing court could believe the intent of the legislature is to establish two separate standards for waiving statutory provisions in which such waivers are generally disallowed, but permitted within sports and recreation.

At the very least, the exemption in S.18 creates a substantial new gray area in Workers Compensation applicability and upsets decades of established case law. The exemption encourages employers to include such deceptive language by excluding provisions within S.18 that permit a court to disallow an entire contract or impose statutory damages for unfair and deceptive acts and practices. Further, allowing this contract language adds confusion to the workplace and encourages employees to believe they can waive access to Workers Compensation, when that is almost certainly not the intent of the legislature.

The Exemption for Recreational Activity & Sports is Overbroad and Undefinable;

The exemption for the outdoor recreation industry appears to be driven by a desire to protect the Vermont ski industry, but is so broadly defined that it covers many other activities that the legislature probably has not yet identified. Some of these activities are uniquely risky, with dangers under the operator's control and unknown to the participants, and unexamined by the legislature.

Examples:

Horseback riding, SCUBA diving, skydiving, bungee jumping, rock climbing, zip lining, circus arts, organized camping trips, archery, shooting sports, race car driving, go cart driving, mountain biking, golf clubs, tennis clubs, swimming pools, children's summer and sports camps, gyms and fitness centers, and many others.

It is impossible for an inexperienced participant in these varied activities to know or understand the risks involved, or to offer informed consent when signing a standard form contract waiver. This is especially true of beginners and recreational participants, or laypeople who have been drawn to participate by marketing that describes the activity as unrealistically safe, or exclusively pleasurable and without consequence.

Unintended Consequences:

It is impossible to imagine all the potential sports and recreational activities that are exempted under S.18, and the various contract terms that would be otherwise be considered unconscionable, or how Vermont consumers might be affected.

As a specific example, S.18 prohibits a requirement that resolution of legal claims take place in an inconvenient venue, defined as "a place other than the state in which the individual resides or the contract was consummated."

In the skydiving industry most beginners make their first jump using a tandem parachute rig with the student and instructor strapped together. One of the most popular tandem parachute rigs is manufactured by Uninsured United Parachute Technologies (UPT). UPT requires every operator of its parachute system to use a standard form contract waiver that exempts and releases UPT as well as the owner of the rig, the instructor attached to the student, the parachute business, the landowner, and others (see UPT Tandem Waiver, paragraph 2(A through I) regardless of the cause or location of an accident, and requires that all litigation be brought in Volusia County, Florida (paragraph 7). If a dropzone business such as Vermont Skydiving Adventures in Addison, VT, uses a UPT tandem rig, it is also required to use the UPT standard form contract/waiver for every single tandem jump conducted in Vermont.

The UPT contract waiver also includes language that prohibits the participant (or their heirs) from assisting in the prosecution of any claim for damages (paragraph 3). This is designed to make it difficult for third parties such as medical insurance companies, hospitals, doctors, or Vermont Medicaid to effectively recover treatment costs associated with an accident. UPT also includes language that indemnifies all listed parties (UPT, rig owner, instructor, dropzone

business, landowners, etc) from all costs associated with “any and all losses, claims, actions or proceedings of every kind and character” (paragraph 4). This paragraph is designed to give participants a belief that UPT can recover all costs associated with a failed legal defense, and any judgement that might be entered.

It is unlikely that the legislature has fully considered the scope of standard form contracts such as the contract presented by UPT, and conditions that might be exempted under S.18, or how Vermont consumers might be affected by these exemptions.

Here, too, it is worth noting that the dichotomy created by S.18 establishes that contract terms such as designation of an inconvenient venue should be considered unconscionable as a general matter, but the intent of the legislature is to waive that standard and allow these terms within the entire recreational activity, sports, and competition industry.

Recommendations:

- The basic premise of S.18 is plain: unconscionable contract terms are unconscionable and should be prohibited. Period. This is a simple concept that protects Vermonters regardless of which industry is presenting a contract. I urge you to review that basic premise often and to view every part of S.18 within that framework.
- The exemption granted for enrollment or participation in a recreational activity, sport, or competition is overly broad and contrary to the interests of Vermont consumers. This exemption should be struck.
- Recreational participants and employees in the sport and recreation industry should be fully protected from unconscionable contract terms and threats to Workers Compensation coverage, just as consumers and employees in other businesses are protected.
- A narrowly tailored exemption that allows for otherwise unconscionable contract terms for participation in “*athletic competition*” would serve state interests by protecting the economic benefits of competitive athletic events such as the Women’s World Cup race at Killington, the Vermont Open Snowboard and Music Festival at Stratton, and many other competitions that provide economic benefit to local communities and the State of Vermont. These competitions involve a limited number of experienced participants who are capable of offering informed consent. An athletic competition exemption would not affect employment because Vermont Workers Compensation is already denied to “an individual engaged in amateur sports even if an employer contributes to the support of such sports” (21 V.S.A. § 601(14)(B)).
- S.18 is not ready for adoption by the House. This is a generally good bill that could protect Vermonters, but many questions remain regarding the breadth of the recreation/sports exemption. The core of S.18 improves upon the status quo, but the recreational activity and sports exemption inflicts more harm on Vermont consumers than is mitigated.