

Testimony of Brett Smith regarding S. 18. 3/20/19

The Honorable Maxine Grad
Chair of the House Judiciary Committee

To the Chair and Members of the House Judiciary Committee,

I'm Brett Smith, a partner at the marketing agency Fuse. Fuse was founded in 1995 and we have a staff of 35 in our offices in Winooski. We provide marketing services for national consumer brands in areas that include marketing strategy, event marketing and promotion.

My partners and I have worked hard to grow our business and provide good jobs in our community. We are proud that Fuse has been recognized as one of the Best Places to Work in Vermont by Vermont Business Magazine for the past nine years. On a personal level, I have been active in our community in Vermont, including having spent 6 years as a board member of the United Way.

As a community member and owner of an agency that helps other businesses market and sell to consumers, I appreciate and believe in consumer protections. That said, I am very concerned that S. 18 creates wide range of unintended consequences that would have a negative impact on my company and other Vermont business of all sizes. I appreciate the opportunity to share my feedback.

1. The term standard form contract is defined very broadly.

It seems that this law would apply to any contract produced by a business or its lawyers and provided to an individual. Most businesses create contracts based on the foundation or components of other contracts, so it's not clear if there's any way a business could produce a contract with an individual that would not apply. What if a form contract is provided to an individual who is given the opportunity to provide feedback and negotiate the terms? Is that still applicable?

2. The bill's intent, as I understand it, is to protect individuals who are *buying* goods & services, but it also applies when a business is contracting with individuals who are *selling* goods & services to businesses – with significant consequences.

Thus, the bill includes a very wide range of business contracts between an organization and an individual provider of services or goods (rather than an individual consumer), including:

- Service agreements between a company and an individual consultant, contractor or freelancer across a spectrum of fields
- Releases for image rights or liability for models in a photo shoot
- Sponsorship or promotional agreements between a company and an individual athletes or celebrity
- Employment agreements or NDAs between a company and an individual employee

If I have understood the bill correctly, this would have unintended consequences for a bill designed to protect consumers:

First, consider a Vermont company contracting with an out-of-state individual who provides services or goods.

- The Vermont company wouldn't be able to use standard clauses in its contract with the out of state freelancers related to indemnification or limitation of liability such as having the contractor agree

not to seek damages for their own injury when providing services, because that could limit the contractor's rights under state or federal law.

- It also appears that Vermont companies could not have a clause requiring arbitration since that would limit the freelancer's rights
- These are just some of the implications – I believe there are many more.

Thus, the bill will result in forcing Vermont businesses to greatly weaken contracts with individual service providers, raising the risk and the legal costs for Vermont companies who are otherwise operating lawfully and appropriately when working with individual contractors. The bill puts Vermont companies at a disadvantage compared to out of state competitors.

Second, consider the scenario where a Vermont individual 'freelancer' provides services to an out-of-state company. This bill could prevent the out-of-state company from using standard contract with terms like an out-of-state choice of venue clause or a limitations of liability in its contract with a Vermont individual service provider. As a result, many or most out of state companies' contracts with Vermont freelancers, that they use as a standard practice with contractors everywhere in the US, would clash with this terms of this bill. I believe this could become a warning flag for out of state companies – sending the message that if you want to sub-contract with individual freelancers or consultants, avoid Vermont. This has similar implications for out of state employers with Vermont employees. The bill's provisions could dis-incentivize them from having employees in Vermont, which this seems to conflict with the efforts Vermont is making to court remote workers.

Beyond these areas, I suspect there are other circumstances in which this bill would have unintended consequences related to working with individual providers of goods or services.

3. Even after revision, the bill's impact on liability release agreements still poses significant risk to Vermont for-profit businesses and non-profit organizations that rely on them to operate.

The bill's recent revision to carve out "A contract for the non-drafting party's enrollment or participation in a recreational activity, sport, or competition" will protect businesses with activities that fall squarely within the three areas of the 'carve out.' However, there are several activities undertaken by Vermont businesses and non-profits that deserve equal protection. These activities either fall outside of this 'carve out', or raise potentially costly questions of applicability. Some examples include a release for participation in the following activities that are or may not be considered a recreational activity, sport, or competition:

- Use of tools loaned by a non-profit like a library or a 'maker space'
- An educational activity such as a field trip
- Hosting a party at a venue like the YMCA
- Participating in a photo shoot
- A team building activity conducted by a business
- A game at a fair or used during a promotional event
- Working out at a gym for health reasons or physical therapy rather than sport or recreation

Each of these activities either clearly does not involve a recreational activity, sport, or competition; or else an attorney may make the case that in certain circumstances the activity is not a recreational activity, sport, or competition.

And this is an incomplete list of possible activities ... I'm sure there are more. Each deserves the same protection as the sports and outdoor recreation industry deserves. The unintended impact of this bill related

to liability releases is really far reaching ... For the activities that fall outside of “recreational activity, sport, or competition” I suspect they would see insurance rates increase or lose the ability to insure and then conduct the activities.

Finally, I am concerned that even Vermont organizations with activities that seem to squarely be protected by the carve out may end up with more legal challenges. For example, if an ice skater who signed a sports participation release was injured while walking onto the skating rink, will the carve out protect the sports activity operator? It’s not clear and the outcome could be more lengthy, drawn out and costly litigation for the outdoor and recreation industries of Vermont.

4. Given all this, the fact that the bill provides the authority to throw out the entire contract based on one clause is concerning.

Given all the potential unintended consequences of this bill, its ability to void an entire contract seems unreasonable and could have significant consequences— ranging from increasing costs and risks for Vermont businesses to preventing operations of certain activities of Vermont businesses and non-profits.

5. Many Websites’ Terms of Use are in conflict with this bill’s language.

Many or most websites have terms of use (arguably standard form contracts between a company and individual) that could conflict with this bill due to venue or indemnity provisions. This would impact businesses in every industry, non-profits and both regulated and non-regulated companies.

6. The exclusion of financial institutions seems unfair, particularly given the broad set of unintended consequences these groups would not have exposure to, while all others would.

Why are lenders, brokers and insurance companies exempted when these are the kind of companies that make heavy use of form contracts with consumers that include choice of forum and waiver clauses that appear would otherwise apply? Why would these groups be able to contract with individual service providers without concern while others can’t? And why would they be able to have website terms of use that for other businesses, would conflict with the bill?

7. Existing law already has remedies for Unconscionable contract terms.

I’m not a lawyer but my understanding is that our system already has reasonable mechanisms to handle unconscionable legal terms in contracts between a business and consumers. Therefore, this bill seems to open up a very large set of unintended consequences while attempting to solve a problem that already has a working solution in our state.

My conclusion is that this bill, while well-meaning in its intent to protect consumers, is fraught with unintended negative consequences that will put many Vermont businesses at risk while making Vermont a more difficult place to competitively operate in for a company of any size.

Thank you.

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