

OUTLINE OF TESTIMONY - S. 18  
House Judiciary Committee  
April 23, 2019  
Mark Heyman, Esq., General Counsel

**Introduction**

- We appreciate the time this Committee has spent on S. 18 and the opportunity to focus on a few specific areas as the discussion and debate on this bill has moved forward.
- We remain extremely concerned regarding the impact and consequences of this bill. My job is to identify both current and future risks to the business and take actions to mitigate those risks. In my opinion, S. 18 in its current form represents an existential threat to the viability of our business or our business model so long as we remain the Vermont-based company we have always been and always wanted to be since our founding. One may disagree with my assessment, but analyzing all factors involved and making those decisions or recommendations is the essence of a large part of my job. Logic Supply and many other businesses, whether in the tech sector or not, cannot afford to simply wait to see what happens which is why we and others have been so involved in the discussion.
- We have stated our concerns to this Committee and the Senate Judiciary Committee and do not want to repeat ourselves today. Rather, we wanted to limit our feedback to a few areas and some of the questions that have come up since we've testified.

**Why do we need this language?**

- Contracts, including standard form contracts do serve a valuable purpose. Contracts are drafted in order to ensure agreement on the legal and enforceable rights, responsibilities, obligations and remedies of two or more parties. Most parties to a contract go about their respective business and even when disputes arise, there are policies, procedures and other steps followed which generally address whatever situation has come up.
- While we may not need to even turn to the contract in 99% of the cases, we and our customers are well served by them in that the contract represents the sum total of our mutual expectations with respect to the products we sell and the policies, procedures, etc. to support and service our customers. The contract really comes into play for the 1% of situations where things may not go as planned. While "1%" seems small, the potential risks and liabilities involved multiplied by thousands of computers sold and thousands or

millions of dollars of risk and the consequences can be so extreme as to threaten the economic viability of any business.

- To do what we do, we do use our standard form contract to limit the risks & liabilities of the business, along with providing a comprehensive warranty and technical support to ensure our customers get the value they bargained for when making a purchase. We do so in a manner consistent with current law, both in statute and according to common law standards and for the benefit of our individual and business customers alike, our employees and our business partners.

### **Subsection (a)(2) & The Presumption Problem**

- Our primary concern is with the proposed Section 6055(a), which provides for 5 types of clauses which, if present in a standard form contract are presumed to be unconscionable. We object in principle to the use of this presumption because it presumes guilt and could, as a practical matter, force small and mid-sized VT companies to choose between expending resources they don't have to rebut the presumption at trial or expending fewer resources they don't have to eliminate the threat of litigation.
- Of greatest concern is subsection (a)(2) which states any "waiver of the individual's right to assert claims or seek remedies provided by State or Federal Statute" is presumed to be unconscionable. This language is far too broad in scope and so vague that its specific meaning is lost on us and we fear it may be interpreted and used in ways unintended by the bill's proponents.
- There was some testimony as to the intended meaning of (a)(2), including:
  - The language is specifically intended to preserve an individual consumer's right to a trial by jury, or other such substantive rights as an individual litigant or consumer might have.
  - The language seeks to prohibit any waiver of any statutory protections to minimum wage, OSHA or health and safety statutes, FMLA, Title VII/VT-FEPA, unemployment compensation or the like.
- If the subsection is intended to state such clear and specific rights to be protected, it follows we should change (a)(2) and list those specific statutory claims and remedies meant to be included. Otherwise, we must look to the plain meaning of the language as proposed. In our opinion, the language is so overly broad and ambiguous, it should be deleted. If (a)(2) remains, the language leaves a wide opening for frivolous claims, nuisance settlements, or worse, significant demands and threatened legal action which could cripple most small to mid-size VT businesses.

### **Unintended Consequences of (a)(2)**

- The Uniform Commercial Code is a Vermont statute (See [9A VSA §§ 101 et seq.](#)) and governs contracts for the purchase and sale of goods. Logic Supply's terms and conditions of sale are governed by and comply with the UCC.
- The UCC (See [9A V.S.A. §§ 2-713 - 2-716](#)) sets forth specific claims and remedies which may be pursued by an individual, including a right to seek actual, incidental and consequential damages against a seller for breach of contract. Our terms and conditions of sale contain a Limitation of Liability; Waiver of Consequential Damages clause. The clear language of subsection (a)(2) would render Logic Supply's Limitation of Liability clause as presumptively unconscionable, as it limits or "waives" an individual's right to claims and remedies under Vermont state statute.
- We fear such language would provide an incentive for unscrupulous claimants to threaten litigation or to make frivolous claims based simply on the fact our terms and conditions of sale would be presumed unconscionable in the hopes of obtaining a quick settlement. Given both direct and indirect costs of even the prospect of litigation, including the time and drain on resources, our employees, etc. Logic Supply, or our insurance company, will most likely pay some settlement amount even if we were confident we would prevail once we were able to rebut the presumption through litigation.
- We have faced such claims and threats from Patent Trolls and fear S.18 will create a new type of troll or frivolous litigant, using the procedural and practical leverage the statutory presumption provides. Should S.18 become law, Logic Supply and many other e-commerce and other businesses will find it becomes increasingly difficult to start, grow or even maintain a business in VT given the potential for increased litigation, liability, insurance costs and the like.

### **Why Not Simply "Not Enforce" the provision?**

Our assessment of S. 18 is based on our conclusion the possible negative impact on VT's small and mid-sized businesses will far outweigh any benefits sought by the Bill's proponents for consumers. Several members of the Committee have asked why businesses can't choose to "not enforce" any concerning provisions and thereby resolve our fears of litigation, etc. Simply stated: There's really no opportunity to simply "not enforce" a provision. If these fears could be so easily addressed, it's doubtful so many industries and businesses would be seeking the exemptions from the law granted thus far.

It is only once a complaint or demand is made, that a company has an option to “enforce the contract” or not, but that’s really not a free choice Logic Supply or most businesses can make. For example, if our normal warranty, repair, support, refund options are not enough to resolve a situation to a customer’s satisfaction, and an individual simply demands more than what our contract promises, to simply “not enforce” the provision would be to an extent would be the same as taking out our checkbook.

From a practical point of view, this is not how customers and businesses interact on a daily basis. From a financial perspective no business can accept such unreasonable and unlimited liability from even a small percentage of customers. No business can face such a prospect.

### Solutions

- Narrow overall scope of the bill to standard form contracts for the Sale of Goods, Services & Leases/Real Estate. Addresses many of the peripheral concerns while keeping the stated intent of the bill’s proponents front and center.
- Eliminate (a)(2) or redraft to reference specific statutory rights intended by the proponents of the bill.
- If the burden shifting presumption framework is to stay in the bill, we urge the Committee to consider changes which may mitigate the impact on VT businesses who are presumed guilty and forced to go to a trial to prove our innocence. One way this might be accomplished is to limit the presumption to cases brought or started in Small Claims Court. SCC is a forum designed for an individual, but allows for lawyers, process, etc. and doesn’t pose the same practical burdens on small to mid-size Vermont businesses as a demand or threat of litigation in State Superior or Federal District Court.