



STATE OF VERMONT
OFFICE OF LEGISLATIVE COUNCIL

MEMORANDUM

To: Sen. Richard Sears, Chair, Senate Committee on Judiciary
From: Michele Childs, Legislative Counsel
Date: June 2, 2020
Subject: Tyler Technologies' Odyssey File and Serve Usage Agreement

You asked me to review the user agreement that Vermont attorneys must sign in order to use the new e-filing system adopted by the Vermont Judiciary to determine if it is in compliance with Act 74 of 2019, *An act relating to consumer justice enforcement*. After reviewing both documents, I believe the user agreement contains presumptively unconscionable contract terms as identified in Act 74, and the contract could be considered unenforceable once the act takes effect on October 1, 2020.

Act 74 restricts the use of unconscionable terms in standard form contracts. Based on the Model State Consumer and Employee Justice Enforcement Act, a model statute developed by the National Consumer Law Center, the act establishes a rebuttable presumption that certain types of contractual terms are on their face unconscionable in standard form contracts to which only one of the parties to the contract is an individual, and that individual does not draft or have a meaningful opportunity to negotiate the contract. The presumptively unconscionable terms are as follows: (1) a requirement that legal claims take place in an inconvenient venue, (2) a waiver of the right to a jury trial or to bring a class action, (3) a waiver of the right to seek punitive damages, (4) a requirement that limits the time in which an individual can bring an action to less than the time allowed by the statute of limitations, and (5) a requirement that the individual pay fees and costs to bring a claim substantially higher than what the courts would require.

Currently, pursuant to the 2020 Vermont Rules for Electronic Filing, attorneys are required to e-file wherever the Odyssey e-filing program has been implemented (currently in Windham, Windsor, and Orange counties). To use the system, attorneys must accept the terms of the user agreement as written by Tyler Technologies and have no "meaningful opportunity to negotiate the contract."

There are at least three instances where the user agreement appears to contain unconscionable terms:

- The user agreement requires that “[a]ny controversy or claim arising out of or relating to this Agreement, which is not settled by reasonable negotiations between the parties, will be settled by arbitration that will be binding on all parties” (Sec. 10 of user agreement). **This provision requires a waiver of the right to a jury trial or to bring a class action.**
- The user agreement requires that the arbitrator be a person from Plano, Texas, and that the arbitration hearing be held in Plano, Texas (Sec. 10 of user agreement). Tyler Technologies is headquartered in Plano, Texas. For purposes of Act 74, “inconvenient venue” means “a place other than the state in which the individual resides or the contract was consummated...” (9 V.S.A. § 6055(a)(1)). **These provisions require that resolution of legal claims takes place in an inconvenient venue.**
- The user agreement states that Tyler Technologies will not be liable for any “indirect, consequential, special or exemplary damages” and that “the arbitrator will not be empowered to award punitive damages to either party.” Additionally, the user agreement limits the company’s liability under any action to the total amount paid to the company by the user in the previous three months (Secs. 9.2, 9.3, and 10 of user agreement). **These provisions require a waiver of the right to seek punitive damages.**

In determining whether the terms identified above are unenforceable, a court would consider the principles that normally guide the Vermont courts in determining whether unconscionable terms are enforceable. In determining the enforceability of unfair terms not specifically stated in Act 74, the court would look to common law and the Uniform Commercial Code (9 V.S.A. § 6055(b)).

If Tyler Technologies sought to enforce one of the terms identified above in a legal dispute with an e-filing system user and the court found the terms unconscionable, the court may determine that Tyler Technologies committed an unfair and deceptive practice in commerce and order up to \$1,000.00 in statutory damages per violation and award reasonable costs and attorney’s fees to the user (9 V.S.A. § 6055(d)).

Please let me know if I can provide any additional information or clarification as you continue to work on this issue.