

**BEFORE THE
VERMONT GENERAL ASSEMBLY
SENATE COMMITTEE ON JUDICIARY**

S.18 “MODEL STATE CONSUMER JUSTICE ENFORCEMENT ACT”

**Statement of Dean Thompson,
on behalf of Enterprise Holdings**

February 1, 2019

INTRODUCTION

Thank you, Chairman Sears, Vice Chairwoman Nitka, and members of the Committee, for allowing me the opportunity to speak to you today about the adverse impacts that S.18 would have on the citizens of Vermont and the businesses that serve to drive this wonderful State's economy.

Let me begin by saying, Enterprise does not take lightly the decision to oppose this legislation.

My name is Dean Thompson and I am Vice President of Finance for Enterprise Rent-A-Car. I have been with Enterprise Holdings for 25 years.

In Vermont, Enterprise Holdings operates under three rental car brands – Enterprise Rent-A-Car, Alamo Car Rental and National Rent-A-Car. Across the state, we have (13) locations and rent **approximately 1,800 vehicles daily**. We employ one hundred and ten(110) employees and are by far the **largest rental car company** serving Vermont.

While the rental industry is typically thought of as an airport industry, the largest portion of our rental fleet is located outside of the major airports to service NON-Airport renters. The “off airport” segment of the business is referred to as the ‘Home City’ business. In the Home City marketplace, vehicles are rented to customers who live in the towns and cities of Vermont rather than Airport tourist or the corporate travelers. Approximately **seventy (70%) of our business is with local Vermonters. The remaining 30% of our business is dedicated to the wonderful tourists** that venture to Vermont for skiing, leaf peeping, leisure and other activities.

Enterprise was founded by Jack Taylor in 1957 and to this day remains a private company. I am pleased to report that we recently celebrated our 60th anniversary and in doing so – provided \$60 million in aid to address food hunger around the globe. Similarly, we recently completed the planting of the 12 millionth tree that was part of our 50th anniversary pledge to plant 50 million trees over 50 years.

But I am not here to talk about the beautiful Vermont foliage. I'm here to discuss the proposed legislation that **would negatively impact Vermont residents, businesses and our Vermont Enterprise locations, our employees, their families, and the communities that our business supports through charitable work.**

There are many reasons why Enterprise cares about this legislation.

But today I want to use this opportunity to speak on behalf of:

- The customers we serve.
- The Vermont businesses that you as legislators work so hard to keep in Vermont and
- All of the companies that you want to attract to Vermont.

My testimony will deal primarily with the strong public policy arguments against enactment.

As for the legal arguments, you have already heard from Seamus Duffy of Akin Gump. Enterprise supports Mr. Duffy's testimony.

At the outset, I note this proposed legislation is identical to S.105, a bill that was vetoed by Governor Scott in 2018. None of the Governor's concerns, which were expressed in his May 22, 2018 veto letter to the Secretary of the Senate, are resolved by the current bill. Enterprise shared those same concerns.

Vermont's Businesses Both Large and Small Will Be Negatively Affected

As a threshold issue, this proposed legislation creates **uncertainty**, will **negatively impact** Vermont business both large and small, and **provide no real benefits** to Vermont's citizens. Countless businesses in Vermont rely on standard-form contracts as a vital part of their daily operations. This is especially true for one of the industries in which Enterprise operates, namely **tourism**. **Resorts, hotels, ski rentals, bed and breakfasts, bike and boat rentals** – to name just a few – all utilize standard-form contracts and all are likely to have provisions which would be considered substantively unconscionable under this proposed legislation.¹

As a result, **Vermont's citizens** and visitors who utilize these services will likely **face higher costs and less certainty** in their transactions. This bill claims to serve the purpose of forbidding contract terms that make it harder on individuals, but it is really an outright attack on arbitration, a form of case resolution that been used for over 100 years. The truth is **Arbitration is more efficient, faster, and less costly for businesses and consumers alike** when compared to litigation and jury trials – which can often take years and be too expensive for the average citizen.

For many consumers and employees with disputes against businesses, litigation in court is not a realistic option. They have little hope of navigating the legal system without a lawyer, yet they are unlikely to obtain legal representation when their claims are only modest in size. And even if they manage to get an attorney, litigation in court usually involves significant delays and high cost. By potentially eliminating arbitration, the bill would make it harder for individuals to vindicate their legal rights, especially if he or she cannot afford the high cost of litigation.

In arbitration, by contrast, it is easier for consumers and employees with small claims to obtain relief. Arbitration uses streamlined procedures, making it possible for people to represent themselves without a lawyer. The informality of arbitration also makes it

¹ For example, Zoar Adventure Center which offers outdoor activities like kayaking, rafting, and biking – uses contracts that would be rendered unenforceable by the proposed bill (waiver of claims, venue in MA). Stowe Mountaineer Inn, a very popular inn here in Vermont, also uses a contract which would violate the proposed bill (waiver of injury claims). Finally, local ski resorts, including Okemo and Sugarbush, have standard form contracts that would violate this bill (release of liability).

cheaper and easier for people to prosecute their cases; disputes can be decided over the phone or through paper or e-mail submissions, eliminating the need for people to miss work or personal commitments to attend lengthy in-person proceedings. In addition, the rules of evidence, which oftentimes work against plaintiffs, do not apply. Finally, the costs of discovery are far less given the more informal nature of arbitration.

Despite the many benefits that arbitration provides to individuals, the proposed legislation places arbitration agreements at risk because they usually contain standard terms that would be deemed unconscionable under this legislation. Accordingly, they may be negated altogether, injuring not only businesses, but Vermont's citizens who stand to benefit from arbitration.

I should emphasize that with arbitration, Vermonters are still able to assert their claims, they are just agreeing to do so in a less expensive, more stream-lined format.

Enterprise's Arbitration Clause is Clear and Fair

The United States Supreme Court already **requires** that arbitration provisions in contracts be clear so that the ordinary consumer understands exactly what he or she is agreeing to. All arbitration provisions must explain: that the individual is giving up the ability to go to court; the procedure that takes place in arbitration; and what happens once a decision is made. In other words, under existing law contracts must explain the details of arbitration in a simple, clear way.

Our contract does just that. It clearly explains that all claims are required to go through arbitration and then explains the process.

Interestingly, proponents of the bill, including trial lawyers, argue that arbitration is actually **more** expensive to consumers/Vermonters, but our contract – like many others – explicitly provides that the consumer is to pay his or her portion of the arbitration fees only **up to the amount that they would have had to pay if they brought their claims in a court of law. As such, consumers who make claims do not pay any more than they would have in litigation in court.**

This Legislation Will Flood Vermont Courts With Uninjured Plaintiffs, Harm Businesses and Benefit No One Except Trial Lawyers

The most devastating aspect of the proposed legislation is the near automatic statutory penalties it imposes on businesses. The legislation provides that contracts which contain any of the provisions identified in proposed Section 6055(a) amount to “an unfair and deceptive practice,” the consequence of which is a \$1,000 fine and an award of costs and attorney's fees. The practical effect of this clause is that it exposes companies, both big and small, to **extreme financial insecurity** because they can be hauled into court over terms that have been legal up to this point and faced with potentially staggering statutory violations.

Specifically, the **\$1,000 penalty per violation can have devastating consequences.** For example, if a contract is found to have three of the above unconscionable terms, then

a defendant is subject to a \$3,000 fine per individual consumer. In a class action scenario, that could mean an automatic penalty in the hundreds of thousands (if not millions). **That penalty alone could put a small business, and some large ones, out of business simply for including a venue provision that calls for the case to be heard in a neighboring state.**

More troubling is the fact that this devastating outcome can occur **even when the plaintiff has not actually suffered any injury.** All that is required for a violation under the proposed legislation is that the contract contain, for example, a clause that restricts lawsuits to the statute's definition of an "**inconvenient venue**" -- the definition of which looks only to the position of the individual, and does not consider at all the convenience of the business. If passed, a plaintiff could bring a lawsuit against a business **even if they were perfectly happy with the goods or services provided in an attempt to extract a penalty (and attorney's fees) despite the absence of any harm.**

Here an individual plaintiff could recover thousands of dollars with no actual injury. Worse yet, in the class action context, the penalty to the business could result into the millions of dollars. This type of legislation provides no real benefit to consumers and actually benefits only the organized plaintiff's bar.

Similar Litigation Has Led to a Flood of Baseless Lawsuits: Vermont Should Not Follow New Jersey's Example:

There is a statute in New Jersey, called the Truth-in-Consumer Contract, Warranty, and Notice Act (often referred to as "TCCWNA"), which has essentially the same effect as this proposed bill will have in Vermont. Essentially, the New Jersey statute places **an automatic penalty, a fine**, on companies who have contracts/warranties/signs containing a term that violates a "clearly established legal right" of a consumer. So in other words, if a contract eliminates a consumer's right to assert certain claims -- they are in violation of that statute and have to pay a penalty, **per violation.**

Enterprise also has substantial business in New Jersey, and has seen the devastating effect the law has on New Jersey businesses. Countless baseless lawsuits and claims relating to contract provisions have been filed under New Jersey's law where there was no actual injury. The result is that New Jersey companies **have to spend a substantial amount of money and time** defending against these lawsuits when no one has suffered any actual injury.

These lawsuits are not driven by dissatisfied -- let alone injured -- consumers. Rather, they are driven by trial lawyers seeking to exploit this statute and, in particular, its attorney's fee provision. We have seen first-hand that entrepreneurial plaintiffs' lawyers sign up individual consumers, or even prospective consumers, who have interacted with a business. Those consumers often are completely satisfied with the goods and services provided by those businesses, but yet have been "exposed" to a contract, sign, notice, warranty, etc. that arguably includes some prohibited provision. Despite having no injury, those consumers are recruited by plaintiffs' lawyers to file class action lawsuits on behalf of themselves and thousands of other consumers who, like them, have also suffered no harm. Those plaintiffs' attorneys threaten lawsuits and if they are not paid a significant

sum, file class actions seeking millions of dollars in damages. These types of lawsuits benefit no one except the trial lawyers. The plaintiffs themselves and the class members are not harmed and therefore need no compensation. The businesses that have to defend these lawsuits spend exorbitant sums fighting back or worse, caving in and paying on these meritless claims.

If passed, this legislation would invite exactly that type of exploitation by the organized plaintiffs bar. For smaller businesses in this State with fewer financial resources, this could be devastating.

The Act Would Create Uncertainty in the Enforcement of Contracts

The Act would **create uncertainty** with respect to standard-form contracts, as any violation, no matter how small, would render the entire contract unenforceable. Specifically, proposed Section 6055(c) states that if a standard-form contract contains an illegal or unconscionable term, **courts may refuse to enforce the entire contract**. Such an extreme measure runs against basic contract principles that typically sever the unenforceable provisions from the rest of the agreement. As such, this legislation would likely have the effect of rendering otherwise valid agreements unenforceable, **injuring both parties**. **Such a result would create uncertainty for businesses and individuals alike**, and would call into question the validity of every contract that Enterprise and other businesses in this state enter into every day with consumers. Businesses like Enterprise would face uncertainty because their contracts could be stricken in their entirety for mere technical violations that have no adverse effect on consumers.

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For all of these reasons, we urge the Legislature to reject this bill.

On behalf of Enterprise, our employees, and our customers, I would like to thank you for allowing me to share these perspectives.