

Act Number	Session	Bill Number	Total Number of Committee Pages	Total Number of House Pages	Total Number of Senate Pages
PA 71-347		417	6	2	2
<u>Committee Pages:</u> <ul style="list-style-type: none"> • <i>Judiciary</i> 517-520 • <i>Judiciary</i> 438-439 				<u>House Pages:</u> <ul style="list-style-type: none"> • 3098-3099(<i>Consent</i>) 	<u>Senate Pages:</u> <ul style="list-style-type: none"> • 1765-1766

H-114

**CONNECTICUT
GENERAL ASSEMBLY
HOUSE**

**PROCEEDINGS
1971**

**VOL. 14
PART 7
3011-3376**

Business on the calendar for Wednesday, May 19, 1971 -
Page 1 of the calendar, the Consent Calendar.

MR. SPEAKER:

Gentleman from the 95th.

REPRESENTATIVE SARASIN:

Prior to moving to the Consent Calendar, I would ask that one item be removed, Page 2, Calendar 1001, Senate Bill 1722, File 1028 and 645. I ask that be removed from the consent calendar.

MR. SPEAKER:

So ordered.

REPRESENTATIVE SARASIN:

I move acceptance of the Joint Committee's favorable reports and passage of the bills on today's consent calendar which are:

Calendar 979, Senate Bill 0118 - An Act Establishing the Time Limit for the Report of the Port Authority Study Commission, File 865.

Calendar 980, Substitute for Senate Bill 0208 - An Act Concerning Hearings by the Water Resources Commission on Permits for New Discharges, File 866.

Calendar 981, Senate Bill 0417 - An Act Concerning Agreements on Consequences of Excusable Delays, File 661.

Calendar 983, Substitute for Senate Bill 1539 - An Act Changing the Name of the State Welfare Department, file 802.

I move the adoption of these items.

MR. SPEAKER:

Wednesday, May 19, 1971

7

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Are there further individual objections. Hearing none, in accordance with our rules, the question on acceptance of the joint committee's favorable report and passage of the bills. All those in favor indicate by saying Aye. Opposed. The bills are passed.

Representative Prete.

REPRESENTATIVE PRETE:

I move the following items be placed on the consent calendar.

Page 8, Calendar 985, House Bill 5222, File 1066 - An Act Exempting Needles and Syringes Sold on Prescription From the Sales Tax.

Calendar 987, Substitute for House Bill 6822, File 1078 - An Act Concerning External Degrees and College Credit by Examination.

Page 9, Calendar 991, Substitute for House Bill 7312, File 1075 - An Act Authorizing the Establishment of Schools Without Walls and the Delegation by School Boards to Community Committees of the Power to Administer Same.

Page 10, Calendar 998, Substitute for House Bill 6384, File 1069 - An Act Concerning Consent for Autopsies.

Calendar 1000, Substitute for House Bill 8566, File 1067 - An Act Concerning the Planning Commission Appeals.

Calendar 1003, Substitute for House Bill 7776, File 1086 - An Act Concerning Appeals From Decisions and Actions of the Real Estate Commission.

S-79

**CONNECTICUT
GENERAL ASSEMBLY**

SENATE

**PROCEEDINGS
1971**

**VOL. 14
PART 4
1457-1920**

May 12, 1971

40.

THE CHAIR:

Will you remark?

SENATOR CUTILLO:

Yes sir. The remarks on the amendment speak for itself. This gives us again those of us in the legislature if you read the bill the opportunity to know those people who are lobbyists. Not only by the name tag. But the bill itself requires that when they do register with the Secretary of the State. That a photo would accompany their registration. A size to be given by the Secretary of State. Whether it be a 4 by 6 or what have you. At least a photograph of which anyone of us can go down to the Secretary of State's office and look and refresh our memories as to just who these people are. I move the passage of this bill.

THE CHAIR:

The question is on passage of the bill. Will you remark further? If not all those in favor of passage of the bill signify by saying aye. AYE. Opposed nay? All those in favor say aye. AYE. Opposed nay? The ayes have it. I would say the nays have better voices but there are more ayes. The ayes have it. The bill is passed.

THE CLERK:

Cal. 500, File 661, Favorable report joint standing committee on Judiciary S.B. 417 An Act Concerning Agreements on Consequences of Excusable Delays.

THE CHAIR:

Senator Rome.

May 12, 1971

41.

SENATOR ROME:

Mr. President, I urge acceptance of the joint committee's favorable report and passage of the bill.

THE CHAIR:

Will you remark?

SENATOR ROME:

Mr. President, this merely allows merchants to amend their original sales agreements by written agreement. It is a necessary commercial device. And I think its a good bill and ought to pass.

THE CHAIR:

The question is on passage of the bill will you remark further? If not all those in favor of passage signify by saying ^{AYE.} aye./ Opposed NAY. The ayes have it. The bill is passed.

THE CHAIR:

Senator Caldwell.

SENATOR CALDWELL:

Mr. President, it comes to my attention that the next bill to be taken up is Cal. 511. An Act Concerning Environmental Standards for Public Utility Services. I understand that the Legislative Commissioner's office is still working on an Amendment. So may we pass that for the time being. With the possibility of returning to it later.

THE CHAIR:

So ordered.

**JOINT
STANDING
COMMITTEE
HEARINGS**

JUDICIARY

**PART 2
393-688**

1971

Rep. Carrozzella: Thank you. Mr. Van Winkle to be followed by Virginia Bond.

Mr. Van Winkle: Thank you, Mr. Chairman and Members of the Committee, I would like to speak with respect to S.B. #417.

S.B. #417 - AN ACT CONCERNING AGREEMENTS ON CONSEQUENCES OF EXCUSABLE DELAYS

I am an attorney employed by United Aircraft Corporation and I am a Member of the Bar Association and I am here to present this Bill as a recommendation of the Committee on Commercial Law and Bankruptcy of the Bar Association which is also has been improved by the Board of Delegates of the Bar Association, It is a very technical amendment and I hope that I can make you understand what the point is in a very brief period of time.

The Uniform Commercial Code recognizes what has long been a standing part of a common law with respect to impossibility of performance, frustration of purpose and excusable delays. So the Code does recognize that in the event of a fire or act of God, or Government Intervention, one party may be excused from performance of a contract or excused in delay in performance.

The Code has embodied this into law in Section 2-615 but provides that the only consequences of this are that the seller must notify the buyer that there is a delay and the buyer then has 30 days within which to terminate the contract or accept the delay. There is no possibility of any other contractual provision and the section of the Code, which immediately follows that, says the parties are prohibited from making any agreement to the contrary. I think the purpose for this, and I have been over this with Professor Griswold and Professor Peters from Yale and the late Professor Star from the University of Connecticut, The purpose was to protect the consumer in a consumer type transaction where a seller with experts might provide in his sales terms and commissions that the buyer must accept performance regardless how long it is delayed and so it has some merit, perhaps in that situation.

The amendment which the Bar Association has approved in one which applies solely to transaction between merchants are defined in the commercial Code as so many other words of ours are and they are people who are skilled in dealing with particular goods or skilled in the particular transaction. So the amendment that is proposed here would allow merchants in contracts among themselves, to provide for the consequences of an excusable delay, for instance it might be provided that if the seller is delayed because of a fire or tornado, the parties could agree in advance that the seller could be excused up to a period of 60 days. At that time, then, the buyer would have his option of terminating the contract for agreeing to some extension.

46
BC
THURSDAY

JUDICIARY COMMITTEE

FEBRUARY 25, 1971

Now this is a provision that is unfair - both to sellers and buyers and in our Sales Contracts with companies like Boeing, Pan American Airlines, etc., we have felt it necessary to put the customer on notice that such a provision exists and this provision says that if we give notice of a delay, the buyer has 30 days to respond and if he fails to respond, the contract is automatically terminated.

Our customers have written back to us and objected to this and they say, I would like to quote just a couple of them. "We consider the provision that the contract is terminated in the absence of formal notification within 30 days to be unreasonable". Now what they are worried about; of course, is the notice coming into their Purchasing Department or their Sales Department and it never gets to the Legal Department within the 30 day period and before they know it, their contract is terminated.

Well in the case of an Airline such as Pan American, they have ordered perhaps a Boeing 747 from - an order from Boeing 747 aircraft at a cost of \$20, million, well without their notice, their contract for the engines has lapsed so they have the contract for the airplane and no contract for the engines. Now, you say, well, we could not cut our customer off, well obviously we can't but our customer is, of course, concerned - well, are we then going to ask for an increase in price? So it works a grave hardship both on sellers and buyers.

The problem has come up in three other States, Washington, Wisconsin and Idaho and all three States has acted to repeal this particular Section. In 1967 it was suggested to the Legislature that this provision be repealed in Connecticut. Instead it was modified in a way which is not proved workable. The modification was that in the case of goods specially manufactured and not suitable for resale, they the parties, can make an agreement on what happens in the case of an excusable delay. Now this really does not take care of the situation where I cite our own instances because I am most familiar with them, but in the manufacturing of an engine, we never manufacture any engines for inventory because an item that costs \$750,000 or \$800,000, you cannot afford to keep them stocked so we manufacture only to order.

Now, if the contract is cancelled, yes it is suitable for resale in the market, but it may take two or three years to find a buyer for that particular engine so it really is not any solution to the problem. So I recommend to you, on behalf of the Bar Association, this amendment which does nothing more than allow merchants, between themselves in their contracts, to spell out what will happen in the event of an excusable delay.

S.B. No. 417 - An Act Concerning Agreements On Consequences Of
Excusable Delays

The above bill proposes an amendment to a section of the sales law of the Uniform Commercial Code. The proposed amendment is a recommendation of the Committee on Commercial Law of the Connecticut Bar Association and is also supported by businesses in Connecticut. It has no application to consumer transactions and applies only to sales by one businessman to another.

The model form of the Uniform Commercial Code recognizes that unforeseen circumstances such as a fire or governmental intervention may be a valid excuse for delay in the performance of a sales contract. But, the Code also contains a provision which prohibits agreements between sellers and buyers on the rights of the parties or consequences of excusable delays. With respect to the particular provision prohibiting agreements on the consequences of excusable delays, changes to the law have been requested in Wisconsin, Washington and Iowa resulting in the repeal of the statutory section in question in all three States. In Connecticut, a request in 1967 for repeal of the section resulted in an amendment which remedied a part of the problem but left a situation which has proved virtually unworkable.

The problem is this. The Code recognizes, as mentioned, that there are some legitimate excuses for delay in performance of a contract. Such excuse may be a fire, hurricane, strike, governmental action or similar contingency. Upon the occurrence of such a contingency, the seller must give notice of the resulting delay to the buyer. The buyer then has thirty days within which to respond in writing either terminating the contract or modifying it to accept the delay. The Code also provides that if the buyer is delinquent in responding with a written notice of either termination or acceptance of modification within thirty days, the contract between the parties automatically terminates. The problem is that the parties are absolutely prohibited from making any other contractual agreement which would provide a satisfactory compromise between the two arbitrary results dictated by the Code. Sections 42a-2-615 and 616, Conn. Gen. Stats.

Let me illustrate by example the dilemma that is presented both for sellers and buyers. The design and development of an aircraft engine may require a period of three or four years and an expenditure of perhaps \$200 million. The lead time to manufacture an engine may be one to one and one-half years and the selling price of the engine may be \$750,000. Sales of such engines to Boeing, Pan American, Air France or other customers are by order only; no engines are built for inventory because the market and number of buyers are so limited. Deliveries

are made to customers in installments over many months. In the course of performance of such a contract the seller may meet with some unexpected delay, such as a strike at the plant of a supplier. The supplier will not be able to predict the length of the strike and under the Code must give notice of an indefinite delay. In turn, the engine manufacturer must give notice to its customers of an indefinite delay. After an expenditure of millions of dollars and performance over a period of years, the seller will find that his buyer has an absolute right to terminate for a delay that may turn out to be only a matter of a few days. The buyer will find that if he neglects to respond, or responds improperly, to a delay notice within thirty days, the contract will automatically lapse and he will have no right to the engines he needs for aircraft which he has ordered at prices up to \$20 million per aircraft.

In the illustration given, the matter is further complicated because the manufacturer has to give a notice to his own supplier within thirty days. At the time the manufacturer's thirty-day period runs out, the thirty-day grace period for his customers will still be open and the manufacturer won't know whether his own customers have terminated or affirmed their orders, or whether perhaps by oversight the notice of delay was not attended to by the customer and the contract lapsed by operation of law.

These situations could be provided for in advance by mutual agreement between the seller and buyer if the parties were free to negotiate mutually satisfactory terms. But, in this case, the Uniform Commercial Code prohibits contracting parties from working out solutions to fit their particular situations.

As illustrated, this is a problem not only for sellers but for buyers. In contract proposals to buyers, we have felt it necessary to include a clause setting forth the exact requirement of the Code to warn buyers that the contract will terminate if the seller gives notice of an excusable delay and the buyer fails either to terminate the contract or accept the indefinite delay within thirty days. We have been sharply criticized by our customers for such a high-handed and unreasonable proposition. Some typical responses are quoted below:

Customer A - "We consider provision that contract is terminated in absence of formal notification within 30 days to be unreasonable."

Customer B - "You are categorically saying that United Aircraft has the right to terminate the whole order or affected portions of an order without having received authority to do so from the Buyer."

"Under no circumstances could we accept such a clause."

Customer C - "In this regard if the Buyer has to have equipment from Pratt & Whitney, it is not practical to provide for automatic termination of an order in the event of excusable delays."

As I have said, we do not wish to include such a harsh provision in our sales contracts but are required by law to follow this provision.

There may be public policy which justifies the arbitrary treatment prescribed by the Code where the buyer is a consumer at the retail level. But there is no such justification where both parties are experienced operators in the field of commerce (defined in the Code as "merchants," §42a-2-104).

The Code in various other circumstances provides that different rules and standards are appropriate where the contracting parties are "merchants." (A merchant, in brief summary, is one who deals in goods of the kind or holds himself out as having knowledge or skill peculiar to the practices or goods involved.) (1) For instance, where both parties are merchants, the right to rely on a particular defect in a product is waived if the buyer rejects the product but fails to identify the defect when requested to do so by the seller in writing. This rule does not apply to non-merchants. (§42a-2-605) (2) A merchant buyer has higher duties of care with respect to rejected goods than a non-merchant. (§42a-2-603) (3) The implied warranty of merchantability under the Code arises only if the seller is a merchant. (§42a-2-314) (4) A firm offer is irrevocable for up to three months even without consideration if the offeror is a merchant. (§42a-2-205)

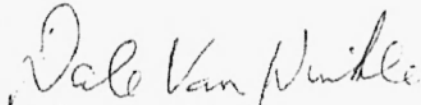
These sections show that the draftsmen of the Code recognized that in some circumstances merchants may need rules different from those applicable to non-merchant consumers.

Such is the case with respect to excusable delays. There is no public policy that dictates that merchants should be forbidden to work out contractual arrangements between themselves which will fit the unique circumstances of their products and transactions. Neither merchant buyers nor merchant sellers are satisfied with the present situation.

In Wisconsin, Washington and Iowa the problem was solved by deletion of the subsection. Connecticut in 1967 amended this same subsection to allow an allocation of the risk between the parties where the

goods are specially manufactured and not suitable for sale in the ordinary course of business. This amendment has not proved broad enough to be workable.

The State Bar Association Committee on Commercial Law has considered this problem and recommends that the particular provision of the Uniform Commercial Code be amended to allow merchants to make contracts between themselves spelling out the rights of the parties in the event of an excusable delay. S.B. No. 417 accomplishes that purpose.



Dale Van Winkle
Vice President
United Aircraft Corporation

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