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Act Number: 07-210

Bill Number: 6897

Senate Pages: 5259-5273, 5310-5312 **18**

House Pages: 5240-5247, 8535-8540 **14**

Committee: Judiciary: 3545-3564, 3670-3672 **23**

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**CONNECTICUT
GENERAL ASSEMBLY
SENATE**

**PROCEEDINGS
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PART 16**

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are found not competent to stand trial, and would allow them to be treated in the community.

Mr. President, the purpose of this bill were to allow DMHAS, again, with the oversight of the court, to treat people who are found not competent to stand trial in the least restrictive means possible during the time that they are in the custody of the court.

THE CHAIR:

Will you remark? Will you remark further on the bill? Senator McDonald.

SEN. MCDONALD:

Mr. President, if there is no objection, might this item be placed on the Consent Calendar?

THE CHAIR:

Hearing and seeing no objections, so ordered.

Mr. Clerk.

THE CLERK:

Calendar Page 6, Calendar 650, Files 640 and 903,
Substitute for House Bill 6897, An Act Concerning

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Liquidated Damages Provisions in Contracts, Requests for Mortgage Payoff Statements and the Repossession of Motor Vehicles in Bankruptcy Cases, as amended by House Amendment Schedule "A" and "B", Favorable Report in Committee on Judiciary.

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

Thank you, Mr. President. Mr. President, I move acceptance of the Joint Committee's Favorable Report and passage of the bill.

THE CHAIR:

Acting on approval of the bill, will you remark further, Sir?

SEN. MCDONALD:

Yes, I will, Mr. President. Mr. President, this is a consumer-oriented bill that in the first instance would require that in a consumer-related contract, any time that there is a provision in that contract which

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would liquidate potential damages from a breach of that contract, it would require that that notice be provided in 12-point font, all in capitals, and that it would specifically require that the consumer who is entering into that contract have to acknowledge that provision, either by signing his or her name or initialing it.

Additionally, Mr. President, Section 2 of the bill, would make it clear that when a mortgagee of real estate authorizes a payoff letter, with respect to the payment of a mortgage, this bill would make it clear that that mortgagee can also ask the mortgagee's attorney to request that information, as long as the attorney can do so with full authority of his or her client.

Mr. President, I believe the Clerk is in possession of LCO 8722. I ask that it be called and I be granted leave to summarize.

THE CHAIR:

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Mr. Clerk.

THE CLERK:

LCO 8722, which will be designated as Senate
Amendment Schedule "A". It is offered by Senator
McDonald of the 27th District.

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

Thank you, Mr. President. Mr. President, I move
adoption of the amendment.

THE CHAIR:

Please proceed, Sir.

SEN. MCDONALD:

Thank you, Mr. President. Mr. President, as I
indicated in the description of the underlying bill,
there is a new requirement that future liquidated
damages provisions in consumer contracts would have to
be specifically set forth and individuals would have
to take particular action with respect to that.

The fact is, Mr. President, that there are a wide range of contracts that deal with this subject matter, and those who have already written these contracts need some additional time to implement these changes.

And, therefore, Mr. President, the first part of the amendment would set an effective date for Section 1 of the bill to July 1, 2008. Secondly, Mr. President, the amendment would strike Section 3 of the bill.

And though I understand it is a well-intentioned measure, Mr. President, Section 3 of the bill would essentially usurp or attempt to usurp the provisions of the United States Bankruptcy Code, with respect to motor vehicles and the rights of retail buyers, under the Bankruptcy Code.

And, Mr. President, it is at least my opinion that we are without authority to try to usurp the provisions of the Bankruptcy Code, and I believe that this section should be stricken.

THE CHAIR:

Will you remark? Senator Kissel.

SEN. KISSEL:

Good evening, Mr. President. Thank you, Sir.

Questions, through you, to the proponent of the amendment.

THE CHAIR:

Senator McDonald.

SEN. KISSEL:

My question essentially is the way you characterized Section 3 of the bill and the amendment seeks to strike it in its entirety. I'm going to offer my understanding of what that section does within the bill, and if the proponent of the amendment could explain how I may be in error in my interpretation, that would be welcome.

My understanding is that with the bankruptcy changes that occurred on the federal level, that when it comes to individuals in Chapter 7 proceedings that

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own automobiles, that up until the change in the federal laws, an individual could reconfirm the debt owed on the automobile, sign an agreement, essentially recapitulating new terms regarding the debt on the automobile, or they could continue to make monthly payments as best as they could.

But my understanding is that the Bankruptcy Reform Act essentially took that third area and stated or indicated that the states could enter into the field, if they so chose.

So that if you were counseling someone that was in Chapter 7, especially if the automobile's value, if it's an older automobile, there may be more owed on the loan than the automobile was worth, that essentially to reconfirm the debt or to sign a new agreement probably wouldn't be the wisest course of action, and it would be best for the individual to make monthly payments as best they could.

If ultimately they were not able to make those monthly payments, then either the lender or the automobile company or whoever extended the credit could repossess the automobile, but at least the debtor would not be saddled with the difference between the value of the automobile and what was left on the debt.

And so it strikes me that unless there is an absolute prohibition under federal law that allowing this provision to remain in this bill, as was passed up to us from the House, actually works to protect folks, especially those in a weaker bargaining position, and that it's actually pro-consumer and pro-debtor, then I don't understand why we would, in an otherwise consumer-friendly piece of legislation, strike a provision that was not required to be stricken under the federal laws, through you, Mr. President.

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

Thank you, Mr. President. Through you, it was a fairly lengthy question, but I think I can answer it this way.

Well, first and foremost, no state in the Union has adopted a provision such as this. I think that it is the result, Mr. President, of the fact that our Congress crafted a carefully considered section of the Bankruptcy Code, with respect to Chapter 7 bankruptcy filings, and pursuant to that legislation, Mr. President, this option was expressly abolished in that reformat.

Secondly, Mr. President, the fact is that this would constitute an event of default under the contracts to which the parties are involved in the contract.

Mr. President, we would essentially be rewriting a contract that was voluntarily entered into between

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the individual and the company that would have the rights under the agreement. And so, Mr. President, we would be unilaterally transforming the agreement into a month-to-month agreement, with all of the rights and none of the obligations that had been agreed to by the bankrupt debtor.

THE CHAIR:

Senator Kissel.

SEN. KISSEL:

Thank you, Mr. President. And another question, through you. Well, is it the position of the proponent of the amendment that, because of the changes in the federal bankruptcy law, that the State of Connecticut would be preempted from entering into field?

I know in other areas regarding debtors, states have specific laws and protections protecting them. In fact, the one that comes to mind is the Homestead Exemption, which is available to individuals, if they

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file for bankruptcy protection in the State of Florida. It's very appealing.

It actually works great harm I think to creditors, but it is one of the reasons why folks quite often choose to file bankruptcy in the State of Florida.

While not being completely familiar with all of the intricacies of the Bankruptcy Reform Act passed recently by Congress, again my specific question is, is the State of Connecticut preempted from moving forward with Section 3, or is this simply a decision that the proponent of the amendment feels that we should make unilaterally, through you, Mr. President?

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

Thank you, Mr. President. Through you, well, as I stand here today, I can't say for certain that it would be preempted by federal law.

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Mr. President, I think that this proposal, coming at the late hour it has, needs to have more research done on that issue, precisely as Senator Kissel has suggested.

But I would say, Mr. President, that before we unilaterally and retroactively start reforming contracts entered into by people in transactions, we should proceed cautiously. Mr. President, I should also ask that when the vote be taken, it be taken by roll call.

THE CHAIR:

A roll call vote will be ordered, Sir. Senator Kissel.

SEN. KISSEL:

Thank you, Mr. President, and I very much appreciate the answers articulated by my good friend and colleague, Senator McDonald. I actually would argue against adoption of this particular amendment.

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Regarding the first provisions, regarding the change of the effective date, regarding putting of the disclosures into the contracts, I can understand that, and I think that there's a couple of ways that we could actually effectuate that should this particular amendment not succeed.

But regarding Section 3 of the underlying bill, it certainly has been a proposal that's been kicking around this legislative session. It was certainly looked at very favorably by our colleagues in the House. I think it's extraordinarily pro-consumer.

I don't believe that it necessarily has to be characterized as reformulated, reformulating, or restating agreements already entered into. It simply affords debtors the right to continue to make monthly payments, and if they run into trouble along the way, certainly the creditor would have the right to repossess the vehicle.

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For those reasons, I do believe that the amendment can be characterized as somewhat anti-consumer, and I think that it's better off that we would leave it within the bill that is before us this evening. Thank you very much, Mr. President.

THE CHAIR:

Thank you, Senator McKinney. Will you remark? Will you remark further on Senate Amendment "A"? If not, Mr. Clerk, please call the roll. The machine will be open.

THE CLERK:

An immediate roll call has been ordered in the Senate. Will all Senators please return to the Chamber.

An immediate roll call has been ordered in the Senate. Will all Senators please return to the Chamber.

THE CHAIR:

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Have all Senators Voted? If all Senators have voted, the machine will be locked, and the Clerk will give the tally.

THE CLERK:

Motion is on adoption of Senate Amendment Schedule "A".

Total number voting, 35; necessary for adoption, 18. Those voting "yea", 23; those voting "nay", 12. Those absent and not voting, 1.

THE CHAIR:

Senate Amendment "A" passes. Will you remark on the bill? Senator McDonald.

SEN. MCDONALD:

Mr. President, if there is no objection, might this item be placed on the Consent Calendar.

THE CHAIR:

Hearing and seeing none, so ordered. Senator Handley.

SEN. HANDLEY:

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An immediate roll call has been ordered in the Senate on the second Consent Calendar. Will all Senators please return to the Chamber.

An immediate roll call has been ordered in the Senate on the second Consent Calendar. Will all Senators please return to the Chamber.

Mr. President. Those items placed on the second Consent Calendar begin on Calendar Page 1, Calendar 112, Senate Bill 1321.

Calendar Page 3, Calendar 573, House Bill 6390.

Calendar Page 6, Calendar 650, Substitute for House Bill 6897.

Calendar Page 10, Calendar 192, Substitute for Senate Bill 1257.

Calendar Page 13, Calendar 356, Substitute for Senate Bill 1182.

Calendar Page 14, Calendar 484 and Calendar Page HB 6992
18, Calendar 630, Substitute for House Bill 7240.

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Mr. President that completes those items placed on the second Consent Calendar.

THE CHAIR:

Please call the roll again. The machine will be open.

THE CLERK:

An immediate roll call has been ordered in the Senate. Will all Senators please return to the Chamber.

An immediate roll call has been ordered in the Senate on the Consent Calendar. Will all Senators please return to the Chamber.

THE CHAIR:

Senator DeFronzo. If all Senators have voted, the machine will be locked. The Clerk will call the tally.

THE CLERK:

Motion is on adoption of Consent Calendar No. 2.

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Total number voting, 35; necessary for adoption,
18. Those voting "yea", 35; those voting "nay", 0.
Those absent and not voting, 1.

THE CHAIR:

Consent Calendar No. 2 passes. Senator Looney.

SEN. LOONEY:

Yes, thank you, Mr. President. Mr. President, I
would move for immediate transmittal to the House of
Representatives of all items acted upon in the Senate
today needing additional action in that Chamber.

THE CHAIR:

Hearing and seeing no objections, so ordered,
Sir.

SEN. LOONEY:

Yes, thank you, Mr. President. Also, Mr.
President, I would move for a suspension to refer all
items from today's Calendar to the Committees'
referenced and ask that that be done immediately and
they not be held.

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GEN. ASSEMBLY
HOUSE

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House of Representatives

May 29, 2007

House Bill Number 7313, as amended by House
Amendment Schedules "A" and "B" and Senate
Amendment Schedule "A", in concurrence with the
Senate.

Total Number Voting	147
Necessary for Passage	74
Those voting Yea	147
Those voting Nay	0
Those absent and not voting	4

DEPUTY SPEAKER FRITZ:

The Bill as amended is passed. Will the Clerk
please call Calendar Number 515.

CLERK:

On Page 9, Calendar Number 515, Substitute for
House Bill Number 6897, AN ACT CONCERNING LIQUIDATED
DAMAGES PROVISIONS IN CONTRACTS, REQUESTS FOR MORTGAGE
PAYOFF STATEMENTS AND THE REPOSSESSION OF MOTOR
VEHICLES IN BANKRUPTCY CASES, Favorable Report of the
Committee on Judiciary.

DEPUTY SPEAKER FRITZ:

Representative Jerry Fox.

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REP. FOX: (146th)

Good evening, Madam Speaker. I move acceptance of the Joint Committee's Favorable Report and passage of the Bill.

DEPUTY SPEAKER FRITZ:

The question is on acceptance and passage. Will you proceed, Sir.

REP. FOX: (146th)

Thank you, Madam Speaker. This Bill is broken down into three different sections, and there are also two amendments that I'll be calling in a few moments.

The first section deals with the liquidated damage provisions in contracts. It is designed to give awareness to consumers when they enter into a liquidated damages contract or a contract that would allow for a specified sum of damages.

The second provision addresses the situation where who may request a payoff statement, particularly if there's a foreclosure situation or if a mortgage is in default.

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The third section deals with a provision in our bankruptcy law where if somebody has filed for bankruptcy but they are currently leasing a vehicle and they are current with their payments on that vehicle.

What the third section does is it allows that person, despite the filing of the bankruptcy, to continue to make payments and to keep their vehicle, provided they remain current with their payments.

Presently, if an individual files bankruptcy, it's my understanding that that filing by itself will cause for the lease to be potentially terminated. This apparently goes back to the way the law was previously, and that is with respect to section three of this Bill.

Now the Clerk has an amendment. The first amendment deals with Section 1. It's LCO Number 7566. I ask that it be called and I be allowed to summarize.
DEPUTY SPEAKER FRITZ:

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Will the Clerk please call LCO Number 7566, designated House "A", and the gentleman has asked leave to summarize.

CLERK:

LCO Number 7566, House "A", offered by Representatives Taborsak, Fox, and Godfrey.

DEPUTY SPEAKER FRITZ:

Representative Fox.

REP. FOX: (146th)

Thank you, Madam Speaker. This Amendment deals with the first section, with respect to liquidated damages as part of this Bill. It addresses those situations where there's a written contract for the purchase or lease of goods or services.

The purpose of the contract would be primarily for personal, family, or household purposes. What it states is that in those contracts that do call for a liquidated damages provision that there be a bold-faced setting in caps which states I acknowledge that this contract contains a liquidated damages provision.

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It also requires that the individual against who that provision would be enforced initials or signs that provision.

In addition, there is a Section B, which is now added, which just clarifies that this provision does not apply if there's a contract between consumers and agencies of the state, negotiable instruments, or provisions for late fees, prepayment penalties, and default on interest rates. I move adoption of the Amendment.

DEPUTY SPEAKER FRITZ:

The question is on adoption. Will you remark further on the Amendment before us? Will you remark further on the Amendment before us? If not, let me try your minds. All those in favor, please signify by saying Aye.

REPRESENTATIVES:

Aye.

DEPUTY SPEAKER FRITZ:

Those opposed, Nay. The Ayes have it, the Amendment is adopted. Representative Fox.

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REP. FOX: (146th)

Thank you, Madam Speaker. I also have a second Amendment, LCO Number 7220. I ask that it be called by the Clerk and I be permitted to summarize.

DEPUTY SPEAKER FRITZ:

Will the Clerk please call LCO Number 7220, designated House "B".

CLERK:

LCO Number 7220, House "B", offered by Representative Hamzy.

DEPUTY SPEAKER FRITZ:

Representative Fox.

REP. FOX: (146th)

Thank you, Madam Speaker. This Amendment, which I consider a friendly Amendment, it simply clarifies the situation, when an individual is in default, who may request a payoff statement, who that payoff statement may be requested from.

Presently you would have to, if the mortgagee, the lender, is represented by counsel, you'd have to make the request directly to the counsel.

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What this permits is the mortgagor or the mortgagor's attorney may request directly from the bank itself, as a means of trying to get a payoff figure at a quick rate in the event that there is a possible sale or attempt to somehow make up the arrears. So I move passage of this Amendment.

DEPUTY SPEAKER FRITZ:

The question is on adoption. Will you remark further on the Amendment before us? Will you remark further on the Amendment before us? If not, let me try your mind. All those in favor, please signify by saying Aye.

REPRESENTATIVES:

Aye.

DEPUTY SPEAKER FRITZ:

Those opposed, Nay. The Ayes have it, the Amendment is adopted. Will you remark further on the Bill as amended? Will you remark further on the Bill as amended? If not, staff and guests come to the Well of the House, and the machine will be opened.

CLERK:

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The House of Representatives is voting by Roll
Call. Members to the Chamber. Members to the
Chamber. The House is voting by Roll Call.

DEPUTY SPEAKER FRITZ:

Have all the Members voted? Have all of the
Members voted? Check the board, make sure your vote
is accurately cast. If so, the machine will be
locked, and the Clerk will take the tally. The Clerk
will announce the tally.

CLERK:

House Bill Number 6897, as amended by House
Amendment Schedules "A" and "B".

Total Number Voting	148
Necessary for Passage	75
Those voting Yea	148
Those voting Nay	0
Those absent and not voting	3

DEPUTY SPEAKER FRITZ:

The Bill as amended is passed. Are there any
announcements or points of personal privilege?
Representative Christopher Donovan.

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DEPUTY SPEAKER KIRKLEY-BEY:

Will the Clerk please call Calendar Number 515.

CLERK:

On Page 38, Calendar Number 515, Substitute for House Bill Number 6897, AN ACT CONCERNING LIQUIDATED DAMAGES PROVISIONS IN CONTRACTS, REQUESTS FOR MORTGAGE PAYOFF STATEMENTS AND THE REPOSSESSION OF MOTOR VEHICLES IN BANKRUPTCY CASES, as amended by House Amendment Schedules "A" and "B", Favorable Report of the Committee on Judiciary.

DEPUTY SPEAKER KIRKLEY-BEY:

Representative Fox, you have the floor, Sir.

REP. FOX: (146th)

Thank you, Madam Speaker, and good afternoon.

DEPUTY SPEAKER KIRKLEY-BEY:

Good afternoon.

REP. FOX: (146th)

I move acceptance of the Joint Committee's Favorable Report and passage of the Bill in concurrence with the Senate.

DEPUTY SPEAKER KIRKLEY-BEY:

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The question before us is on acceptance and passage in concurrence with the Senate. Will you remark further?

REP. FOX: (146th)

Thank you, Madam Speaker. This Bill has been before this Chamber previously. It deals with liquidated damages clauses in consumer contracts.

It also has a section that deals with the mortgage payoffs and who may request mortgage payoffs and a procedure by which those are obtained.

The Senate was sent this Bill about a week ago. They did offer an Amendment. The Clerk has Senate Amendment "A", LCO Number, I'm not sure the LCO Number but Senate Amendment "A". Okay, LCO Number 8722.

DEPUTY SPEAKER KIRKLEY-BEY:

Will the Clerk please call LCO Number 8722 and the Representative asked for leave to summarize.

CLERK:

LCO Number 8722, Senate "A", offered by Senator McDonald and Representative Taborsak.

DEPUTY SPEAKER KIRKLEY-BEY:

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Is there any objection to summarization? Hearing none, please proceed, Representative Fox.

REP. FOX: (146th)

Thank you, Madam Speaker. What this Amendment does is it pushes the effective date of this Bill out until July 1, 2008. I think the reason for that is that certain companies may currently offer form contracts. That will give them an opportunity to adjust to this new provision.

In addition, the Senate Amendment strikes Section 3 in its entirety of this Bill, which had dealt with bankruptcy, car dealership bankruptcies and car payments and when they are due. So I move adoption.

DEPUTY SPEAKER KIRKLEY-BEY:

The question before us is on adoption of Senate Amendment "A". Will you remark further?

Representative Taborsak, you have the floor.

REP. TABORSAK: (109th)

Thank you, Madam Speaker. I rise in support of this Amendment, and I would just like to say, I would like to thank Chairman Lawlor, Representative Fox,

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Representative O'Neill and Representative Hamzy for working with me on this piece of consumer protection legislation. It really has been a bipartisan effort. I just want to thank them all. Thank you, Madam Chairman.

DEPUTY SPEAKER KIRKLEY-BEY:

Thank you, Representative. Will you remark? Will you remark further on Senate Amendment "A"? If not, let me try your minds. All those in favor please indicate by saying Aye.

REPRESENTATIVES:

Aye.

DEPUTY SPEAKER KIRKLEY-BEY:

All those opposed, Nay. The Ayes have it. The Amendment is adopted. Will you remark further on the Bill as amended? Will you remark further on the Bill as amended? If not, staff and guests please come to the Well. Members take your seats. The machine will be opened.

CLERK:

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The House of Representatives is voting by Roll
Call. Members to the Chamber. The House is voting by
Roll Call. Members to the Chamber, please.

DEPUTY SPEAKER KIRKLEY-BEY:

Have all Members voted? Have all Members voted?
Please check the board to see that your vote has been
properly cast.

The machine will be locked and the Clerk will
prepare the tally. Will the Clerk please announce the
tally.

CLERK:

House Bill Number 6897, as amended by House
Amendment Schedules "A" and "B" and Senate
Amendment Schedule "A", in concurrence with the
Senate.

Total Number Voting	147
Necessary for Passage	74
Those voting Yea	147
Those voting Nay	0
Those absent and not voting	4

DEPUTY SPEAKER KIRKLEY-BEY:

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The Bill as amended passes. Will the Clerk
please call Calendar Number 129.

CLERK:

On Page 2, Calendar Number 129, House Bill Number
5539, AN ACT CONCERNING SECURED AND UNSECURED LENDING,
Favorable Report of the Committee on Banks.

DEPUTY SPEAKER KIRKLEY-BEY:

Representative Ryan Barry, you have the floor,
Sir.

REP. BARRY: (12th)

Thank you very much, Madam Speaker. I move for
acceptance of the Joint Committee's Favorable Report
and passage of the Bill.

DEPUTY SPEAKER KIRKLEY-BEY:

The motion before us is on acceptance and
passage. Will you remark further, Sir?

REP. BARRY: (12th)

Yes. Thank you very much. This Bill makes some
technical changes in banking statutory provisions. It
has no fiscal impact.

**JOINT
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HEARINGS**

**JUDICIARY
PART 11**

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JUDICIARY

March 12, 2007

SEN. MCDONALD: Next is Representative Taborsak, followed by Barry Hawkins.

REP. TABORSAK: Thank you, Senator. Thank you, Representative Lawlor, and distinguished Members of the Judiciary Committee. Appreciate the opportunity to be able to testify on behalf of House Bill 6897 AN ACT CONCERNING LIQUIDATED DAMAGES PROVISIONS AND CONTRACTS.

I'd like to first just say that I've noticed that the Committee's draft appears to be one of general application, which I see absolutely no downside to if this bill becomes a law and it applies to both consumer situations and business situations, both general contracts and service contracts.

I think that's great because what the bill is really about is promoting fairness in contract law, promoting disclosure of this one very specific issue, which is liquidated damages provision.

So, if it is, in fact, going to be viewed as one, a bill of general application, I applaud that. I think it's a great idea.

Our Legislature has a rich history of promoting fairness, clarity and predictability in contract law. I really don't need to waste much time talking about that to this Committee. Your good work has created acts like the Connecticut Unfair Trade Practices Act, the Home Improvement Contractor Act, and a number of consumer protection efforts.

All of these bodies of law go to again, promoting the concepts of fairness in contracting, predictability, clarity.

This bill is specific and simple. It really just goes to liquidated damages provisions, one specific provision that you find in contracts, and you can, I think that in our minds we can restate the name of the bill to understand its purpose a little bit more, which, and to restate it, we could say that it is an act to prohibit non-disclosure of liquidated damages provisions.

That's what we're going after here in this bill, is this element of non-disclosure that seems to accompany these very harsh provisions.

And this is not an unfamiliar place for this Legislature. We have, like I mentioned, a number of acts. We actually have, in fact, law on regulating liquidated damages provisions in both the consumer context and in the business context.

You could do an OLR search, and you'd find a report that would explain where we are on that. But like many other laws, over time, circumstances arise. People find ways to get around them.

This is no exception to that issue. That keeps us in business, and I offer you a copy of a contract. It's attached to my testimony here, that shows an enforceable contract, a contract that's been enforced by a Connecticut Superior

Court that has a liquidated damages provision in the fine print.

And I can barely read it myself, and this is the true size of the contract that went before a Superior Court, and that is executed by people all over Fairfield County and Litchfield County.

I can at least speak for those two counties, because I know that in this case waste removal companies are using this contract.

But really, it's not just targeted at that particular industry because right now, the law is such that this contract is enforceable the way it is, with this liquidated damages provision.

Just a note on liquidated damages. This provision has been met with great scrutiny historically by our courts and by our Legislature, because it really goes against the grain of those concepts of fairness and disclosure, and predictability in contract law.

When a party is awarded, essentially, a sum of money through a provision in the contract, liquidated damages provision for services that they haven't provided yet that are in the future, due to determination of the contract, that's something that our courts have scrutinized over the years, and there is a body of law out there, both in common law, and also as I've mentioned, statutory law, that really kind of limits the situations that liquidated damages provisions should be enforced.

This bill here, House Bill 6897, takes it a step further to make sure that the people that really need to understand what they're signing are disclosed this information, understand that this provision's in the contract by requiring them to initial a disclosure in the contract, right after the provision, basically saying that they understand the terms of this liquidated damages provision.

And human nature will, and human tendencies will make this bill work, because people are going to have to stop and have a dialogue on that issue.

No longer will a slick-talking sales rep be able to kind of slide the contract through if he has to mention to the purchaser of these services, oh, Sir, oh, Ma'am, you have to sign here after this liquidated damages provision.

So I think that the simplicity of this bill is the most appealing aspect of it to me. I know from my experience as an attorney working with people when you draw their attention to something that they have to initial, it gets their attention, it creates a dialogue.

And I think that this bill will go a long way toward again, limiting the non-disclosure element that goes along with this very harsh provision, and will just help consumers.

It will help small business owners tremendously in knowing what they're signing before they wind up in litigation because they want to

break a contract like this, and then they find out that there's a penalty provision that's going to be enforced by their local court, making them pay for services into the future that they haven't received yet.

So, again, I appreciate the Committee's efforts here. I hope that this bill gets your support, and that if it is going to be a bill of general application, you know, I applaud that, too. I think that that's a great idea, and I'll be glad to take any questions on this.

SEN. MCDONALD: Thanks very much. You know, I was trying to look at this contract that you provided to us, and frankly, I can't make out any of it. I don't know if it's just been Xeroxed so many times, but what was the nature of the liquidated damages clause in this contract?

REP. TABORSAK: The nature of the liquidated damages clause in this contract provided for, and I can't read it either, and this is a true size, around, I believe 30% of any of the total services or the value of the total services that would have been provided had the contract continued in place through its termination.

So if the contract provided for, let's say, \$5,000 worth of services for the service provider, it would be 30% of whatever portion they were unable to collect upon, even though they weren't going to have to provide that service, it would be going into the future, the party, the purchaser of the service breaking

the contract would have to pay that in order to avoid a lawsuit.

And that's what happens with these small businesses that don't have the money to spend on attorneys reviewing every legal document that comes across their desk.

They get into a situation like this, and then basically they're muscled, economically, out of litigating the issue because they just don't have the money for the attorneys, so they'll pay a service provider in a situation like this, whatever their offer is.

Maybe it's 50 cents on the dollar of the liquidated damages amount, and they'll basically, you know, just have to deal with that, and it's unfortunate, and I think it creates a vicious cycle.

What I've seen again in my experience is that these larger corporate service providers know that they have this on their side, and where is the incentive to provide a good service if you can, you know, tell the other party in the contract that hey, if you want to break the contract, you've got to pay me this, and I've got case law that supports my contract.

What have you got? You know, I'll take 50 cents on the dollar, and I'll let you break the contract, and that's the reality of what happens, and I think that it could all be avoided if there's actually a dialogue, and I think that this bill will go to promote that

kind of a dialogue on this sort of harsh provision.

SEN. MCDONALD: Okay. You know, I appreciate the proposal. I was just sitting here wondering if this would be sort of like when you take your car in to be serviced, and they just say initial here, here and here, and everybody just does it, not really reading what they're initialing for.

REP. TABORSAK: Right.

SEN. MCDONALD: Or at least I do. Maybe I'm explaining my ignorance of it.

REP. TABORSAK: Fair point. Fair point.

SEN. MCDONALD: There's a concept in refinancing of mortgages that you could have a right of cancellation for a couple of days, too, at least in the consumer oriented area. Would that be something that would interest you, if there's a liquidated damages provision in it?

REP. TABORSAK: I think that that, I think that would complement the idea here. I think that the part of the language in the bill talks about there being a conspicuous statement as well.

And I think that if that's focused on a little bit more, and perhaps if even it's given a specific font requirement, I think if that statement is very conspicuous, and perhaps apart from and separated from the provision, so that it draws the reader's attention to it.

And that statement being I understand this liquidated damages provision together with initialing next to that disclosure, I would hope that that would be a little bit better than what you've mentioned, Senator, which I totally understand is, you know, like these form contracts where you just initial at the bottom of the page and continue on, and you don't pay much more attention to it, because we've all seen that, and I'm sure most of us have done it.

I know I, myself, am guilty of doing the same thing. But I think if there's a conspicuous statement that that would help, and I'd welcome anything like a right of rescission to add to this bill as well. I think that would be a great idea.

SEN. MCDONALD: Okay, thanks very much.
Representative O'Neill.

REP. O'NEILL: I was going to say, the font requirements, because if it was printed in the same size type that this is, you wouldn't be, I can't read it, and I'm wearing my reading glasses, and I still can't read it.

Was this, the contract that you're showing us, was this a contract between two businesses? Is that what this was?

REP. TABORSAK: That's correct.

REP. O'NEILL: Okay, because in a consumer sort of situation, I don't remember all the rules, but

I mean, it seems to me this font size probably failed some kind of a test somewhere. I think it does.

So we're not dealing, and it sounds like what you're aiming at here is really not aimed so much at consumers as it is businesses that were to be protected by something like this.

REP. TABORSAK: I would agree with that. This situation has arisen mostly in the context of your large corporate service provider, and your small mom and pop business owner.

And the small business owner, we all know, in many cases, is nothing more than an extension of the individual running the business, their strengths and weaknesses, whatever knowledge they bring to the table.

So you're correct in saying that, and from my knowledge of what the law is for consumers, that there are greater protections there for the consumers.

And I think it's unfortunate, because the courts generally, and this is where we come in as Legislators, generally view when it's a business to business transaction, as it being a level playing field, the exceptions being where the Legislature steps in with a law and says, well, you know what?

In this situation we ought to provide this safeguard, changing that kind of general rule of thumb because these small businesses, really, I mean, they're no more sophisticated than the person running them.

And it's unfortunate that they're not treated with the same level of protection that the consumer is with, you know, provisions like the liquidated damages provision.

REP. O'NEILL: But when you originally, I take it this was originally your bill before we got a hold of it?

REP. TABORSAK: And Representative Godfrey. Correct.

REP. O'NEILL: And Representative Godfrey, because I'm trying to figure out, was it really aimed at, because you cite at the beginning of your testimony, if you want to make it a provision of general application.

Were you aiming it to be just in recycling contracts, or was it just for businesses? I mean, what was the restriction you originally started with?

REP. TABORSAK: I, you know, I was trying to keep it very broad, because looking at the consumer protection legislation that we have on this issue, I felt that it could complement that area as well as provide safeguards that are not there in any form in the business to business context. So I was intentionally keeping it broad, and I'm glad that it is broad.

REP. O'NEILL: Okay, so--

REP. TABORSAK: If it is one of general application, I think that that's a great idea.

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REP. O'NEILL: Okay, but it wasn't like this is distinct from what your original idea was?

REP. TABORSAK: No.

REP. O'NEILL: Okay, because that was the inference that I drew. Because, for example, in a commercial lease, you have a different set of rules that apply.

If you're a tenant in a house or an apartment or something, basically they can't hold you, the landlord has an obligation to go out and mitigate damages to find a tenant.

But if you're a commercial lessor, they don't have that kind of obligation. At least the last time I looked at the law that was the way that stood, and we do seem to draw this distinction, and it doesn't matter whether you're Microsoft, and on the other side is Halliburton or whether you're Mom's Apple Pies little bakery versus Microsoft or Halliburton.

I mean, there is no distinction unless you're a corporate or business type entity that you're right, we just sort of throw it over. There's a very sharp line of demarcation that exists.

REP. TABORSAK: Right.

REP. O'NEILL: Do you know of any other cases where we've done something like this for businesses to distinguish either bargaining power or to give us a special protection for a business versus another business?

REP. TABORSAK: Well, I would say that the only thing that comes to mind, and I could look into this more, too, is that the Connecticut Unfair Trade Practice Act is an example of legislation that does protect both businesses, I think in some instances, and correct me if I'm wrong, I'm sure our LCO people could.

But I believe that in instances it corrects, I mean, it protects businesses as well as, you know, regular consumers under the same body of law.

So I think sometimes, you know, we do make exceptions in our state laws to equally protect both consumers and businesses.

REP. O'NEILL: And this contract you said was enforced, that a judge was able to read enough of this--

REP. TABORSAK: I presume the judge, or they brought in an expert to analyze the language, and figure out what the liquidated damages provision was, because they did enforce it, and it was basically identical to the terms here.

And as an aside, there's a bill that's before, that was actually just recently JF'd by General Law, that addresses another provision that's in this particular contract, and which again has been enforced, actually by the same Superior Court decision, an automatic renewal provision in contracts.

There's basically a sister bill to this in General Law that was just JF'd requiring the same kind of conspicuous language to be initialed by the person against whom it would be enforced, doing the same thing because what happens in this contract, since we're dealing with it here, it's almost like a double whammy, for lack of a better way to explain it.

The person who signs the contract, if they've missed the liquidated damages provision, they probably missed the automatic renewal provision, which could renew the contract for another five years.

So they really have no idea what they're up against until a lawyer, you know, really scrutinizes it, does the math and says, well, if you break this contract, not only do you have to pay liquidated damages, but it's multiplied by this five-year automatic contract renewal provision, which you missed, which was also buried in the boiler plate.

So I'm hoping that both bills make it through, and that both, you know, have general application and go out there and pick up these small business owners that really should be treated more like consumers than, you know, large corporations that have deep pockets and attorneys on retainer.

REP. O'NEILL: When, because you keep mentioning small businesses, should there be a size limitation here?

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REP. TABORSAK: I don't think so. You know, I mean, because when you look at what detriment this bill would be to the business community, no one, knock on wood, has spoke up against it yet.

What we're talking about here is going forward. If this is a very broad law, contracts would have to be revised to include a conspicuous statement with a space to initial.

So I think when you look at it from that perspective, what's the harm in requiring anyone, when I say anyone, any entity, any person, from having the same safeguard, I think that general application really makes sense for this bill.

So I think that's a good question, but I don't think that it really makes a huge difference, and that it's something that we should do for everyone.

It just basically promotes fairness in contracting, which is a concept that, you know, reaches out to both contracts in the business context and in the consumer context.

REP. O'NEILL: And I assume that it's also intended that this would apply to say, a real estate contract that a lawyer's prepared?

REP. TABORSAK: I would have no problem with that, and I think that that would make sense, again. I think general application is best in this case.

REP. O'NEILL: Thank you, Mr. Chairman.

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REP. LAWLOR: Thank you. Are there other questions?
Oh, I'm sorry. Senator Roraback.

SEN. RORABACK: Thank you, I was watching up in my
office. Good afternoon, Representative.

REP. TABORSAK: Good afternoon, Senator.

SEN. RORABACK: Do you have copies of the memorandum
of decision? Was it a memorandum of decision
that the Superior Court said?

REP. TABORSAK: I do not have it with me. I could
certainly provide it. There are actually two
decisions on this issue that I know of, and I'd
be glad to get them to the Committee.

SEN. RORABACK: Were either of them appealed?

REP. TABORSAK: Not that I'm aware of, and I last
checked the law to make sure that it wasn't
appealed, probably a few weeks ago, so--

SEN. RORABACK: That's [inaudible]. Was there a
contract of an easement analysis done, or an
unconsonability analysis done?

REP. TABORSAK: It's hard to say what the total
analysis was of these two particular decisions.

SEN. RORABACK: If you have copies, that's all
right.

REP. TABORSAK: I'd be glad to get them to you, but
I think that what the court did was, it ran the
liquidated damages provision through the

standard common law, and the standard common law tests, and also whatever statutory law was in effect at the time, and it passed muster and was enforced.

SEN. RORABACK: And I worry, like Representative O'Neill does, about the standard real estate contract, which pretty much says you lose the deposit if the deal goes south, and I guess they would all have to be revised if this law passes, and law offices would have to be informed of the change.

REP. TABORSAK: Well, you know, that's a good question, and I think hopefully maybe LCO can help answer that. I'm not sure that we couldn't either exclude real estate contracts, or if they wouldn't already be excluded from what defines liquidated damages.

I haven't taken the issue that far to be able to answer honestly if, like you said, the forfeiture provision in a real estate contract, that the deposit qualifies as liquidated damages. I don't know the answer to that right now.

SEN. RORABACK: And I think some of the formal contracts even recite that this shall be as liquidated damages, and as compensatory, whatever. Thank you, Representative. Thank you, Mr. Chairman.

REP. TABORSAK: Thank you.

REP. LAWLOR: Representative Morris.

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REP. MORRIS: Thank you, Mr. Chairman. I want to commend you on a good concept. A great bill here protecting Joe Consumer, for lack of a better name.

REP. TABORSAK: Thank you.

REP. MORRIS: But I want to follow a little bit on the line where Representative O'Neill was in terms of General Law. Protecting Joe Consumer as opposed to a business to a business relationship, and I'll give you an example of one, and then you can let me know, let us know whether you think, you know, you're right.

Maybe it should just be between consumers, and that's what we're originally trying to protect, a person who may not be knowledgeable enough when they're signing that piece of paper.

Construction industry, AIA contracts, typically have a boiler plate clause in them about liquidated damages. If a project isn't completed within a certain amount of time, certain amount of days, the contractor will be charged \$500 a day, or whatever.

Typically, those liquidated damages really aren't assessed unless it's really egregious, all right?

However, I'm just sort of thinking if, you know, we include this kind of language in there because it's kind of standard, understanding within the industry that people don't go after it unless it's egregious, but now the person is actually signing their name saying, yeah, I

understood what this means, and they may go after it, and that's just one industry that I'm thinking about.

Aside from something you said, very well, you're right. They have to go out and change all these AIA contracts or whatever.

So if, and I'm not, if I'm making more of a statement than a quick see here, but I'm giving you something to consider, and saying if that's the case, the industries such as that, whereas businesses, which are really knowledgeable, they really do understand what liquidated damages mean, would it be that important to you to want this to really be a rule of general law, or should we really be considering, you know, there are certain industries where that language is there.

It isn't typically applied unless something is egregious, and certainly those are parties who normally are represented with wealthy attorneys.

REP. TABORSAK: Well, if I, Representative Morris, if I understand your question, I think if I could try to narrow it down, a lot of good thoughts there.

It sounds like the question is, should this be specific to certain industries? Should we exclude some situations, or should it just be complete general application?

REP. MORRIS: Well, if I can, you know, stick with that, with Joe Consumer, who may not be aware,

maybe small businesses, small businesses or large businesses have the attorneys that normally review their contracts before they sign them--

REP. TABORSAK: Right.

REP. MORRIS: --and we may be placing a burden on them, maybe.

REP. TABORSAK: Right. Right. I would probably fall on the side of general application again, because I think that defining, I think that we have to include small businesses in this sort of protected class here.

And to try to define what a small business is, and to continue to redefine that as times change, economics change, I just think that we'd be making something more difficult than it would need to be.

And as far as the larger corporations that have attorneys on retainer, I'm really not too sympathetic or concerned about what they have to go through in order to comply with such a law because, you know, I have more sophisticated clients.

I have, you know, smaller mom and pop type shops, and usually if there's a, I mean, first of all I draft all of my contracts.

I review any contract that lands on my desk, but the more complex the situation, the more the contract is tailored to that situation, so I don't even think that there'd be much of an

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issue as far as a detriment to those industries in adding such a disclosure into their contracts, because they probably tailor them for almost every transaction that they get into.

So I would think again, that it probably would be easier to go completely general application, and that it would not only be easier, but it really would not do any harm for anyone, and would only, I think do good.

I mean, what's a detriment to the corporate person who has to initial after a liquidated damages provision? You know, really, there isn't much there, so.

REP. MORRIS: Thank you. Very good points. Thank you, Mr. Chairman.

REP. LAWLOR: Any further questions? If not, thanks again.

REP. TABORSAK: Thank you. Thank you, Chairman Lawlor.

REP. LAWLOR: Next is Barry Hawkins, and Mr. Hawkins will be followed by Kevin Hennessy and Jack Doyle.

BARRY HAWKINS: Representative Lawlor, Senator Kissel, Members of the Judiciary Committee, thank you for the opportunity to comment in support of Committee Senate Bill 597 AN ACT ADOPTING THE UNIFORM ASSIGNMENT OF RENTS ACT.

The Connecticut General Assembly

House Democrats



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MEMBER
HOUSING
PLANNING & DEVELOPMENT
TRANSPORTATION

March 12, 2007

Re: Testimony for H.B. 6897, An Act Concerning Liquidated Damages Provisions in Contracts

Dear Senator McDonald, Representative Lawlor and Honorable Judiciary Committee Members:

Thank you for this opportunity to provide testimony on H.B. 6897, An Act Concerning Liquidated Damages Provisions in Contracts.

I support H.B. 6897 because it will bring much needed fairness and stability to business to business contracting in the state of Connecticut; specifically in the service contract context.

H.B. 6897 is directly aimed at eliminating the non-disclosure of liquidated damages provisions in contracts. Far too often small businesses in our state experience an "unfair surprise" when they learn for the first time that they are stuck in a service contract with a liquidated damages clause. Too often these provisions go unseen due to being buried in the fine print (*see sample attached hereto*). I have also heard accounts of misleading statements by sales reps contributing to this problem. Whatever the cause may be, the reoccurring theme is that these harsh provisions invariably go unnoticed, and unread, by the people who need to understand them the most. H.B. 6897 goes a long way toward addressing this problem by requiring the purchaser of the services to sign or initial a disclosure in the contract stating that they "understand this liquidated damages provision". The act of signing or initialing a specific provision in the contract will provide the necessary warning to the purchaser about the significance of that particular provision, which warning will in turn trigger a dialogue between the parties. This will go a long way toward insuring fair disclosure of these harsh contract provisions to Connecticut small business owners. Right now, no such state law goes far enough to provide this level of guaranty.

H.B. 6897 presents a simple, effective, and cost-effective way to provide greater fairness in contracting and end the ugly business practice that accompanies liquidated damages provisions. Your support of this bill and protecting small businesses is applauded and appreciated.

Thank you again for your time and consideration.

(CONTRACTOR)

Collection • Processing • Marketing

TYPE OF SERVICE SUPPLIED

FRONT END LOAD CONTAINER SERVICE

PICKUP ADDRESS IF DIFFERENT THAN CUSTOMER'S MAIN ADDRESS.

DAYS SERVICES WILL BE SUPPLIED

- MONDAY
- TUESDAY
- WEDNESDAY
- THURSDAY
- FRIDAY
- SATURDAY
- SUNDAY (IN SEASON)
- ON-CALL ONLY

TOTAL NUMBER OF DAYS: 1X

ESTIMATED VOLUME PER PICKUP: 4YD

EQUIPMENT SUPPLIED TO CUSTOMER

1-2YD FEL CONTAINER

RECYCLING SERVICE AGREEMENT

INDUSTRY	EQUIPMENT CHANGE	DATE
SERVICE TO BEGIN		
SERVICE TO TERMINATE		

1. The Contractor shall be responsible for collecting and for customer service to the Contractor's clients during the term of this agreement.
2. The Contractor shall be responsible for the type of equipment and for the hours of service to be provided by the Contractor's personnel.
3. The Contractor shall be responsible for the maintenance of the equipment and for the replacement of parts and materials.
4. The Contractor shall be responsible for the safety of the equipment and for the safety of the personnel.
5. The Contractor shall be responsible for the disposal of the waste material.
6. The Contractor shall be responsible for the collection of the waste material.
7. The Contractor shall be responsible for the processing of the waste material.
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19. The Contractor shall be responsible for the processing of the waste material.
20. The Contractor shall be responsible for the marketing of the waste material.

TERMS: NET PAYABLE UPON RECEIPT OF INVOICE

ACCEPTED BY:

RICHARD BLUMENTHAL
ATTORNEY GENERAL



55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

Office of The Attorney General
State of Connecticut

**TESTIMONY OF
ATTORNEY GENERAL RICHARD BLUMENTHAL
BEFORE THE JUDICIARY COMMITTEE
MARCH 12, 2007**

I appreciate the opportunity to support House Bill 6897, An Act Concerning Liquidated Damages Provisions in Contracts.

This legislation requires a party potentially liable for liquidated damages to sign a statement stating that the party has read the provision and understands its meaning. Any such provision that is not signed cannot be enforced.

House Bill 6897 is consistent with current case law limiting the enforceability of liquidated damages provisions to situations where the court finds:

1. the value of the damage as a result of the breach is expected to be uncertain or difficult to prove;
2. there was intent on the part of the parties to agree to a liquidated damage amount;
3. the amount in the contract is reasonable and not disproportionate to the amount of loss presumed by the contractual parties.

See, *Berger v. Shanahan*, 142 Conn. 726 (1955).

Onerous liquidated damages are used to intimidate consumers. They may have unknowingly agreed to such amount and then have difficulty proving they did not agree to it. This legislation may help some consumers -- and some businesses -- by drawing special attention to the existence and extent of a liquidated damages provision.

Proponents are concerned about the use of liquidated damages in certain solid waste contracts. I have proposed legislation to prohibit liquidated damages clauses in solid waste hauler contracts when the consumer cancels the contract prior to the end of the contract period.

I urge the committee's favorable consideration of House Bill 6897.