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Testimony of Thomas P. Willcutts Regarding H.B. 5531
An Act to Adopt the Uniform Arbitration Act

I am the managing attorney of the Willcutts Law Group, a Hartford law firm that focuses its practice, in part, on representing investors in claims against stock brokerage firms, including for losses that stem from violations of the protections accorded to Connecticut citizens by Connecticut's Uniform Securities Act. Because of my experience in this field (almost 20 years), and because nearly all of these cases are subject to arbitration agreements, I have on numerous occasions spoken on the subject of arbitration at the annual Securities Forum hosted by Connecticut Department of Banking, at its request.

I have litigated the enforceability of arbitration agreements, including one of the leading Connecticut Supreme Court decisions on this topic: *Levine v. Advest, Inc.* 244 Conn. 732 (1998). I am currently involved in an attempt to request that the United States Supreme Court revisit the issue of whether imposing mandatory arbitration agreements upon investors represents an unacceptable violation of the anti-waiver provisions of the protections accorded to investors by both the State and Federal Securities Acts.

The United Supreme Court once ruled that such mandatory arbitration agreements are voidable under the Federal Securities Acts. Although the Supreme later reversed itself on that ruling in a 5-4 decision, it specifically indicated that it would go back and readopt its original ruling if evidence were presented to it that mandatory securities arbitration agreements place investors at the mercy of a biased system unfairly controlled by the securities industry. My law firm has done a great deal of work investigating this issue and accumulating evidence concerning whether mandatory arbitration agreements in consumer contracts, such as stock brokerage contracts, are systemically unfair and biased.

In its role of addressing matters pertaining to civil justice, it is difficult for me to imagine a more important issue for this Committee to take up than the existence of mandatory arbitration agreements within consumer contracts of adhesion, which effect all Connecticut citizens. These agreements undercut our Constitutional right to have a civil dispute decided by a court of law and a jury of our peers, absent our electing to waive those rights.

The authors of the Uniform Arbitration Act specifically acknowledge within their commentary that (1) arbitration should represent a voluntary choice by the parties to forgo the protections of court and to arbitrate their dispute instead *and* (2) that non-

negotiated consumer contracts of adhesion, which contain unconscionable, one-sided and biased arbitration agreements, is a problem that needs to be addressed. The authors of the Uniform Act, however, specifically elected not to take on this problem within the Uniform Act - for various reasons I suspect, some of which they list within their Commentary.

Regardless of the motivation of the authors of the Uniform Arbitration Act for not addressing consumer contracts of adhesion within the Act, there is unquestionably a practical barrier for States to address this problem unilaterally, which is the Federally Arbitration Act (the "FAA"). The FAA can and has pre-empted state efforts to invalidate arbitration agreements that the states view as contrary to state law, unconscionable or simply unjust.

While the FAA represents a significant barrier to the ability of states to invalidate arbitration agreements, the FAA does not prevent states from passing laws to make arbitration agreements better or fairer. In my experience, the single worst feature of non-negotiated arbitration agreements within consumer contracts of adhesion is the ability of the commercial party to unilaterally determine in advance what arbitration group will decide the case. Invariably such unilateral power is used to select a group that the commercial party knows or reasonably believes will favor its interests. It is a known fact that some arbitration outfits have been created for the specific purpose of being designated to decide disputes for a particular industry in favor of that industry.

It is my belief that this problem that was identified within commentary of the Uniform Arbitration Act, but not addressed by the Act, is one that the states can effectively address in legislation that does not risk FAA pre-emption, which arises where the law attempts to invalidate the arbitration agreement altogether. The following is a general outline for a proposed solution to the problem of commercial parties, by means of consumer contracts of adhesion, having the sole power to determine what group will arbitrate its dispute with a consumer:

In any consumer contract of adhesion that contains a mandatory arbitration clause, the consumer may elect to proceed, in addition to any other choices presented within the arbitration agreement, to select the arbitrator(s) as follows:

- 1. The consumer may select an arbitrator of his or her choosing.¹**
- 2. The commercial party may select an arbitrator of its choosing.**
- 3. The arbitrators selected by the parties shall select a third, neutral arbitrator.**

¹ Service as an arbitrator will naturally be subject to the applicable ethical restrictions for arbitrator service.

The parties' dispute will be decided by a majority of the three arbitrators so selected.

Each party will bear the costs of their own arbitrator and the parties will evenly divide the costs of the neutral arbitrator, subject to a decision by the arbitrators to allocate costs in a different matter in light of the merits of the dispute before them.

If the parties' dispute is below a certain minimal amount (to be determined by the Legislature), then in consideration of the costs involved, the parties' dispute will be decided by a single arbitrator agreed upon by the parties. The costs of the single arbitrator will be evenly divided between the parties, subject to a decision by the arbitrator to allocate costs in a different matter in light of the merits of the dispute.

These provisions regarding splitting the costs of arbitration shall be overridden by any provision within the agreement that places greater responsibility upon the commercial party for bearing the costs of the arbitration.

Where the dispute is to be decided by three arbitrators and the parties' arbitrator selections cannot agree upon the selection of a neutral arbitrator, or where there is to be a single arbitrator and the parties cannot agree upon the selection of a single arbitrator, then either party may petition the Superior Court to appoint a neutral or single arbitrator.

This arbitrator selection method has a long history of use and it is widely regarded as being an unbiased and fair means of selecting arbitrators. There is no defensible argument for one party to an arbitration agreement to have the sole power to unilaterally determine the group that will administer an arbitration and determine who will serve as the arbitrator(s).

This proposal need not be inserted into the Uniform Arbitration Act itself, because it more accurately represents a consumer protection law. There are many examples of consumer laws passed by the Connecticut Legislature to protect Connecticut citizens from onerous and one-sided terms within consumer contracts of adhesion. Regardless of how this proposed protection for Connecticut consumers is formally enacted, no law addressing arbitration should be passed without addressing this fundamental issue of fairness.

Thank you,

Thomas P. Willcutts