



30 Bank Street
PO Box 350
New Britain
CT 06050-0350
06051 for 30 Bank Street
(860)223-4400
fax (860)223-4488

Testimony of David M. Bizar
Chair, Connecticut Bar Association Consumer Law Section
House Bill 5128,
An Act Clarifying Certain Depository Institution Disclosure Requirements
Committee on Banks
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Senator Duff, Representative Barry, members of the Committee, thank you for the opportunity to comment on House Bill No. 5128, An Act Clarifying Certain Depository Institution Disclosure Requirements. My name is David M. Bizar. I am the Chair of the Connecticut Bar Association's Consumer Law Section and I am also a partner in the Hartford office of McCarter English LLP. The members of the Consumer Law Section have a particular interest in HB 5128 and Section 42-150u of the 2008 supplement to the General Statutes codifying PA 07-210, which applies solely to consumer contracts. The Section supports the efforts of the proponents of HB 5128 to exempt contracts between a consumer and a depository institution, but respectfully submits that the proposed amendment does not go far enough.

The Consumer Law Section's membership represents diverse and opposing interests, and includes plaintiff's lawyers, defense lawyers, compliance lawyers and public interest attorneys. It is rare that the Section takes a position on proposed legislation because in order to adopt one a substantial majority of its membership must agree. In this instance, the Consumer Law Section's membership voted unanimously to oppose PA 07-210 in its entirety because it will not help consumers and will result instead in unintended consequences and needless litigation. Section 1 of P.A. 07-210 provides that no provision in a contract to purchase or lease goods or services entered into, renewed, or extended on or after July 1, 2008 primarily for personal, family, or household purposes that provides for the payment of liquidated damages in the event of a breach is enforceable unless:

1. the contract contains a statement in boldface type at least 12 points in size immediately following the provision stating "I ACKNOWLEDGE THAT THIS CONTRACT CONTAINS A LIQUIDATED DAMAGES PROVISION," and

2. the person against whom the provision is to be enforced signs his or her name or writes his or her initials next to the statement.

The Act may actually hurt consumers and businesses both when it is complied with and when it is not. Under "well established" law, a liquidated damages provision must fix "fair compensation to the injured party for a breach of the contract." *Berger v. Shanahan*, 142 Conn. 726, 731 (1955). Three conditions must be satisfied: "(1) The damage which was to be expected as a result of a breach of the contract [must be] uncertain in amount or difficult to prove; (2) there [must be] an intent on the part of the parties to liquidate damages in advance; and (3) the amount stipulated [must be] reasonable" *Id.* at 731-32. When the amounts are unreasonable or are penalties, they are already unenforceable. *Id.* When the law is complied with, the consumer will have initialed the disputed provision and specifically acknowledged it. A court will be more likely to uphold the provision in these circumstances, even if is approaching that of a penalty. On the other hand, when the law is not complied with the liquidated damages provision, which under existing law would have had to have been fair to the consumer to be enforceable, will now be void. Yet, the consumer will still owe damages to the business for their breach. The parties will have to engage in litigation to determine the amount of these damages, which in theory could be higher, and many consumer contracts obligate the consumers to pay the business's legal fees. Consumers may also receive windfalls in those instances in which businesses that are unaware of the law execute non-compliant contracts, and then decide not to pursue the consumers for their damages.

Understanding that repealing PA 07-210 is preferable but unlikely, the Section alternatively suggests that the Committee consider amending Section 1(b) House Bill 5128 to exempt:

- All contracts with regulated persons or entities, including those licensed, registered or regulated by the Federal Deposit Insurance Corporation, Office of the Comptroller of Currency, Federal Trade Commission, and the Connecticut Departments of Banking, Consumer Protection, Insurance, Motor Vehicles, Public Health, Public Utility Control and Public Works;
- All contracts with persons or entities who are licensed, certified, or registered under Title 20 or Title 21 of the Connecticut General Statutes;
- All contracts exempted under CGS Section 42-287, including consumer contracts with securities broker-dealers and registered investment advisors; and
- health club contracts (CGS Section 21a-216, *et seq.*), apartment listing service contracts (CGS Section 42-103b, *et seq.*), time share contracts (CGS Section 42-103w, *et seq.*), layaway plans (CGS Section 42-125aa, *et seq.*), home solicitation sales (CGS Section 42-134a, *et seq.*), funeral service contracts (CGS Section 42-200, *et seq.*), rent-to-own agreements (CGS Section 42-240, *et seq.*), extended warranty agreements (CGS Section 42-260, *et seq.*), diet program contracts (CGS Section 42-280, *et seq.*), and telemarketing agreements (CGS Section 42-285).

In addition, the Consumer Law Section recommends further amending House Bill 5128 to (a) add a geographical restriction limiting the applicability of the law to “contracts made in this state;” (b) define liquidated damages to mean “an amount of money agreed upon by both parties to a contract when entering into the agreement that one will pay to the other upon materially breaching (breaking or backing out of) the contract due to the breach;” and (c) to exempt contracts for the purchase, sale or lease of property in excess of \$50,000.

On behalf of the members of the Consumer Law Section I respectfully request that the Banks Committee consider repealing PA 07-210 or, alternatively, amending House Bill 5128 as suggested. The members of the Consumer Law Section would be pleased to work with members of the General Assembly to help draft substitute language to achieve this objective.

Thank you again for this opportunity to comment on House Bill 5128. I would be happy to answer any questions that you may have.