

TESTIMONY OF MARK P. KINDALL  
CONCERNING COMMITTEE BILLS 317 AND 320

My name is Mark Kindall. I am a resident of West Hartford, Connecticut, and for the past four years I have represented Marta Farb in the litigation against a bank in Connecticut that she described in her testimony to the Committee concerning Committee Bills 317 and 320. I had not intended to provide testimony to the Committee myself; however, I believe that it is important to correct some of the misleading statements made by the representative of the Connecticut Banker's Association. Accordingly, I ask that the Committee consider this testimony as part of the record for the Public Hearing.

- The CBA representative testified that the legislation addresses a problem "that did not occur" in Ms. Farb's case. The proposed legislation, however, addresses four problems: (1) that banks are arguing that state laws protecting consumers from oppressive attorney-fee shifting provisions do not apply to bank depositors; (2) that banks craft fee-shifting language for their contracts that makes consumers liable for the banks' legal fees in a dispute *regardless* of whether the bank prevails; (3) that making consumers liable for the banks' attorneys' fees in any dispute is inequitable because banks can afford to hire multiple high-priced firms that no individual customer can afford; and (4) that banks can insert language into contracts that gives them the right to take money out of their customers' accounts without notice or court order in the event of a dispute. Of these four things, only the last did not occur in Ms. Farb's case – and the only reason it did not occur was because she closed her account before she filed her lawsuit.
- The CBA representative testified that, in Ms. Farb's litigation, the bank "has not asked the consumer to pay its legal fees" but has only "asked for a declaratory ruling concerning its rights under the contract." This is not simply misleading, it is false. To quote directly from the bank's own court papers, the bank has asked the court to grant "a declaratory judgment *that it is entitled to all fees and costs incurred in this action*" as well as an award of "damages," "attorneys' fees," interest" *and* "a set off against any sums that may be awarded to Plaintiff in this action." The last item is significant, because it demonstrates that the Bank is asking the Court to compel Plaintiff to pay its attorneys' fees and expenses even if she prevails in the case (which is the only circumstance in which she would be awarded "any sums"). The CBA Representative also suggested that these fees might be paid not by Plaintiff but by her attorneys ("the consumer is not responsible for paying any legal fees (the law firm is responsible)"), but this is a complete fabrication. Plaintiffs' firms work on a contingency, so they don't get paid unless Plaintiff prevails in some measure. But there is no legal doctrine of which I am aware that would make Plaintiffs' attorneys

liable for paying *defendants'* legal fees, and the CBA representative did not cite to any.

- The CBA representative indicated that it would be a great hardship for banks across Connecticut to redraft their deposit agreements if this legislation passed, and this would be a "tremendous burden" that is unwarranted because "we are not aware of any situations where banks are alleged to have used those provisions irresponsibly." Ms. Farb's testimony demonstrates that banks *do* use such broad contractual authority to bully and intimidate their customers if any of their policies are challenged; although the CBA does not regard this as "irresponsible," consumers probably would not agree with that assessment.
- The CBA representative's testimony indicates that the kind of contract language at issue in this case is common. I do not know whether that is the case; most bank contracts that I have seen give the bank the power to charge customer's accounts for expenses incurred dealing with particular issues like third-party attachments, and have separate provisions that deal with disputes between the bank and its customers. Moreover, most banks revise their deposit agreements on a regular basis. All that said, the Committee could save banks from having to redraft their contracts by making a minor modification to the bills to prohibit the abusive practices rather than the contract language that authorizes the practices, as follows:

The language in Section 1(b) of Committee Bill 317 which appears at lines 27-31 could be changed as follows:

~~"No bank or other entity that accepts and holds deposits from consumers shall include a clause in its consumer contract allowing for such bank or other entity to collect~~ have any claim for, or right to, attorneys' fees from its customers ~~if such bank or other entity prevails in a claim brought by consumers based on the consumer contract."~~

The language in Section 2(b) of Committee Bill 320 which appears at lines 29-33 could be changed as follows:

"In a claim brought by consumers, any ~~Any~~ bank or other entity that accepts and holds deposits from consumers is prohibited from ~~including a clause in its depository contract that allows for such bank or other entity to holding~~ holding a consumer liable for its losses, costs or other expenses prior to adjudication of the rights of the parties."

- The CBA representative indicated that there was no reason to change the status quo, since a judge will ultimately rule on the question of attorneys' fees. Even in cases like

Ms. Farb's, however, where the bank can't simply debit its customer's account because it has been closed, a judge's determination on fees is guided by what the law permits. In most litigation, the "American Rule" requires each side to bear its own litigation costs, and a judge never even addresses the issue. While we permit parties to a contract to modify the American rule by agreement in some cases, Connecticut, like most states, places limits on the types of fee-shifting provisions commercial parties can put in consumer contracts. The question before this Committee is whether banks should be allowed to make consumers pay their legal fees when consumers have claims against banks. Consumers have no negotiating power with respect to the content of deposit agreements; they are presented on a take-it or leave-it basis. Banks provide an essential service which most consumers can't simply do without. And banks typically have the resources to hire far more expensive attorneys than most of their customers could ever afford. Accordingly, it makes no sense to allow fee-shifting in these situations. I urge the Committee to adopt the proposed bills, with the modification suggested in Ms. Farb's written testimony.