

TESTIMONY BEFORE THE MARYLAND SENATE ON HB 103

My name is Jeff Sovern and I am the Michael Millemann Professor of Consumer Protection Law at the University of Maryland Francis King Carey School of Law. Thank you for allowing me to testify in this matter. I make my statements in my individual capacity and do not represent any organization.

HB 103 would prevent businesses from using fine print that “waives, limits, impairs, or disclaims a right conferred or created or a manner of enforcement established by federal or state law.” Maryland has already enacted laws that limit some such clauses. For example, last year Maryland prohibited businesses from using small print to shorten the amount of time consumers have to sue.¹ Similarly, Maryland’s Uniform Commercial Code blocks businesses from disclaiming warranties or limiting the remedy for warranty breaches.² HB 103 simply extends this approach to other contract clauses not already covered by these existing laws. In doing so, Maryland would protect consumers against bad actors that seek to take advantage of consumer inability to understand complex contract terms.

Businesses should not be able to take advantage of consumers by burying terms in fine print that make businesses unaccountable for misconduct. Inserting contract terms into contracts to overturn state and federal law allows unscrupulous businesses to take advantage of consumers who cannot protect themselves because they cannot understand contract terms, do not read fine print, and have no power to negotiate form contracts. This point is dramatically illustrated by the company that jokingly inserted a term in its contract obliging consumers to surrender their soul upon request, only to discover that 88% of its customers had agreed to do so.³

Studies have confirmed that consumers don’t read contracts.⁴ Among those who have acknowledged not reading contract terms before agreeing to them are Chief Justice Roberts,⁵ former Court of Appeals Judge and legal luminary Richard Posner,⁶ consumer law professors,⁷ and even the lawyers who draft such contracts.⁸

One reason consumers may not read contracts is that they cannot understand them. Numerous studies, including some I was involved with, show that consumers have difficulty understanding

¹ See Consumer Protection—Consumer Contracts—Limitation Periods, 2025 Maryland Laws Ch. 194 (H.B. 431).

² See Md. Code Ann. Com. Law § 2-316.1.

³ See 7,500 Online Shoppers Unknowingly Sold Their Souls, FOX NEWS (Apr. 15, 2010).

⁴ See Florencia Marotta-Wurgler, *Does Contract Disclosure Matter?* 168 J. INSTITUTIONAL & THEORETICAL ECON. 94, 96–97 (2012) (finding that the overwhelming majority of consumers do not read their contracts).

⁵ See Debra Cassens Weiss, *Chief Justice Roberts Admits He Doesn’t Read the Computer Fine Print*, ABAJ (Oct. 20, 2010).

⁶ Debra Cassens Weiss, *Judge Posner Admits He Didn’t Read Boilerplate for Home Equity Loan*, ABAJ (June 23, 2010).

⁷ See Jeff Sovern, *Another survey of consumer law professors fails to find any who always reads consumer contracts before signing them*, CONSUMER L. & POL’Y BLOG (June 17, 2019).

⁸ See Jeff Sovern, *Poll finds majority of consumer financial services lawyers rarely or never read consumer contracts before agreeing to them*, CONSUMER L. & POL’Y BLOG (NOV. 21, 2023); See Jeff Sovern, *Lawyer who created use of arbitration clauses to prevent class actions doesn’t read consumer contracts*, CONSUMER L. & POL’Y BLOG (APR. 10, 2022).

contract clauses that affect their rights.⁹ It is simply unfair to allow companies to strip away consumers' rights when consumers cannot understand the provisions doing so.

Ceccone v. Carroll Home Services, 165 A.3d 475 (Md. 2017) illustrates the unfairness of these contract terms. That case involved a maintenance agreement for a furnace. Obviously, furnaces are expected to last much longer than a year, but the agreement limited the time in which the consumer could sue to one year—though nothing in the contract shortened the statute of limitations for claims that the company could bring. The clause appeared on the back of a printed form with eighteen paragraphs; some sentences were printed entirely in capital letters, drawing attention to them, but the limitations clause was not. For the reasons discussed above, consumers are simply not in a position to protect themselves against such one-sided clauses. The Court determined that such clauses are enforceable if they satisfy several conditions, including that they are reasonable. Unfortunately, few consumers have the resources to litigate questions of whether contract terms are reasonable and so for many consumer transactions, a reasonableness test is no better than a blanket rule allowing such terms to stand. While the legislature last year overturned *Ceccone* as to terms limiting statutes of limitations,¹⁰ the legislature should make clear that other contract terms should likewise not be subjected to a reasonableness test.

HB 103's provision providing that violations of the section would be an unfair, abusive or deceptive practice would deter unscrupulous businesses from tricking consumers by including unenforceable terms in their contracts. Researchers have discovered that consumers often believe they are bound by unenforceable contract terms.¹¹ That confirms the intuition that most consumers don't know whether particular contract terms are enforceable or not and so believe that they are bound even by unenforceable terms. Consequently, if businesses include unenforceable terms in their contracts, they may be able to trick consumers into thinking the terms bind them when they don't. As a result, just outlawing particular terms is not enough; the General Assembly should deter businesses from using unenforceable terms by making inclusion of such terms itself a violation of the law, as HB 103 does.

All businesses should be governed by the same rules. At present, some businesses can use contracts to shorten the period in which consumers can hold them accountable for their products and some businesses can't. Some companies can limit consumer remedies and some companies can't. Businesses should face a level playing field and consumers transactions should be governed by the same laws on matter who the provider is. HB 103 would take a big step towards making that happen.

⁹ See, e.g., Roseanna Sommers, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation*, 19 PLOS ONE 1 (2024); Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, "Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 Maryland LAW Review 1 (2015); Jeff Sovern & Nahal Heydari, *Not-So-Smartphone Disclosures*, 76 Arkansas Law Review 437 (2023).

¹⁰ See Consumer Protection—Consumer Contracts—Limitation Periods, 2025 Maryland Laws Ch. 194 (H.B. 431).

¹¹ See Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 Cornell Law Review 117 (2017); Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine Print Fraud*, 72 Stan. L. Rev. 503 (2020).

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Including terms taking away rights the law provides consumers is one way for bad actors to take advantage of consumers. Maryland has adopted its consumer protection laws for a reason and it should stand by those laws. For these reasons, I respectfully urge the Maryland General Assembly to VOTE FAVORABLY on HB 103.

Respectfully submitted,

Jeff Sovern