INDIANA COMMUNITY ACTION POVERTY INSTITUTE

Research and Public Policy

Testimony before the House Financial Institutions Committee

2/13/2024

Greetings Chairman Baldwin & Members of the Committee,

Thank you for the opportunity to provide testimony. My name is Erin Macey, Director of the Indiana Community Action Poverty Institute.

We are talking today about making a significant change to the relationship each of has with our financial institutions - covering checking, savings, retirement accounts, business checking, and so on.

I understand that this law is designed to make updating and adding to contracts easier for financial institutions – and I understand their interest. It would be far easier to modify contracts in this way than to secure affirmative consent. What has troubled most me about this bill from the beginning – and what I keep hoping I'm wrong about – is that with this language, there appear to be no limits to what can be changed or added to a contract by notice. Each attorney I have spoken to – and that's probably totaling two dozen by now – has suggested to me that the power we are giving financial institutions here is very broad – unprecedented is one word that has been used, unconstitutional is another.

There have been four concerns that have been raised in the course of vetting this bill:

- For example, nothing in this bill prevents the written notice from being buried somewhere a consumer would be unlikely to notice it. In the recent Decker v. Star case, notice was buried on p. 13 of a monthly e-statement.
- Nothing in this bill prevents a bank from adding new terms that are retroactive or that would permit a bank to essentially change the contract in the past. For example, if the bank had been charging fees that were not permitted by its agreement, nothing in this bill stops the bank from adding a term to the contract that says customers waive any right to refunds of those fees. This might actually open the language up to constitutional challenge, because the purpose of a contract is to settle terms and if one party can, at any time, make retroactive changes, it could be seen as impairing the right to contact.
- Nothing in this bill prohibits a bank limits the scope of changes or additions to those a consumer might benefit from or want.
- Nothing in this bill puts a timeline on how long the customer has before the change becomes effective, yet the decision to end a banking relationship and start a new one is quite burdensome and time-consuming. For some customers – small business owners in particular, who may have invoicing and billing tied to their accounts - this would make rejecting new terms extremely difficult.

We would ask that you add consumer guardrails:

- Hold financial institutions to the duty of good faith, which in Indiana we currently in insurance and employment contracts – and have seen courts in Indiana apply to banking relationships, as in Old National Bank v. Kelly, where the courts held "we discern no crucial difference between insurance companies and banks, as each –from a superior vantage point – offer customers contracts of adhesion, often with terms not readily discernable to a lay person."
- Disallow financial institutions from making changes that are retroactive, so that if a financial institution was improperly charging fees or failing to credit interest properly, we would stop the bank from adding a term to the contract that says customers waive any right to those fees or that interest. In other words, no "get out of lawsuits free" cards.
- Provide conspicuous notice that continued use will be deemed assent so that notices won't be buried somewhere a consumer is unlikely to see them, such as in the fine print on page 14 of a monthly e-statement and

- Provide a long enough period for customers to make an informed decision to continue the banking relationship – one that recognizes that it is not so easy to disentangle from a banking relationship, particularly for small business owner who may have invoicing, payroll, and billing all tied to a particular account. [In the Decker case, customers were only given 10 days to close their bank account.]

If today's bill makes you squeamish, it might give you some comfort to know that on February 1st, the Indiana Supreme Court reconsidered the Land decision – the decision that I understand gave rise to these concerns – and added language that might render this legislation unnecessary:

"We recognize the practical difficulties that businesses may face in securing affirmative consent to contract modifications from existing customers. And for that reason, we leave open the possibility of adopting, in some future case, a different standard governing the offer and acceptance of unilateral contracts between businesses and consumers."

We know there are fine financial institutions in the state of Indiana that would only use this power for good. But we also have to accept the reality that there will be those that will seek to take advantage or who might seek to protect their own interests by taking away consumers' rights. We want Hoosiers to be banked and we want them to feel like they can establish relationships of trust with their financial institution and be treated fairly by those institutions. As you make your decision about this legislation today and moving forward, I urge you to be mindful of the full scope of the impact this legislation could have on all your constituents who engage in banking relationships and strike a reasonable balance between their interests and the interest of financial institutions.