I am here to support Delegate Krizek's proposed addition to the Virginia Consumer Protection Act, HB737.

The provision as proposed states:

17a. Failing to disclose in any advertisement for goods or services that the provisions of any contract or written agreement associated with the goods or services advertised restrict the consumer's rights in any civil action or right to file a civil action to resolve a dispute that arises in connection with the consumer transaction. Such provisions shall be void and unenforceable in any instance where the supplier fails to provide such required disclosure;

The purpose of the provision is to highlight practices of merchants to impose restrictions on consumers in maintaining the consumer's rights to pursue claims against the merchant when the good or service causes a dispute.

Such restrictions typically restrict the consumer's limitation on damages, the forum where relief can be sought, choice of law, or the causation of a claim. Typically these restrictions are embedded in fine print in multipage contracts of adhesion. And even in such inconspicious areas the terms are not disclosed until the ultimate time of sale.

Making the requirement to disclose such limitation on relief more conspicuous the Consumer will be on fair notice and may seek alternative sources for the good or service which does not require the consumer to limit their remedy or the consumer can understand the options and availability of the good or service in relation to these limits.

I would like to address an issue relating to the Federal Arbitration Act raised by Legislative Counsel. The FAA does assert preemption and there is a concern that this proposal would be unenforceable due to the FFA's goal of encouraging Arbitration. However there are many judicial results where these types of minor infringes on Arbitration have been upheld. For example in a 2013 NY case, the Arbitration enforcement was held to only apply to transactions in interstate commerce. In a July 2020 case the Fourth circuit affirmed a EDVA case which held a payday lending contract imposing a foreign choice of law and forced Arbitration claim against public policy and nonenforceable. Recently, in 2019, the Supreme Court let stand a 9th Circuit case involving ATT and Comcast effort to impose Arbitration when consumers were seeking injunctive relief. Regardless, restrictions such as forums and damages certainly would not be preempted.

I would also say that many merchants routinely put restrictions in their contracts due to pressure from trade groups and overly zealous advisors but really do not support alienating their customers. I would give you a personal example where I purchased an automobile from Beyer Automotive. Only upon completing the purchase did I notice a forced arbitration clause in the sale terms. After a personal contact with then Congressman Don Beyer, the dealership crossed out the Arbitration clause. Congressman Beyer noted that the form used was one supplied by the Dealership Trade Group. I understand that the Beyer Dealerships no longer use the standard trade group form and their sales contracts do not require arbitration.

Respectfully,
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