



Testimony to the House Government Oversight Committee in Opposition to provisions of House Bill 376

Curtis M. Fifner

Dec. 8, 2021

Chair Wilkin, Vice-Chair White, Ranking Member Brown, and members of the House Government Oversight Committee, thank you for the opportunity to testify on this important legislation.

My name is Curtis Fifner, and I am an attorney with Elk & Elk in Columbus, Ohio. I am also the Legislative Chair for the Ohio Association for Justice, (OAJ). As a voice of the plaintiff's bar in Ohio, OAJ is dedicated to preserving individuals' right under the Seventh Amendment and Article I of Ohio's Constitution, both of which guarantee the citizens of Ohio the right to trial by a jury of their peers in civil cases.

In this digital age, the crossroads of privacy, property, and injury are more confusing than ever. HB 376 seeks to clarify this confusion by creating certainty that data is the property of the consumer and uninformed use of the consumer's property is illegal. This bill brings to mind Ferris Bueller, who gave the keys of Cameron's father's Ferrari to a valet. Unbeknownst to Ferris and Cameron, the valet took advantage of the opportunity and abused the prized car. Should we allow Ohioans to be advantage of like this, or should mechanisms be included for the private sector to work?

I am not a computer scientist, so the focus of my testimony is in how the these laws will be enforced when a company breaks these laws. Sadly, this bill has inadequate enforcement mechanisms, would do little to protect Ohioans privacy, and begs the government to help.

According to the bill, when a covered entity breaks the new law, customers are prohibited from privately seeking recourse. For example, if a company, whose privacy policy tells the Ohioan that they will not sell the consumer's data, sells the data anyways, I am prohibited from helping the Ohioan get it back.

Instead, the bill establishes the Attorney General as the sole authority to enforce the requirements of the bill. Using the same example as before, if a company, whose privacy policy tells the Ohioan that they will not sell the consumer's data, sells the data anyways, the process of being made whole looks like this:

- 1) File a complaint with the company.

- The company may charge the customer different rates if the customer wants to exercise their rights. In order for the customer to make a valid complaint, the company can require customer to verify by providing personally identifiable information to them. This may be in conflict with the customer's right to take back personally identifiable data.

Or the customer can:

- 1) File a complaint with the Attorney General, who may bring an action on behalf of the customer or initiate an investigation if they have "reasonable cause".
 - To avoid penalty, the company must only "cure" the customer and promise never to break the law again.
- 2) Only if a company breaks the law a second time in the same exact way as the first, the Attorney General may file civil action on behalf of the customer.
 - However, the company can evade all responsibility by asserting that they have implemented a list of technological best practices written by a federal bureaucracy.
- 3) If the AG is somehow successful in the case, the state may be awarded up to \$5000 per violation but the Ohioan may be made whole up to \$2250. There are questions about what constitutes a violation, is it one pieces of data sold or all the pieces of data sold?

This process does not protect Ohioans. It doesn't even help Ohioans.

OAJ members and I believe the private sector can regulate itself much better and more efficiently. Instead of that complicated and bureaucratic process, the bill should allow Ohioans to maintain their constitutional rights and allow juries to hold a company accountable for breaking the law. In other words, the individuals who are harmed by companies that sell their valuable personal data without their permission should be able to take action to hold these companies accountable instead of having to rely on the government to have the time and resources to take appropriate action on their behalf.

The bill would be much improved with the following amendments:

- Allow a private right of action with a 2 year statute of limitations, or allow a private right of action if the AG chooses not to prosecute a claim.
- Clearly define how an illegal action is required to be cured for an Ohioan, whose rights have been abridged.
- Specify that Ohio consumer complaints should be heard by Ohio judges and juries.

- Remove the safe harbor for compliance with the federal best practice document. If the legislature insists on including a safe harbor from accountability, companies instead should be required to adhere to specific, enforceable requirements that are written and controlled by Ohioans.

After reading this bill, I was confronted with a quote from President Reagan: "*The nine most terrifying words in the English language are: I'm from the Government, and I'm here to help.*"

President Reagan believed that Government was inefficient, slow, and unpredictable, and his words should be a warning flag for legislators on this bill. If the government, who has "exclusive authority" in this bill, is ineffective at protecting or simply chooses not to protect our rights, what good are the rights the bill creates?

Thank you for the opportunity to testify on HB 376. I am happy to address any questions of the committee.