

January 12, 2017

The Honorable Bill Dodd
California State Senate
State Capitol, Room 5064
Sacramento, CA 95814

**SUBJECT: SB 33 (DODD) CONTRACTS FOR GOODS OR SERVICES: WAIVER: FRAUD,
IDENTITY THEFT, AND WRONGFUL USE OF PERSONAL IDENTIFYING
INFORMATION
OPPOSE – JOB KILLER**

Dear Senator Dodd:

The California Chamber of Commerce respectfully **OPPOSES** your **SB 33 (Dodd)**, which has been labeled a **JOB KILLER**, because it discriminates against arbitration agreements made as a condition of entering into a contract for goods or services and interferes with the fundamental attributes of arbitration, which is likely preempted by the Federal Arbitration Act (FAA). This will lead to confusion, uncertainty and costly litigation for such contracts.

SB 33 is Applicable to All Contracts for Good or Services:

SB 33 applies to any contract for goods or services that requires an individual to submit any and all disputes to arbitration, including those arising from claims alleging fraud, identity theft, or personal identifying information. This proposal basically sets up a pleading pathway for consumer attorneys to avoid arbitration by allowing such consumer attorneys to allege numerous claims, including a claim for identity theft or wrongful use of identifying information in the complaint in order to avoid arbitration. Thereafter, the attorney can dismiss the claims for fraud, identity theft, or wrongful use of identifying information, and move forward on the remaining claims in litigation that would have been subject to arbitration. Accordingly, despite the intent or argument that this bill is limited to only certain claims, it will actually impact all consumer contracts.

SB 33 is Likely Pre-empted Under the Federal Arbitration Act:

SB 33 prohibits arbitration agreements made as a condition of a contract for claims involving fraud, identity theft, and wrongful use of personal identifying information. The United States Supreme Court has been consistently clear that a prohibition of arbitrating certain claims is preempted under the Federal Arbitration Act (FAA). See *AT & T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1747, 179 L.Ed.2d 742 (2011)(stating '[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.');

Marmet Health Care Center, Inc. v. Brown, 132 S. Ct. 1021 (holding that West Virginia statute that prohibited the arbitration of personal injury or wrongful death claims arising from a patient's stay at a nursing home as preempted under the FAA). **SB 33** prohibits mandatory arbitration of specific claims involving fraud, identity theft, and wrongful use of personal identifying information. Based upon numerous Supreme Court decisions, this targeted prohibition is likely preempted under the FAA.

SB 33 is also likely preempted under the FAA as it discriminates against arbitration clauses in contracts for goods or services. As set forth in *Concepcion, supra*, a state can enact a contractual defense that is applicable to **all** contracts, but cannot single out arbitration clauses. For example, in 2015, the United States Supreme Court in *DIRECTV, Inc. v. Imburgia*, criticized California for targeting and discriminating

against consumer arbitration agreements. In *DIRECTV*, a California court had applied a rule of law to invalidate an arbitration agreement, which the Supreme Court had already deemed unlawful. In the opinion authored by Justice Breyer, the Court stated that, because California applied an invalid state law to only arbitration agreements and no other contracts, such an application did not place arbitration agreements on “equal footing” with other contracts and, therefore, was preempted by the FAA. *DIRECTV*, 136 S.Ct. 463 (2015); *See also Doctor's Associates, Inc. v. Cassarotto*, 517 U.S. 681 (1996) (striking down a state requirement for a special notice required only for arbitration agreements, not contracts in general, as preempted by the FAA).

Similarly here, **SB 33** targets mandatory arbitration clauses made as a condition of a contract for goods or services that waive an individual's right to pursue civil litigation and deems such provisions as unconscionable. However, there are numerous other mandatory provisions that a party can require as a condition of entering into a contract for goods and services that are not precluded, such as pricing, time and manner of delivery of the goods and services, warranties, performance of the contract, actions that constitute a material breach versus a minor breach of the contract, subcontracting of the work, etc. All of these issues could still be made as a condition of the contract without being statutorily deemed “unconscionable” and, therefore, **SB 33** discriminates against arbitration clauses. Accordingly, **SB 33** is likely preempted by the FAA.

Attorneys Are Generally the Biggest Winners in Class Action Litigation, Not the Consumer:

Arbitration can and do actually provide individuals with a better remedy than pursuing lengthy class action litigation. In *Concepcion*, the consumer pursued a class action lawsuit against AT&T for false advertisement of a “free phone” when the consumer was required to pay \$30.22 for the sales tax. The arbitration clause in *Concepcion, supra*, provided the consumer with the following remedies: (1) the consumer could initiate a dispute on the company's website; (2) once initiated, the company had 30 days to resolve or settle the dispute; (3) if no resolution after 30 days, the consumer could initiate arbitration, all costs of which were covered by the company for non-frivolous claims; (4) the arbitration had to take place in the county where the customer was billed for his/her services; (5) if the claim was less than \$10,000, the consumer could decide whether to have the arbitration take place by phone, in-person, or through written statements; (6) the company was barred from seeking reimbursement of any attorney's fees; and, (7) if the arbitrator awarded the consumer more than the company's last settlement offer, the consumer automatically received an additional \$7,500. *Concepcion*, 131 S.Ct. at 337.

Comparatively, several recent class actions for data breaches/personal identifying information pursued through civil litigation demonstrates that attorneys are the biggest financial winners in class actions:

Perkins v. LinkedIn Corporation, United States Northern District of California, Case No. 5:13-cv-04303-LHK (2016), in which it was alleged LinkedIn wrongfully used members contact information. The case settled for \$13 million, the funds divided as follows: (1) \$1,500 for the named plaintiffs; (2) no less than \$10 per class member; (3) \$3,250,000 for attorney's fees and costs.

Lim, et. al., v. Vendini, Inc., Superior Court for the County of Santa Clara, Case No. 1-14-cv-259897 (2014), in which it was alleged personal identifying information of customers was compromised. The case settled for \$3,000,000, the funds divided as follows: (1) \$2,500 for named plaintiffs; (2) up to \$3,000 per class member for unreimbursed losses as a result of the identity theft or up to \$1,000 for unreimbursed expenses as a result of the identity theft; (3) \$652,340 for attorney's fees.

In re: The Home Depot, Inc. Customer Data Security Breach Litigation, Case No. 1:14-md-02583-TWT, in which it was alleged consumer credit card information was compromised. The case settled for \$13 million, the funds divided as follows: (1) up to \$1,000 for named plaintiffs; (2) identity theft protection for 18 months; (3) up to \$10,000/class member with proof of losses; (4) \$8,475,000 for attorney's fees and costs.

A recent article published on November 23, 2014, by Jonathan Sourbeer in the *Wall Street Journal* titled “A Close Reading of My \$20.91 Settlement Check,” effectively summarized the cost of tort litigation. In this article, an owner of a Toyota vehicle received a settlement check for \$20.91 for the class action

litigation regarding the unintentional acceleration alleged product defect in Toyota vehicles. The check was sent to the recipient for any potential personal injury or property damage, even though the recipient never claimed to have suffered either. The recipient went to the website referenced on the check to find out more about the lawsuit and learned that the court awarded attorney's fees totaling \$200 million, plus \$27 million for expenses. The 25 primary plaintiffs and class representatives received \$395,270.

After learning this information, the recipient posed the following questions: "For me to get that \$20.91 check is costing Toyota more than half a billion dollars in litigation, fees and the settlement awards. How much will that cost me in the future? Will it add \$200 to the price of my next car? Or \$500? Or \$1,000? Maybe that's too much of an add-on in this case. But is it too much when we start totaling the lawsuits that hit all the products we buy every year? Why do we have so much litigation, and why are courts (and the juries of our peers), awarding so much money in situations when lawyers have produced so little, comparatively, for their clients? . . . Ultimately, we're sticking it to ourselves."

SB 33 Will Create a Worse Litigation Environment and Result in Lack of Job Creation:

Banning pre-dispute arbitration agreements in contracts for goods and services will force individuals into an already overburdened judicial system. Assuming an individual can find an attorney willing to pursue the case, a consumer will potentially have to wait years for a resolution, as opposed to arbitration that is generally resolved in less than a year.

California's economy is dependent on its ability to create an environment where job creation can flourish. In the 2014 *Chief Executive's* tenth annual survey of CEOs' opinions of Best and Worst States in which to do business, California was ranked as one of the worst three states in which to do business. The magazine stated: "[a]ccording to Dun & Bradstreet, 2,565 California businesses with three or more employees have relocated to other states between January 2007 and 2011, and 109,000 jobs left with those employers". Similarly, the American Tort Reform Association's "Judicial Hellholes Watch List" ranks California as having the second worst litigation environment in the country. **SB 33** will neither help California's litigation environment nor promote businesses' ability to create jobs as it will drive up California employers' litigation costs.

For all of these reasons, we must **OPPOSE SB 33** as a **JOB KILLER**.

Sincerely,



Jennifer Barrera
Senior Policy Advocate

cc: Dan Seaman, Office of the Governor
District Office, The Honorable Bill Dodd

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