May 31, 2012

TO: Members of the California Assembly

FROM: California Chamber of Commerce
California Financial Services Association
California Manufactures & Technology Association
California New Car Dealers Association
California Retailers Association
California Defense Counsel
California Employment Law Council
Civil Justice Association of California
International Franchise Association
Personal Insurance Federation of CA
TechNet
TechAmerica
California Building Industry Association

RE: **SB 491 (Evans) As Amended April 30, 2012**

POSITION: OPPOSE- JOB KILLER

The above-signed organizations respectfully oppose SB 491 (Evans) as amended April 30, 2012, a bill that will undermine arbitration agreements and instead encourage class action lawsuits that primarily benefit plaintiff's attorneys. The bill prohibits class waivers in contracts of adhesion.

Senate Bill 491 broadly applies to provisions in all types of standard contracts, otherwise known as contracts of adhesion, in consumer, employment, and business to business contexts. A contract of adhesion is simply a standardized contract and is "a familiar part of the modern legal landscape." (*Graham v. Scissor-Tail, Inc*., 28 Cal.3d 807 (1981)). These contracts are valid, enforceable and provide an economy of scale in the marketplace. Contracts can contain provisions specifying how to resolve contract disputes in order to expeditiously resolve contractual problems, including the use of arbitration. Arbitration provides fair, efficient and timely resolution of disputes in a litigious society. Class waivers are found only in arbitration agreements. By providing these provisions are unenforceable, SB 491 would deny enforcement of arbitration. This bill is another attempt by the plaintiff's bar to undermine arbitration and is substantially broader than last year's AB 1062 (Dickinson), which would have weakened the enforcement of arbitration agreements by limiting appeals. That bill failed passage on the Senate Floor.

<u>Plaintiff's Bar Ongoing Efforts to Do Away with Arbitration in California</u>
This bill is part of an ongoing effort by the plaintiff's bar to eradicate the use of arbitration agreements in California, despite the demonstrable benefits arbitration has brought to governments, businesses and consumers. Arbitration has evolved into a productive and useful method of resolving disputes. Existing law requires arbitration to provide both procedural and substantive due process in order to ensure the process is fair (*Armendariz v. Foundation Health Psychcare Services, Inc*, 99 Cal.Rptr.2d 745 (2000); see also *Mercuro v. Superior Court*, 96 Cal.App.4th 167 (2002). In the modern economy organizations continue to look at more efficient paradigms for conducting business. Arbitration as an alternative method of resolving disputes derived from the need to more efficiently handle conflicts.

<u>Arbitration is Quicker, Less Expensive and Fair Results</u>
Arbitration and mediation provisions work well in many areas of law. The cost and time savings of arbitration offer considerable benefits to both parties. In lieu of going to trial, using arbitration to settle a dispute is a widely accepted, faster, and less-costly alternative to the court system. A 2003 survey by the ABA (available at: http://www. abanet.org) found that 78% of trial lawyers felt arbitration was timelier than regular litigation. A recent Cornell study (available at: http://www. hotelschool.cornell.edu) also found arbitration was significantly less time consuming than litigation. Arbitration permits parties to efficiently and economically resolve a dispute through a neutral person. Fairly drawn arbitration agreements benefit businesses, employees, and consumers — and reduce pressure on an already burdened court system.

A 2005 Harris Poll found arbitration litigants — both plaintiffs and defendants — were very satisfied with arbitration. Likewise, a survey conducted by Dispute Resolution Times found that 83% of employees favored using arbitration. Plaintiffs fare at least as well — if not better — in arbitration as they would have in court. Additionally, studies of consumer arbitration have also shown that consumers do better in arbitration (Sarah Rudolph Cole & Theodore H. Frank, The Current State of Consumer Arbitration, DISP. RESOL. MAG. 34 (Fall 2008); also Searle Center on Law, Regulation, and Economic Growth, Consumer Arbitration Before the American Arbitration Association Preliminary Report (finding that consumers win relief in 53% of the cases they file in arbitrations before the American Arbitration Association)).

The U.S. Supreme Court and Congress
Senate Bill 491 is a blatant attempt to circumvent the U.S. Supreme Court and Congress in order to benefit class action attorneys. Moreover, it is a Rube Goldberg construct in order to prevent the use of voluntary arbitration and send disputes into our already overburdened civil courts.

Senate Bill 491 is an effort to do what is not possible or warranted — overruling the U.S. Supreme Court and Congress (Federal Arbitration Act, 9 U.S.C. Section 1 *et seq*). The U.S. Supreme Court held in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) that the Federal Arbitration Act ("FAA") pre-empts California state law, which had deemed class arbitration waivers in standard consumer contracts per se unconscionable. The Court struck down California's rule on the ground that such a rule "interferes with arbitration" to an extent not tolerated by the FAA. This bill runs afoul of the Court's ruling because, while seeming to apply neutrally to all standardized contracts, it establishes a state-law rule that invalidates a clause that can arise only in an arbitration setting. Therefore, it is anthetical to the U.S. Supreme Court's ruling.

Additionally, although it may be argued that this bill would allow classwide arbitration, the U.S. Supreme Court has also held that that a party may not be compelled to submit to class arbitration unless class the parties agreed to do so (*Stolt-Nielsen S.A. v. AnimalFeeds International Corp*., 130 S.Ct. 1758 (2010)).

In short, SB 491 creates a litigation morass. On one hand it would have the effect of compelling classwide arbitration, which *Stolt-Neilson* would prohibit, while on the other hand, it would have a court striking arbitration altogether, which violates *Concepcion.* In any case, the result is increased complicated, expensive litigation.

Federal and State Law Encourage the Use of Arbitration
Federal law encourages the use of arbitration (*Moses H. Cone Memorial Hosp. v. Mercury Const. Corp*. (1983) 460 U.S. 1). Under the Federal Arbitration Act (9 U.S.C. Sec. 2) an arbitration agreement shall be valid, irrevocable, and enforceable, except on such grounds as exist at law or in equity for the revocation of any contract. In *Allied-Bruce Terminix Companies, Inc., et al. v. Dobson* (1995) 513 U.S. 265, the United States Supreme Court reaffirmed this principle. California's review and enforcement of arbitration agreements tracks that in federal law. This bill would change that.

Sends Disputes into Overburdened Courts
California's court system is struggling to serve the needs of Californians. This will be the fourth year of deep budget reductions to the judicial branch. In the recently released May budget proposal, a total of $544 million is targeted to be slashed from the state court budget. This comes on top of large, cumulative cuts over the last three years. Courts have already been reporting they may have to close civil courtrooms and increasing time delays expected to resolve civil lawsuits. Arbitration is a valuable alternative method to resolve disputes and should be encouraged. Instead, SB 491 would send more cases into a system that can ill-afford it.

Continues to Create California Only, Anti-Business Treatment

California's economic recovery is dependent on its ability to create an environment where job creation can flourish. Unfortunately, California's unemployment continues to be one of the worst (http://www.ncsl.org/issues-research/labor/2012-state-unemployment-rates.aspx). In *Chief Executive*'s eighth annual survey of CEOs' opinion of Best and Worst States in which to do business, California was ranked dead last for the eighth consecutive year. Moreover, in a 2011 Harris Poll, California's litigation environment continued to be ranked as one of the worst in the country, which affects companies' decisions to grow or locate business.

Senate Bill 491 undermines the ability to rely on and enforce arbitration agreements in the state. During a time when our court resources are overburdened already, we should promote arbitration rather than undermine it.

For the above reasons, we **oppose** SB 491 and urge a no vote.