

SB 33 (DODD) CONTRACTS FOR GOODS OR SERVICES: WAIVER: FRAUD, IDENTITY THEFT, AND WRONGFUL USE OF PERSONAL IDENTIFYING INFORMATION

JOB KILLER



March 31, 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**

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE** your **SB 33 (Dodd)**, as amended on March 23, 2017, which has been labeled a **JOB KILLER**, because it unfairly attacks the use of arbitration agreements in consumer contracts with “financial institutions” as broadly defined, is likely preempted by the Federal Arbitration Act (FAA), and will negatively impact “financial institutions” with unnecessary and costly class action litigation that does not ultimately benefit the consumer.

SB 33 Applies to Any Contract with a Business Under the Broad Definition of “Financial Institution,” Not Just Those Created Under Fraudulent Circumstances:

Despite the fact sheet that indicates this is a narrowly tailored proposal that seeks to address financial accounts created without the consent of the consumer, it is not. **SB 33** applies to “financial institutions,” which is broadly defined to include any business that engages in financial activities, including insurance. Under **SB 33**, any consumer contract for goods or services with a “financial institution” that includes a provision to resolve any and all disputes through arbitration, including those arising from claims alleging fraud, identity theft or the “wrongful use” of personal identifying information, is deemed unenforceable. Generally, arbitration provisions in a contract do not identify a list of claims subject to arbitration, but rather govern any dispute arising out of the contractual relationship.

Moreover, **SB 33** is not limited to claims alleging an account was created by fraud or through the “wrongful use” of personal identifying information. Rather, **SB 33** exposes these businesses to class action litigation for an unproven allegation of fraud, identity theft or wrongful use of personal identifying information that could be completely unrelated to the creation of a financial account. The term “wrongful use” of personal identifying information is not defined and could include a wide range of claims from a consumer who receives a simple solicitation. **SB 33** goes well beyond the stated purpose or need for legislation and unnecessarily burdens all businesses included in the broad definition of “financial institutions.”

SB 33 Is Likely Preempted Under the Federal Arbitration Act (FAA):

SB 33 is likely preempted under the FAA, which will create years of litigation until this determination is confirmed. The United States Supreme Court has been consistently clear that: (1) prohibiting the arbitration of certain claims; (2) imposing contractual requirements that target arbitration provisions; or (3) interfering with the attributes of arbitration, such as prohibiting class action waivers, are all preempted under the FAA. See *DIRECTV v. Imburgia*, 136 S.Ct. 463 (2015); *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1021 (2012); *AT & T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1747, 179 L.Ed.2d 742 (2011); *Doctor’s Associates, Inc. v. Cassarotto*, 517 U.S. 681 (1996).

SB 33 suffers all three of these fatal flaws. First, it prohibits the arbitration of specific claims (fraud, identity theft and wrongful use of identifying information). Second, it is not a general contractual defense to *any* contract created under the laws of California. Instead, it is limited only to those contracts with financial institutions that contain an arbitration provision. Third, it bars arbitration and the use of class action waivers, which has already been explicitly struck down by the United States Supreme Court. Challenging **SB 33** through the legal system to ultimately establish it is preempted will take years, leaving California employers unnecessarily exposed to costly litigation in the meantime.

SB 33 Allows Class Actions Where the Attorneys Are the Financial Winners, Not the Consumer:

Consumer attorneys dislike arbitration because such agreements include class action waivers. The validity of class action waivers in arbitration agreements was affirmed by the Supreme Court in 2011, in *Concepcion, supra*. By prohibiting an arbitration clause in any consumer contract with a financial institution for goods or services for fraud, identity theft or wrongful use of identifying information, it also prohibits the inclusion of a class action waiver for such claims. Consumer attorneys can easily plead one of these three claims in a civil complaint to avoid arbitration, and pursue a class action. Once litigation is far enough down the procedural timeline, the trial attorneys can dismiss such claims and continue with the other claims that would have been subject to arbitration. This risk is especially so with regard to the term “wrongful use of identifying information” as it is undefined and could include various claims.

Generally, the financial winners in class actions are the attorneys who receive a significant fee/cost award compared to what class members receive. Recent examples of this distribution are: *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; and, (3) \$3,250,000 for attorney's fees and costs; and *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; and, (3) \$652,340 for attorney's fees.

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

Sincerely,

California Chamber of Commerce
American Insurance Association
Association of California Insurance Companies
Association of California Life & Health Insurance Companies
California Apartment Association
California Bankers Association
California Building Industry Association
California Business Roundtable
California Community Banking Network
California Credit Union League
California Employment Law Council
California Forestry Association
California Retailers Association
Camarillo Chamber of Commerce
Civil Justice Association of California
Computing Technology Industry Association – CompTIA
Consumer Data Industry Association
Culver City Chamber of Commerce
El Centro Chamber of Commerce
First American Corporation
Greater Conejo Valley Chamber of Commerce
Internet Coalition
Long Beach Area Chamber of Commerce
NAIOP Commercial Real Estate Development Association SoCal Chapter
National Federation of Independent Business
Orange County Business Council
Oxnard Chamber of Commerce
Personal Insurance Federation of California
Redondo Beach Chamber of Commerce
Santa Maria Valley Chamber of Commerce Visitor & Convention Bureau
Securities Industry and Financial Markets Association
South Bay Association of Chambers of Commerce
Southwest California Legislative Council

cc: District Office, The Honorable Bill Dodd
Tom Dyer, Office of the Governor
Mike Petersen, Senate Republican Caucus