



THE SANTA CLARA COUNTY BAR ASSOCIATION BUSINESS LAW & LITIGATION SECTION PRESENTS:

Recent Developments in the Law of Contractual Arbitration

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A. Statutory Overview.

1. The Federal Arbitration Act (9 U.S.C., section 1-14) (the “FAA”). The FAA evinces a strong public policy favoring arbitration, and thus preempts all state laws inconsistent with the FAA. See *Marmet Health Care Center, Inc. v. Brown*, 564 U.S. ____ [132 S. Ct. 1201] (2012); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 321 [131 S.Ct. 1740] (2011); *Preston v. Ferrer*, 552 U.S. 346 (2008).
2. The California Arbitration Act (Code of Civil Procedure sections 1280 – 1299.9). See also California Rules of Court, Rule 3.1330. Cf. Judicial Arbitration, which is governed by Code of Civil Procedure sections 1141.10 – 1141.31 and California Rules of Court, Rules 3.180 – 3.830.

B. Seminal Cases.

1. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 321 [131 S.Ct. 1740] (2011).
2. *American Express Co. v. Italian Colors Restaurant*, 570 U.S. ____ [133 S.Ct. 2304] (2013).
3. *Iskanian v. CLS Transportation Los Angeles LLC*, 59 Cal.4th 348 (2014).
4. *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005).
5. *Badie v. Bank of America*, 67 Cal.App.4th 779 (1998).

C. After *Concepcion*, what is enforceable, and what is the role of California law in the enforceability of arbitration clauses?

1. Class action waivers. *Iskanian v. CLS Transportation Los Angeles LLC*, 59 Cal.4th 348 (2014) (Class action waiver in arbitration clause enforceable); *Johnmohammadi v. Bloomingdale’s, Inc.*, 755 F.3d 1072 (9th Cir. 2014) (Same); *Davis v. Nordstrom, Inc.*, 755 F.3d 1089 (9th Cir. 2014) (Same).
2. Class-wide arbitrations. Compare *Oxford Health Plans, LLC v. Sutter*, 569 U.S. ____ [133 S. Ct. 2064] (2013) (Arbitrator did not exceed authority in allowing class-wide arbitration of similar claims) and *Stolt-Neilson S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010) (Imposing class-wide arbitration on parties who have not contractually authorized class arbitration violates the FAA). Also note that JAMS and AAA have rules on class arbitration procedure.

3. Is there an actual agreement to arbitrate? Whether there is an agreement to arbitrate depends on the evidence presented to the trial court (*e.g.*, in connection with “bill-stuffer” clauses) and also on the scope of the clause itself. See *Delgado v. Progress Financial Co.*, 2014 U.S. Dist. LEXIS 61010, 2014 WL 1756282 (E.D.Cal. 2014); *Cape Flattery Ltd. v. Titan Maritime, LLC*, 647 F.3d 914 (9th Cir. 2011).
4. Does the arbitration clause violate public policy? See the discussion of the Private Attorneys General Act of 2004 (“PAGA”) (Lab. Code, §2698 *et seq.*) in *Iskanian*, which held that arbitration clause which waived an employee’s right to pursue a PAGA claim violated public policy. See also *Brown v. Ralphs Grocery Co.*, 197 Cal.App.4th 489 (2011) (FAA does not preempt PAGA). *Cf.*, *Quevedo v. Macy’s, Inc.*, 798 F.Supp.2d 1122 (C.D.Cal. 2011) (FAA preempts PAGA; Arbitration agreements may limit PAGA rights).
5. Was the right to arbitrate waived? *Hong v. Cj CGV America Holdings, Inc.*, 222 Cal.App.4th 240, 249 (2013) (Prejudice is critical consideration when determining whether waiver has occurred).
6. Is the arbitration clause unconscionable? Is the clause substantively and / or procedurally unconscionable?
 - i. Bilateral or Unilateral Clause. Is the agreement “unfairly one-sided?” *Little v. Auto Stiegler, Inc.* 29 Cal. 4th 1064 (2003).
 - ii. Forum Selection Clause. *Newton v. American Debt Services*, 549 Fed. Appx. 692, 2013 U.S. App. LEXIS 24720 (9th Cir. 2013) (Arbitration clause unconscionable in part because California resident required to arbitrate dispute in Oklahoma); *Bolter v. Superior Court*, 87 Cal. App. 4th 900 (2001) (Arbitration clause unconscionable in part because California resident required to arbitrate dispute in Utah); *America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1 (2001).
 - iii. Choice of Arbitrators. See *Graham v. Scissor Tail*, 28 Cal. 3d 807 (1981); and a more recent case, *Newton v. American Debt Services*, 549 Fed. Appx. 692, 2013 U.S. App. LEXIS 24720 (9th Cir. 2013).

- iv. Cost of Arbitration. *Newton v. American Debt Services*, 549 Fed. Appx. 692, 2013 U.S. App. LEXIS 24720 (9th Cir. 2013) (Arbitration clause unconscionable in part because consumer's potential liability for attorneys' fees in violation of California's attorneys' fees statute); *Zaborowski v. MHN Governmental Services, Inc.*, 936 F. Supp. 2d 1145 (N.D. Cal. 2013) (Arbitration clause unconscionable in part because fees were high and it limited punitive damages); *Lou v. MA Laboratories, Inc.*, 2013 U.S. Dist. LEXIS 149770 (N.D. Cal. 2013) (Arbitration clause unconscionable in part because clause contain unfair fee-shifting provision and lacked mutuality in remedies available). See also Code of Civil Procedure section 1284.3(a) (prohibiting enforcement of fee-shifting provisions requiring consumer to pay if consumer loses).

D. Drafting Tips.

1. Choice of Law Clause. *Imburgia v. DIRECTV, Inc.*, 225 Cal.App.4th 338 (2014). But see *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218 (9th Cir. 2013). See also *Meyer v. T-Mobile USA, Inc.*, 836 F.Supp.2d (N.D.Cal. 2011).
2. Forum Selection Clause. See discussion above.
3. Opt-Out Clause. See *Kilgore v. Keybank, N.A.*, 718 F.3d 1052 (9th Cir. 2013).
4. Reasonable Limitations Period.
5. Cost of Arbitration. See discussion above.
6. Exemption for Small Claims Actions.
7. Limitations on Discovery. *Sanchez v. Carmax Auto Superstores California, LLC*, 224 Cal.App.4th 398, 404 (2014) (Limitations on discovery in arbitration agreement permissible); *Dotson v. Amgen, Inc.*, 181 Cal.App.4th 975, 983 (2010) (Same).
8. Super-Recovery Clause. *Concepcion, supra* (Discussing fee and damage provisions in arbitration clauses giving consumers more than they would be entitled to if the matter is litigated in court).

9. Scope of Arbitration. *Bernal v. Southwest & Pacific Specialty Financial, Inc.* 2014 U.S. Dist. LEXIS 63338 (N.D.Cal. 2014) (Parties can delegate scope and arbitrability disputes to arbitrator); *Tiri v. Lucky Chances, Inc.*, 226 Cal.App.4th 231 (2014) (Trial Court lacked authority to decide enforceability of arbitration clause where parties delegated that power to arbitrator).
 10. Carefully consider evidence needed to prove agreement to arbitrate.
 11. Pre-arbitration dispute resolution clauses. See *Frei v. Davey*, 124 Cal.App.4th 1506, 1508 (2004).
 12. Provide access to the rules for arbitration.
 13. Sample arbitration clauses
 - i. The JAMS sample clauses: www.jamsadr.com
 - ii. The AAA sample clauses: www.adr.org
 - iii. The CFPB clauses: www.consumerfinance.gov
- E. Alternative to Arbitration: Judicial Reference. Code of Civil Procedure section 638 and California Rules of Court, Rules 3.931 and 3.932.
- F. Recent Developments on the legislature and regulatory front.
1. Legislative Efforts. The Truth in Lending Act (“TILA”), section 129C(e), now prohibits arbitration agreements which require arbitration of disputes regarding certain loans secured by the consumer’s dwelling. 12 C.F.R. section 1026.35(h)(1). See also efforts to pass the Arbitration Fairness Act of 2013, HR 1844.
 2. Regulatory Efforts. The Consumer Financial Protection Bureau (www.consumerfinance.gov), effective June 1, 2013, has banned mandatory arbitration agreements in mortgage loan agreements.

G. Other recent cases of interest.

1. *Young v. Horizon West, Inc.*, 220 Cal. App. 4th 1122 (2013);
2. *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928 (9th Cir. 2013);
3. *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916 (9th Cir. 2013);
4. *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109 (2013);
5. *Goldman v. Sunbridge Healthcare, LLC*, 220 Cal. App. 4th 1160 (2013);
6. *Peng v. First Republic Bank*, 219 Cal. App. 4th 1462 (2013);
7. *Mendez v. Mid-Wilshire Health Care Center*, 220 Cal. App. 4th 534 (2013);
8. *HM DG, Inc. v. Amini*, 219 Cal. App. 4th 1100 (2013);
9. *Little v. Pullman*, 219 Cal. App. 4th 558 (2013);
10. *O'Donoghue v. Superior Court*, 219 Cal. App. 4th 245 (2013);
11. *Roldan v. Callahan & Blaine*, 219 Cal. App. 4th 87 (2013);
12. *Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2013);
13. *Mortensen v. Bresnan Communs., LLC*, 722 F.3d 1151 (9th Cir. 2013); and
14. *Julius Castle Restaurant, Inc. v. Payne*, 216 Cal. App. 4th 1423 (2013).