

RESOLUTION 04-12-2007

DIGEST

Arbitration Agreements: Elimination of Prohibition against Class Actions

Amends Code of Civil Procedure section 1281 to make unenforceable any provision of a consumer or employment arbitration agreement that prohibits class action claims.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 1281 to make unenforceable any provision of a consumer or employment arbitration agreement that prohibits class action claims. This resolution should be approved in principle because California public policy favors and encourages the bringing of class action claims.

An adhesive arbitration agreement which shields a party against liability for fraud or willful wrongdoing violates California's public policy and is therefore unenforceable. (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148.) This resolution recognizes that virtually all consumer and employment contracts are adhesive in nature, and that prohibitions in such contracts against class action claims in arbitration operate as a shield against the drafter's liability for a broad spectrum of wrongdoing. By providing that such prohibitions on class arbitration claims are unenforceable, the resolution would conform arbitration practice in consumer and employment claims to the policies of California law.

TEXT OF RESOLUTION

RESOLVED that the Conference OF Delegates of California Bar Associations recommends that legislation be sponsored to amend Section 1281 of the Code of Civil Procedure, as follows:

- 1 §1281.
2 (a) A written agreement to submit to arbitration an existing controversy or a
3 controversy thereafter arising is valid, enforceable and irrevocable, save except upon such
4 grounds as exist for the revocation of any contract, and as provided below in subsection (b).
5 (b) Any provision in an agreement to arbitrate which is part of (1) a consumer
6 contract or (2)(i) a contract of employment or a condition of employment, (ii) between an
7 employer and a employee involving a transaction or employment to take place in whole or in
8 part within the State of California that prohibits the arbitration of claims other than the claim
9 of the consumer or employee parry to the agreement shall be unenforceable; provided the
10 arbitrator finds that the multiple claims asserted in the arbitration may be maintained as a
11 class action pursuant to the laws of the State of California.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Is unclear whether class action arbitration of consumer disputes or employee/employer disputes may be prohibited in an arbitration agreement.

This Resolution: Would make it clear that provisions in arbitration agreements barring class action claims in arbitration of consumer or employee/employer disputes are unenforceable.

The Problem: Disputes arising in connection with consumer contracts (such a credit card or cell phone agreements) often involving small amounts of money as to any one consumer. Likewise, some employee/employer disputes (such as for overtime pay) may involve small dollar amounts as to any one employee. However, such disputes also often involve hundreds or thousands of consumers/employees who have received the same adverse treatment, and, in the absence of an agreement to arbitrate such disputes, would ordinarily be the basis for a classic class action lawsuit. However, many consumer and employment contracts contain provisions requiring that such disputes be arbitrated; and then go one step further and provide that only the claim of the individual consumer or employee may be arbitrated. Such provisions can provide a windfall for the party with the stronger economic power, because few consumers/employees will bother to arbitrate small claims. See, e.g., *Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148. At present, whether an anti-class action provision are enforceable depends on a judicial determination whether under the circumstances it is unconscionable. That requires litigation within the litigation over the underlying dispute and provides a further basis for discouraging the assertion of valid claims. Businesses and employers should not be able to shield themselves from valid class action claims through the device of an adhesive arbitration agreement as which the consumer or employee has no bargaining power.

IMPACT STATEMENT

This resolution does not impact any other law, statute or rule.

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