

Insights

CAN COMPANIES USE ARBITRATION CLAUSES AND CLASS-ACTION WAIVER PROVISIONS TO MITIGATE THE RISK OF CCPA-RELATED CLASS ACTIONS?

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More than likely.

The CCPA states that consumers may seek, on “an individual or class-wide” basis, actual damages, statutory damages, or injunctive or declaratory relief following certain types of data security breaches.¹ The CCPA further states that “[a]ny provision of a contract or agreement of any kind that purports to waive or limit in any way a consumer’s rights under [the CCPA], including, but not limited to, any right to a remedy or means of enforcement” is “void and unenforceable.”² The reference to contract provisions limiting consumer rights as being void and unenforceable has led some plaintiffs’ attorneys to suggest that the California legislature intended to invalidate the use of arbitration and class action waiver clauses in contracts as those provisions might prevent consumers from proceeding on a “class-wide” basis.

Despite the language in the CCPA, the United States Supreme Court has consistently affirmed the strong federal policy favoring arbitration and the enforceability of class action waivers in arbitration agreements. In the landmark case of *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the Supreme Court explained that the Federal Arbitration Act (“FAA”) was specifically designed to preempt state laws that undermine the goal of the FAA to promote arbitration. Furthermore in *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899 (2015), the California Supreme Court determined that class action waiver provisions within contracts are enforceable even if a state law appears to provide for class action type recovery.

As a result, and based upon the holdings in *Concepcion* and *Sanchez*, there is a strong argument that the CCPA will not be interpreted as preventing consumers from entering into arbitration agreements or from agreeing to waive their ability to proceed in class actions.

For more information and resources about the CCPA visit <http://www.CCPA-info.com>.

This article is part of a multi-part series published by BCLP to help companies understand and implement the General Data Protection Regulation, the California Consumer Privacy Act and other

privacy statutes. You can find more information on the CCPA in BCLP's [California Consumer Privacy Act Practical Guide](#), and more information about the GDPR in the American Bar Association's [The EU GDPR: Answers to the Most Frequently Asked Questions](#).

1. Cal. Civ. Code § 1798.150.
2. Cal. Civ. Code. § 1798.192.

RELATED PRACTICE AREAS

- Data Privacy & Security
- California Consumer Privacy Act

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