SB 33 (DODD) ARBITRATION AGREEMENTS
JOB KILLER

****UPDATED****

April 28, 2017

TO: Members, Senate Committee on Judiciary

FROM: California Chamber of Commerce

American Insurance Association
Association of California 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 Land Title Association
California Restaurant 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 Inland Empire Chapter
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
Simi Valley Chamber of Commerce and Visitor Center
South Bay Association of Chambers of Commerce
Southwest California Legislative Council

SUBJECT: **SB 33 (DODD) ARBITRATION AGREEMENTS**
OPPOSE – JOB KILLER

The California Chamber of Commerce and the organizations listed above respectfully **OPPOSE SB 33 (Dodd)**, as amended on April 24, 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 all disputes arising from their relationship through arbitration would be invalid. 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. **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 only certain claims arising from a "fraudulent relationship" or "unlawful use of personal identifying information" with a financial institution. Accordingly, 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. Moreover, **SB 33** specifically does not apply to formation of contracts, but rather it applies to "relationships." The only area that the FAA has left to the state to regulate is general contractual defenses that are applicable to all contracts, not "relationships." In fact, **SB 33** acknowledges that there is a valid agreement to arbitrate that has been consented to by the consumer. Accordingly, **SB 33** does not impact general contract formation.

Next, **SB 33** bars arbitration and the use of class action waivers, that as specified under **SB 33**, were specifically "contained in a contract consented to by the consumer." Barring the application of arbitration or class action waivers 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 Is Ambiguous in its Application With the Determination of "Fraudulent Relationship or Unlawfully Using the Consumer's Personal Identifying Information:

SB 33 states that upon petition to compel arbitration, the court must determine whether the arbitration agreement involves a "financial institution" that is seeking to apply a written contract to arbitrate to a "fraudulent relationship" or "unlawful use of consumer personal identifying information." It is unclear how the court would make this determination. Specifically, if the decision to compel arbitration is simply based upon an allegation of a fraudulent relationship or the unlawful use of consumer personal identifying information, then **SB 33** provides the perfect pleading pathway for class action attorneys to avoid arbitration. By simply alleging these causes of action in a complaint, the court may ultimately deny arbitration and send the entire case to litigation, thereby undermining all arbitration agreements. Notably, nothing in **SB 33** requires a court to bifurcate claims that fall within this provision from other causes of action alleged that should be compelled to arbitration under a valid contract.

Comparatively, if **SB 33** requires a court to make a factual determination that a "fraudulent relationship" or the "unlawful use of consumer personal identifying information" exists, then **SB 33** essentially turns a petition to compel arbitration into a substantive, dispositive motion on the validity of the claims asserted. At the outset of the case, the parties would have to litigate the existence of a fraudulent relationship or unlawful use of consumer personal identifying information, which undermines the very point of arbitration.

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 all disputes arising from the relationship, it also limits the use of a class action waiver for such claims. Consumer attorneys can easily plead one of these 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.

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 SB 33** as a **JOB KILLER.**

cc: The Honorable Bill Dodd
Tom Dyer, Office of the Governor
Mike Petersen, Senate Republican Caucus
Margie Estrada, Senate Committee on Judiciary
District Offices, Members, Senate Committee on Judiciary