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Class Action Waivers Are Enforceable Despite Any State Statutory Right To A Class Action

Article By:

Travis J. Anderson

Shannon Z. Petersen

In ***Flores v. West Covina Auto Group***, --- Cal.Rptr.3d ----, 2013 WL 139200 (Cal.App. 2 Dist. Jan. 11, 2013), the California Court of Appeal extended the U.S. Supreme Court's landmark decision in *AT&T Mobility, Inc. v. Concepcion*, 131 S. Ct. 1740 (2011) by holding that the Federal Arbitration Act preempts any right to a class action under the California Consumers Legal Remedies Act ("CLRA"), and class action waivers in arbitration agreements governed by the FAA are therefore enforceable.

The CLRA grants consumers the right to file class actions to enforce its terms, and—according to the *Flores* court—provides that "any waiver by a consumer" of this right "is contrary to public policy and shall be unenforceable and void." Cal. Civ. Code § 1751. The court determined that the FAA preempts the CLRA's antiwaiver provision because the latter "stands as an obstacle to the accomplishment and execution of the full purposes and objective of the FAA," which is to enforce arbitration agreements according to their terms. If an arbitration provision is subject to the FAA and contains a class action waiver, the waiver must be enforced regardless of state public policy concerns.

In *Flores*, consumers filed a putative class action against an car dealership, alleging the dealership sold them a "lemon" and failed to fully disclose all sale terms. The dealership moved to compel arbitration and enforce the class action waiver contained in a form contract widely used by dealerships throughout California. Plaintiffs opposed, contending the CLRA prevented enforcement of the class action waiver, and that the arbitration agreement was unconscionable and therefore unenforceable. The trial court granted the dealership's motion and compelled arbitration.

The Court of Appeal affirmed. In doing so, it disagreed with *Fisher v. DCH Temecula Imports LLC*, 187 Cal.App.4th 601 (2010), which had denied arbitration on the ground that the CLRA establishes an unwaivable right to bring class actions. The *Flores* court correctly noted that, "since *Fisher*, the United States Supreme Court's decision in *Concepcion* has altered the legal landscape substantially." The Court of Appeal found "no meaningful distinction" between the CLRA's antiwaiver provision and the preempted class action waiver rule in *Concepcion*, and held that the FAA preempted both *Fisher* and the CLRA's prohibition against class waivers.

The *Flores* court further held that the arbitration agreement was not substantively unconscionable for any other reason. Plaintiffs focused on four terms they claimed were one-sided in favor of the dealership—1) a party who loses at arbitration can appeal to a panel of three arbitrators only if the award is $0, exceeds $100,000, or grants injunctive relief; 2) the dealership only pays the first $2,500 of plaintiffs' arbitration costs; 3) only certain arbitration organizations could be selected by the plaintiffs without the dealership's approval; and 4) self-help remedies, including the right to repossession, are excluded from arbitration. Citing *Pinnacle Museum Tower Association v. Pinnacle Market Development (US), LLC*, 55 Cal.4th 223 (2012), the Flores court held that none of these terms were "so one-sided as to shock the conscience." Thus, the agreement was fully enforceable.

The California Supreme Court will soon address these and/or related issues in *Sanchez v. Valencia Holding Co. LLC*, 201 Cal.App.4th 74 (2011) *review granted*, 139 Cal.Rptr.3d 2 (Mar. 21, 2012), which involves the same form contract.

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