

# Class Actions: Arbitration Agreements and Class Action Waivers (Federal, CA)

A Practical Guidance® Practice Note by Alejandro (Alex) Moreno,  
Sheppard, Mullin, Richter & Hampton LLP



Alejandro (Alex) Moreno  
Sheppard, Mullin, Richter & Hampton LLP

This practice note discusses agreements to arbitrate and class action waivers under federal and California law. It addresses how arbitration agreements commonly limit access to judicial class actions; who benefits from limitations on class actions, and in which types of cases; mandatory arbitration agreements; fighting and defending class action waivers; considerations for defense and plaintiff's counsel; and how a class action waiver might affect the strength and value of a potential case.

An arbitration agreement with a class action waiver is one of the strongest weapons in the arsenal of a class action defense attorney. An agreement to arbitrate and class action waiver can turn a dispute involving millions of potential claimants and multi-millions in all-in exposure into a simple bilateral dispute, sometimes with just a few dollars at stake. Winning a motion to compel arbitration and enforcing the class action waiver can effectively end litigation or lead to a favorable settlement on an individual basis. From the plaintiff's perspective, whether there is a mandatory arbitration agreement and a class action waiver is critical to the decision to accept or pursue a case.

For more information on class actions and arbitration, see [Class Action Arbitration in the United States \(Federal\)](#).

## Arbitration and the Class Action Waiver

If a dispute is subject to arbitration pursuant to an agreement governed by the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.), a party to the agreement may apply to a federal district court for an order directing the parties to proceed to (i.e., compelling) arbitration rather than litigation in court. The FAA is grounded on a national policy favoring arbitration. See *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333, 344 (2011). It provides for uniform and broad enforcement of arbitration agreements when it applies. The FAA preempts state laws and court decisions that disfavor arbitration. Subject to certain limited exceptions, the FAA applies to arbitration agreements that touch upon matters involving interstate and foreign commerce. See 9 U.S.C. § 1.

In *Concepcion*, the U.S. Supreme Court ruled that class action waivers in arbitration agreements are enforceable. Section 2 of the FAA provides that agreements to arbitrate are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333, 344 (2011). So long as a defendant can show a valid agreement to arbitrate and a valid class action waiver, then a putative class action plaintiff will be unable to proceed on a class basis.

The impact of an order compelling arbitration and enforcing a class action waiver is to convert a putative class action (with the potential for classwide damages) into an individual dispute and action—effectively neutralizing the threat. Because an agreement to arbitrate may be waived by

inaction, when faced with a class action complaint, you should immediately assess whether there is an agreement to arbitrate and whether the agreement contains a class action waiver.

## Who Benefits from the Class Action Waiver?

The primary beneficiary of a class action waiver will be the party facing potential class action liability. In nearly all instances, this party will be the entity or business that inserted the class action waiver into its arbitration clause.

Class action waivers are typically most beneficial where the claimant seeks to aggregate a large number of small claims, where it would be burdensome or economically infeasible for each of the claimants to individually pursue their claim in arbitration. Examples of such cases include an action to recover a small monthly fee which was allegedly wrongfully charged to all customers under a mobile phone services contract, or an action to recover an allegedly unearned or improperly disclosed banking fee. In each of the prior examples, the named plaintiff likely suffered only a few dollars of actual damages (and likely could have those amounts refunded by simply raising the matter with the customer service department of the defendant company). The only way plaintiff's counsel can effectively pursue such claims is to bring a class action, which has the potential to create very large exposure for the entity defendant.

## What Types of Contracts May Be Subject to a Class Action Waiver?

Class action waivers are extremely common in a wide variety of industries, including banking and finance, telecommunication, online retail and services, gyms and other subscription services, insurance, healthcare, and/or any other industries where the consumer enters into an ongoing contractual relationship with the service provider or merchant.

### Substantive and Procedural Unconscionability

By their nature, class action waivers are typically inserted in situations where a form contract is provided to a large number of consumers. These contracts of adhesion typically provide the consumer very little, if any, ability to negotiate the terms of the relationship. It is worth noting that the arbitration clause at issue in *Concepcion* had many consumer friendly attributes (requiring the company to pay all costs

associated with nonfrivolous claims, requiring arbitration to take place in a location of the consumer's preference, etc.) that likely played into the Supreme Court's final determination. *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333 (2011). In other cases, however, plaintiffs have challenged class action waivers in contracts of adhesion as unconscionable.

Although unconscionability is difficult to establish, a business entity that seeks to minimize the risk of having its arbitration agreement (and class action waiver) deemed unconscionable should keep in mind the negotiation process and the substance of the contractual relationship containing the arbitration clause. "Procedural unconscionability concerns the manner in which the contract was negotiated and the respective circumstances of the parties at that time, focusing on the level of oppression and surprise involved in the agreement." *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922 (9th Cir. 2013). To minimize the risk of a claim of procedural unconscionability, the consumer should be given a full opportunity to review the agreement before becoming bound. In addition, the terms of the arbitration clause (including the categories of disputes subject to arbitration and scope of the class action waiver) should be clearly explained in the agreement.

"A contract is substantively unconscionable when it is unjustifiably one-sided to such an extent that it 'shocks the conscience.'" *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923 (9th Cir. 2013). To minimize the potential for substantive unconscionability, the agreement should not contain onerous one-sided terms. For example, it shouldn't require the consumer to bear the expense of arbitration. The American Arbitration Association (AAA) allows companies to register their arbitration clauses to ensure they comply with the AAA's Due Process Protocols. Pre-dispute registration with the AAA is an effective method for an entity to obtain third-party approval and vetting of the fairness of its arbitration clause and class action waiver.

## What Alternative Does an Arbitration Agreement with a Class Action Waiver Provide to a Judicial Class Action?

Class arbitration is not available unless clearly allowed under the express terms of the arbitration clause. Indeed, in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1411 (2019), the U.S. Supreme Court established that an ambiguous agreement

cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration. Given that entities insert arbitration clauses and class action waivers into their agreements for the specific purpose of avoiding the risk of class liability, agreements to class arbitration are uncommon.

Moreover, at least in California state court, a claimant seeking class arbitration should be aware that claims for public injunctive relief under California's consumer protection statutes may not be arbitrable. See *Clifford v. Qwest Software, Inc.*, 251 Cal. Rptr.3d 269, 274 (Cal. App. 2019) (the *Broughton-Cruz* rule holds that claims for public injunctive relief cannot be arbitrated) (citing *Broughton v. Cigna Healthplans*, 988 P.2d 67 (Cal. 1999), and *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157 (Cal. 2003)); cf. *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 937 (9th Cir. 2013) (holding that the *Broughton-Cruz* rule is preempted by the FAA in federal court). If a plaintiff seeks relief under California's consumer protection statutes, the *Broughton-Cruz* rule may impede class arbitration. For more information on class arbitration, see [Class Action Arbitration in the United States \(Federal\)](#).

Even if a consumer plaintiff is unable to bring a class action, however, there is still a risk of mass individual arbitration. Although uncommon (and typically only seen in the employment litigation context), mass individual arbitration is more likely where the arbitration clause contains terms favorable to the plaintiff (i.e., requiring the entity to pay the costs of arbitration and providing for the recovery of attorney's fees). Because of the potential of a multiplicity of claims, defense costs can quickly escalate where an entity is faced with mass individual arbitration. For small consumer claims, however, which are typically worth less than employment claims, mass individual arbitration is unlikely because it would be difficult for plaintiff's counsel to round up enough consumers willing to dedicate the time and effort to pursue what amounts to a small claim.

On balance, defendants should be wary of giving clear consent to class arbitration. Arbitral orders are typically not appealable and, subject to limited exceptions, are subject to review in court only in instances of fraud, conflicts of interest affecting the arbitrator, misconduct at the arbitration hearing, or the arbitrator exceeding the scope of his or her authority under the relevant agreement. Class arbitration raises the specter of a possibly devastating class action award against the defendant without the procedural safeguards built into the court system.

## Strategies for Dealing With Class Action Waivers

Entities that employ arbitration agreements can minimize the risk that their arbitration agreement and class action waiver may be invalidated because they control the specific language of those clauses. To limit the risk that an arbitration clause and class action waiver will be found unenforceable, drafters should write clear, concise arbitration clauses that take into account the current state of the law.

For example, it has been common for practitioners to include a nonseverability clause (a so-called poison pill) that invalidates the entire arbitration agreement if any portion of the class action waiver is found unenforceable. The reason for including this clause was presumably to eliminate the risk of being directed to arbitrate class claims (which raise the risks discussed above). Given the U.S. Supreme Court's decision in *Lamps Plus*, however, the better option is to include a severability clause that requires any unenforceable terms to be excised from the agreement, but requires all other terms to be implemented (including the portions of the class action waiver that are enforceable). *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019). That way, the entity gets the full benefits of the arbitration clause and class action waiver as allowed under the law. Even if the court retains jurisdiction over the portion of the claim that was not ordered to arbitration due to the unenforceable term, the entity's total exposure is likely to be much smaller than it would have been had the entire class action waiver been thrown out.

### The McGill Rule and the Danger of a Waiver of a Plaintiff's Right to Seek Public Injunctive Relief

In *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017), the California Supreme Court held that the predispute waiver of a plaintiff's right to seek public injunctive relief under California's consumer protection statutes was unenforceable. The California Supreme Court further held that the FAA does not preempt this *McGill* rule because such a clause is "illegal" and a ground for the invalidation of any contract. *Id.* at 95-95; 9 U.S.C. § 2. The Ninth Circuit has confirmed that the *McGill* rule is not preempted by the FAA. See *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019). As a result, entities that employ arbitration provisions should carefully scrutinize their class action waivers to ensure they cannot be construed to waive a plaintiff's right to seek public injunctive relief under California's consumer protection statutes.

As the court discussed in *McGill*, public injunctive relief is relief that has “the primary purpose and effect of” prohibiting unlawful acts that threaten future injury to the general public. Relief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff—or to a group of individuals similarly situated to the plaintiff—does not constitute public injunctive relief.

Arbitration clauses that may fall afoul of *McGill* typically require all disputes to be arbitrated, but prevent the arbitrator from granting any remedy that would affect a person other than the plaintiff. Unless such an agreement contains a carveout that would allow the court to retain jurisdiction to grant injunctive relief, then it would appear that such a clause would violate the rule in *McGill* by completely preventing the plaintiff from seeking public injunctive relief.

Importantly, if an arbitration agreement arguably violates the rule in *McGill* and contains a broad nonseverability clause, then there is a real risk that the court will invalidate the entire agreement to arbitrate regardless of whether the plaintiff seeks public injunctive relief. There is currently a split in the district courts of the Ninth Circuit regarding whether the plaintiff must actually seek public injunctive relief **before** seeking to apply the rule in *McGill* to get out of arbitration.

The majority of district courts have found that the plaintiff must seek public injunctive relief before seeking to apply the rule in *McGill* to invalidate an agreement to arbitrate. See *Johnson v. JPMorgan Chase Bank, N.A.*, 2018 U.S. Dist. LEXIS 167272, at \*15–21 (S.D. Cal. Sep. 2018); *Wright v. Sirius XM Radio Inc.*, 2017 U.S. Dist. LEXIS 221407, at \*24–27 (C.D. Cal. June 1, 2017); *Delisle v. Speedy Cash*, 2019 U.S. Dist. LEXIS 96981, at \*19–22 (S.D. Cal. June 10, 2019); *Eiess v. USAA Fed. Sav. Bank*, 2019 U.S. Dist. LEXIS 144026, at \*33–37, \*40 (N.D. Cal. Aug. 23, 2019). The majority rule is consistent with how the California Supreme Court analyzed the issue in *McGill*. See *McGill*, 393 P.3d at 90–91 (in answering the question of whether the arbitration agreement contains an invalid clause purporting to waive the plaintiffs’ right to seek public injunctive relief in any forum, “we first conclude that *McGill*’s complaint does, in fact, appear to seek... public injunctive relief[.]”).

Applying the majority rule is also consistent with the general policy of resolving any doubts regarding the arbitrability of a particular dispute in favor of arbitration. See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). It is further consistent with general principles of contractual interpretation that require a court to interpret a contract to “make it lawful, operative, definite, reasonable, and capable of being carried into effect[.]” Cal. Civ. Code § 1643 (emphasis added); see also Cal. Civ. Code

§ 3541 (“[a contractual] interpretation which gives effect [to the contract] is preferred to one which makes [it] void.”). Nevertheless, a minority of district courts in the Ninth Circuit have found that the rule in *McGill* can apply irrespective of whether the plaintiff actually seeks public injunctive relief. See *Lotsoff v. Wells Fargo Bank, N.A.*, 2019 U.S. Dist. LEXIS 169373, at \*11 (S.D. Cal. Sept. 30, 2019).

To avoid problems, a well-drafted arbitration clause should specify the forum in which a plaintiff can seek public injunctive relief. For reasons related to appealability and the existence of a clear procedure for modifying injunctions, it is advisable that the entity specify that a court of competent jurisdiction shall retain jurisdiction over any request for the **remedy** of public injunctive relief. The provision can require that court proceedings be stayed while plaintiff pursues its substantive claims in arbitration. Only after the plaintiff prevails on the substance, can such plaintiff seek a public injunction in court.

### PAGA Claims

Similar to the rule in *McGill*, in *Iskanian v. CLS Transportation*, 327 P.3d 129 (Cal. 2014), the California Supreme Court held that an agreement that waives a worker’s right to bring a representative action under Labor Code Private Attorneys General Act is illegal and unenforceable. In *Tanguilig v. Bloomingdale’s, Inc.*, 210 Cal. Rptr. 3d 352 (2016), the California Court of Appeal held that a PAGA claim cannot be compelled to arbitration without the state’s consent.

Many of the same considerations discussed with respect to *McGill* apply to *Iskanian* and its progeny. Employers should actively review the language of their arbitration agreements to ensure that they do not violate PAGA. Moreover, employers should rely on severability clauses to make enforceable as much of their arbitration agreement and class action waiver as possible.

## Enforcing Class Action Waivers

A class action waiver typically comes into play when a plaintiff files a class action lawsuit in court. The defendant’s first consideration should be whether they want to stay in the plaintiff’s chosen forum. If the plaintiff has filed in state court, then defendant should consider whether removal to federal court is possible under federal claim jurisdiction, diversity jurisdiction, or the Class Action Fairness Act.

Case law on arbitration is more developed in federal court and the FAA has fewer exceptions to arbitration than the California Arbitration Act (CAA). For example, under the

CAA, the court can refuse to compel arbitration if it finds that “[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact.” Cal. Code Civ. Proc. § 1281.2(c). This exception is not applicable under the FAA.

### **The Motion to Compel Arbitration**

Once the defendant has chosen a forum, the defendant should file a motion to compel arbitration. In California state court, the filing of a motion to compel arbitration stays the proceedings upon the request of the moving party. See Cal. Code Civ. Proc. § 1281.4. The effect of a motion to compel arbitration in federal court is not as clear because it is not among the responsive pleadings allowed under Fed. R. Civ. P. 12.

That said, the Ninth Circuit has recognized that parties are allowed to file responsive pleadings beyond an answer or a Fed. R. Civ. P. 12 motion in response to a complaint. See *Ritza v. Int’l Longshoremen’s & Warehousemen’s Union*, 837 F.2d 365, 369 (9th Cir. 1988) (“federal courts . . . traditionally have entertained certain pre-answer motions that are not expressly provided for by the rules.”) (internal citation omitted). In federal court, the defendant should include a request to stay its obligation to answer the complaint pending the resolution of the motion to compel arbitration. See *Charles Ford v. Verisign, Inc.*, 2005 U.S. Dist. LEXIS 53004, at \*15 (S.D. Cal. Dec. 16, 2005) (granting request to stay pending resolution of motion to compel arbitration).

If the arbitration agreement contains a class action waiver and arbitration is compelled, then the defendant has effectively avoided class action liability because the dispute has been compelled to arbitration as an individual action. To the extent the court determines as part of its arbitration order that some portion of the claims are nonarbitrable, the defendant should ask to stay the proceedings pending resolution of the arbitration. See 2 U.S.C. § 3; Cal. Code Civ. Proc. § 1281.4. An order granting a motion to compel arbitration is not immediately appealable in state or federal court.

If, however, the court denies the motion to compel arbitration, the defendant may take an interlocutory appeal of the order denying arbitration under both the FAA and the California Arbitration Act. See 2 U.S.C. § 16; Cal. Code Civ. Proc. § 1294. To avoid the expense and risk of litigating in two forums at once, the defendant should seek to stay proceedings in the trial court pending the resolution of the appeal of the order denying arbitration.

### **The Petition to Enforce an Arbitration Award**

In California, contractual arbitral awards can be enforced under the CAA or the FAA. The CAA governs the enforcement of arbitral awards rendered in or outside of California. Cal. Civ. Proc. Code § 1286. Where there is federal subject matter jurisdiction, parties may enforce arbitral awards in either a California state court or a California federal court. In such a situation, the substantive provisions of the FAA will apply regardless of whether enforcement is sought in state or federal court.

### ***Enforcing an Arbitration Award in California State Court***

If filed in California state court, a petition for judicial confirmation of an arbitration award must be filed no earlier than 10 days after, but not later than four years after, the date of service of a signed copy of the award on the petitioner. See Cal. Civ. Proc. Code §§ 1288, 1288.4.

Practitioners should note that the CAA has different venue rules depending on the relationship between California and the arbitration that is subject to the award. The careful practitioner should employ a checklist to determine the proper venue:

1. First, a petition for judicial confirmation should be filed in a court that:
  - a. Has jurisdiction –and–
  - b. Is in the county where the arbitration was held
    - i. See Cal. Civ. Proc. Code § 1292.2.
2. If the arbitration was not held exclusively in any one California county, then the petition can be filed in the county where the arbitration agreement was entered into or was to be performed. See Cal. Civ. Proc. Code §§ 1292.2, 1292(a).
3. If neither of the first two options is available, the petition can be filed in any county where any party to the court proceeding resides or has a place of business. Cal. Civ. Proc. Code § 1292(b).
4. Finally, if none of the above options apply, the petition may be filed in any county in California where personal jurisdiction can be established. See Cal. Civ. Proc. Code § 1292(c).

## Enforcing an Arbitration Award under the Federal Arbitration Act

To enforce an arbitral award under the FAA, there must be a basis for federal subject matter jurisdiction (diversity or federal question).

A petition for judicial confirmation under the FAA must be filed within one year of the date the arbitral award is made. See 9 U.S.C. § 9.

If the arbitral agreement provides that judgment shall be entered by a particular court, a petition for judicial confirmation may be filed in that court. See 9 U.S.C. § 9. If no court is named in the arbitration agreement, the petition for confirmation may be filed in a court in the district where the arbitral award was made. See *id.*

In either state or federal court, once a petition is granted, it has the effect of a court judgment and can be executed upon under state law procedures. If the class action waiver is enforced, then the entry of the judgment would act as *res judicata* with respect to the individual claims of the plaintiff. Given the longer statute of limitations and the fact that the state court acts as a court of general jurisdiction, a California state court may be preferable to a federal court as a forum for a petition to confirm an arbitral award.

## For Defense Counsel: Whether and How to Draft an Arbitration Clause and Class Action Waiver

It is almost always advisable for a business that serves consumers to include an arbitration agreement and class action waiver if it is able to do so. Typically, including an arbitration agreement and class action waiver is viable only where there is an ongoing contractual relationship between the consumer and the business. A well-drafted and effective arbitration clause and class action waiver can essentially nullify the expense and annoyance of class action lawsuits.

Draft the arbitration clause and class action waiver with care. Ultimately, the business holds the cards in this regard given that arbitration and class action waivers are matters of private agreement. The business should consider writing a simple, easy to understand arbitration clause that clearly does not violate the rules in *McGill* or *Iskanian*. See *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017) (claims for public injunctive relief), and *Iskanian v. CLS Transportation*, 327 P.3d 129 (Cal. 2014) (claims under PAGA).

Given the U.S. Supreme Court's decision in *Lamps Plus*, the drafter should also avoid a nonseverability or poison pill clause that invalidates the agreement to arbitrate if any portion of the class action waiver is found unenforceable. Instead, the drafter is better served by including a normal severability clause that allows the court (if appropriate) to excise any allegedly illegal clauses in the arbitration agreement, while still enforcing the remainder of the agreement to arbitrate.

Effective arbitration agreements and class action waivers are typically simply drafted and simple to follow. An arbitration agreement should identify:

- The parties to the agreement
- The categories of claims that are arbitrable
- The identity of the arbitrator (and rules applicable to arbitration) –and–
- The categories of claims subject to the class action waiver

For example:

**Who:** Resolving disputes through arbitration/Arbitration Agreement between you and [entity]

**What:** If you have a dispute, we hope to resolve it as quickly and easily as possible. First discuss your dispute with a customer service representative. If the customer service representative is unable to resolve your dispute, you agree that either [entity] or you can initiate arbitration as described in this section.

**Definition:** Arbitration means an impartial third party will hear the dispute between [entity] and you and provide a decision. Binding arbitration means the decision of the arbitrator is final and enforceable. A dispute is any unresolved disagreement between [entity] and you. A dispute also includes a disagreement about this Arbitration Agreement's meaning, application, or enforcement. The arbitrator shall decide any dispute under this arbitration agreement.

[Entity] and you each agrees to waive the right to a jury trial or a trial in front of a judge in a public court. This Arbitration Agreement has only one exception regarding the disputes that are arbitrable: Either [entity] or you may still take any dispute to small claims court.

**Where:** This Arbitration Agreement is governed by the Federal Arbitration Act. The [American Arbitration Association/JAMS] will administer each arbitration and the selection of arbitrations will be according to [applicable AAA or JAMS rules]. The arbitration will be held in the state of your residence.

**Class Action Waiver:** Neither [entity] nor you will be entitled to join or consolidate disputes by or against others as a representative or member of a class, to obtain relief in any arbitration in the interests of the general public, or to act as a private attorney general.

If any provision related to this arbitration agreement is found to be illegal or unenforceable, then such provision shall be severed from the arbitration agreement, but the rest of the agreement shall remain enforceable and in full effect.

[Entity] or you each can exercise any lawful rights or use other available remedies to:

- Preserve or obtain possession of property
- Exercise self-help remedies, including setoff rights –or–
- Obtain injunctive relief (including public injunctive relief), attachment, garnishment, or appointment of a receiver by a court of competent jurisdiction

The substance of any disputes where public injunctive relief is available shall be decided by the arbitrator. Only if the claimant succeeds on its claim permitting the remedy of a public injunction may such claimant request that a court of competent jurisdiction enter an injunction in conformity with the arbitral award.

In addition to the basic terms above, the entity should also determine who is responsible for paying for the costs of arbitration. As discussed above, consumer-friendly terms such as requiring the entity to pay the arbitration expense (but not claimant's attorney's fees) of any non-frivolous claim may lessen the risk that the arbitration agreement is deemed unconscionable.

## For Plaintiff's Counsel: The Importance of Determining Whether a Class Action Waiver is in Play

The possibility of an enforceable arbitration clause and class action waiver should be the foremost consideration for you as putative class counsel for plaintiffs. A well-drafted arbitration clause can kill a class action in its infancy. Therefore, when evaluating a consumer class action case, you should attempt to determine whether the putative plaintiff is in a contractual relationship with the defendant business.

If so, obtain a copy of the contract. It is very likely that it will mandate arbitration and waive the right to bring a class action.

If it does, carefully scrutinize the language of the arbitration clause to determine whether there are any exceptions. Also look for the possibility of voiding the agreement because it includes an illegal clause (as discussed in *McGill* and *Iskanian*) and poison pill.

Successfully avoiding arbitration may be sufficient for you to pursue the case on a class basis. Even if the claims are compelled to arbitration, however, consider whether the successful pursuit of public injunctive relief under California's consumer protection statutes may be sufficient to enable you to pursue the litigation (and obtain fees) under a private attorney general theory.

## Related Content

### Practice Notes

- [Federal Arbitration Act Fundamentals](#)
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- [Class Action Fairness Act \(CAFA\) Jurisdiction Video \(Federal\)](#)
- [Class Action Fundamentals \(CA\)](#)
- [Class Action Fundamentals \(Federal\)](#)

### Annotated Forms

- [Class Action Complaint \(General\) \(CA\)](#)
- [Class Action Settlement Agreement \(Rule 23\(b\)\(3\)\) \(Federal\)](#)
- [Class Certification Order \(Proposed\) \(Federal\)](#)
- [Motion for Class Certification \(CA\)](#)
- [Notice of Class Action Pendency \(CA\)](#)
- [Notice of Class Action Settlement \(CA\)](#)

### Checklists

- [Arbitration Organizations: Choosing an Organization Checklist \(U.S.\)](#)
- [Arbitrators: Finding, Vetting, and Selecting an Arbitrator Checklist \(U.S.\)](#)
- [Preliminary Injunction in Aid of Arbitration Checklist \(Federal\)](#)
- [Class Action Notice of Settlement Checklist \(Federal\)](#)
- [Class Action vs. MDL Comparison Chart \(Federal\)](#)

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### **Alejandro (Alex) Moreno, Partner, Sheppard, Mullin, Richter & Hampton LLP**

Alejandro (Alex) Moreno practices general business and commercial litigation in state and federal courts. He is also experienced in private dispute resolution and arbitration, including FINRA arbitration, and has succeeded on behalf of his clients after full arbitration and brokered favorable pre-arbitration settlements. Alex also handles appeals in the California Court of Appeal and the Ninth Circuit.

Alex represents clients in the banking and finance, mortgage, cannabis, hospitality, technology and telecommunications, restaurant and franchise, energy and extraction, and healthcare industries. He defends consumer class actions, securities litigation and shareholder derivative suits, cross-border litigation, and litigation for high-net-worth individuals and companies with a need for Spanish speaking counsel. Alex has prevailed as named counsel in complex securities fraud class actions under Section 10(b) of the Exchange Act of 1934 and has defended derivative claims involving California, Nevada, and Delaware corporations. He is also experienced in the law of receivership and has managed the legal affairs of businesses placed into receivership.

Start-up companies turn to Alex to formalize their corporate governance, set up effective employee equity compensation plans, and analyze potential conflicts of interest to help them ramp up to Series A funding.

Alex lived for two decades in Mexico and Spain and applies his familiarity with Latin American culture to successfully solve legal disputes for Latin American clients. For example, he has successfully resolved labor disputes involving primarily Spanish speaking workforces. Alex has also led and organized fact gathering investigations for U.S. companies with factories in Latin America.

A prolific writer, Alex regularly contributes to various legal blogs discussing developments in the law affecting public companies, issuers of securities, banking and finance regulations, the enforceability of arbitration agreements and class action waivers, and companies with business in Latin America.

As part of his pro bono work, Alex has successfully resolved guardianship and immigration matters. He also regularly advises charities and public interest groups on regulatory and dispute resolution matters.

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