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Legislature Enacts New Arbitration Restriction

The California legislature enacted a bill, SB 33, intended to limit the ability of a depository financial institution to enforce an arbitration agreement in instances where the agreement to arbitrate was contained in a contract that was created fraudulently without the consumer's consent.

Under existing Code of Civil Procedure Section 1281.2, a procedure is created for a party to a contractual arbitration agreement to petition a court to compel arbitration. A court must enforce the arbitration agreement unless it determines that:

- there has been a waiver
- the agreement has been revoked, or
- a party to the arbitration agreement is also a party to a related and pending court action or special proceeding with a third party and there is a possibility of conflicting rulings.

SB 33 adds an additional ground for a court not to enforce an arbitration agreement by adding the following language to Section 1281.2:

(d). The petitioner [the party seeking enforcement] is a state or federally chartered depository institution that, on or after January 1, 2018, is seeking to apply a written agreement

to arbitrate, contained in a contract consented to by a respondent consumer, to a purported contractual relationship with that respondent consumer that was created by the petitioner fraudulently without the respondent consumer's consent and by unlawfully using the respondent consumer's personal identifying information, as defined in Section 1798.92 of the Civil Code.¹

According to sponsor California Treasurer John Chiang, the bill is crafted narrowly to address very specific circumstances. However, it is unclear whether this new exception to enforcing arbitration agreements would withstand U.S. Supreme Court scrutiny. Alex Alanis is CBA's lead lobbyist on the bill.

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¹ Civil Code Section 1798.92(c) reads, "Personal identifying information" means a person's name, address, telephone number, driver's license number, social security number, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings account number, or credit card number."