

## Class-Action Waivers and Arbitration Clauses in HIPAA/Data Security Disputes

By Paul E. Knag, Murtha Cullina LLP

In an age dominated by technological advancement, companies looking to store large amounts of information have turned away from metal filing cabinets and toward electronic databases. This is especially true of health care providers (HCPs) and payers that possess personal information relating to millions of individuals. While this method of storing and sharing information is convenient, it has also created opportunities for hackers to illegally access individuals' personal information.

In fact, according to experts in the field of data security, "there are now only two types of companies left in the United States: those that have been hacked and those that don't know they've been hacked."<sup>1</sup> Just this year, Anthem suffered a breach that compromised the security of 80 million customers' medical records.<sup>2</sup> To date, the Anthem breach has prompted the filing of more than ninety class actions.<sup>3</sup> Similarly, in 2013, four unencrypted laptops containing personal information on over 4 million people were stolen from Advocate Health Care.<sup>4</sup> That breach was also followed by a class-action lawsuit.<sup>5</sup> The list of health care companies that have been subject to class actions resulting from data breaches is plentiful. Many of these cases have ended in multi-million dollar settlements.<sup>6</sup>

Initially—and still to a certain extent—courts have been reluctant to allow these kinds of class actions to go forward. They reason that, although there has been a data breach, the class-action plaintiffs have failed to prove Article III standing because they have not suffered actual injuries.<sup>7</sup> However, this trend of dismissal has diminished as more courts have allowed data-breach class actions to proceed.<sup>8</sup>

Given that data breaches will likely increase before they decrease, HCPs and payers should consider ways to cope with the financial ramifications posed by related class actions. Obviously, any company's first line of defense should be to implement an effective data-security policy. However, doing this takes months—maybe even years, depending on the size of the company. Even with a valid policy in effect, unfortunately, companies still might be subject to an unexpected breach. Rather than rely on the coin-flip possibility that courts will dismiss class actions, HCPs and payers could be proactive by incorporating arbitration clauses with class-action waivers into their contracts with customers and patients.

### Interplay Between HIPAA and DATA Security Disputes

In 1996, Congress passed the Health Insurance Portability and Accountability Act (HIPAA) to protect the privacy of health information due to rapidly increasing amounts of information

that health providers have access to.<sup>9</sup> HIPAA's provisions were designed to promote efficiency within the health care system by improving the exchange of information among health plans, health care clearinghouses, and health care providers.<sup>10</sup>

HIPAA does not provide individuals or entities with a private right of action.<sup>11</sup> In other words, private parties cannot sue for violations of HIPAA; only the government may enforce HIPAA via fines and other penalties.<sup>12</sup> However, this has not stopped plaintiffs from successfully relying on HIPAA violations as a basis for state-law claims.

In *Byrne v. Avery Center for Obstetrics and Gynecology, P.C.*, the Connecticut Supreme Court held that, despite not allowing a private right of action, HIPAA may nonetheless inform the relevant standard of care in negligence cases involving health care providers' breaches of patient confidentiality.<sup>13</sup> Accordingly, the *Byrne* court concluded that HIPAA did not preempt—but rather, supported—the plaintiff's state-law negligence claim.<sup>14</sup>

This reasoning has been carried over into the class-action context. In *Baum v. Keystone Mercy Health Plan*, a federal district judge considered whether to remove a class action that had been filed in state court.<sup>15</sup> The plaintiff in *Baum* filed suit in state court after a USB drive went missing from the defendant Keystone's facilities.<sup>16</sup> The plaintiffs alleged that the USB drive possessed by Keystone contained personal health information of the plaintiff and 280,000 others.<sup>17</sup> The plaintiff's complaint, which stated only state-law causes of action, explicitly pled that Keystone was negligent in failing to comply with HIPAA.<sup>18</sup> Relying on this averment, Keystone attempted to remove the case to federal court by arguing that the HIPAA allegation provided federal question jurisdiction.<sup>19</sup>

The court rejected this argument, finding that the complaint did not raise a question of federal law. The court went on to clarify, like the Connecticut Supreme Court did in *Baum*, that HIPAA is merely supportive of the claim because it provides a measuring stick for the defendant's negligence. In conclusion, the *Baum* court declared that, since the complaint was a "straightforward state-law tort case . . . [it] should be decided by a state court under Pennsylvania's more stringent information security statute."<sup>20</sup>

Cases like *Byrne* and *Baum* act as warnings to HCPs and payers that their own HIPAA violations could be used against them in a purely state-law class action. In the same vein, *Baum* should make HCPs and payers eager to implement arbitration clauses with class-action waivers into their agreements with patients and customers. If the defendant in *Baum* had included

some type of waiver or arbitration clause, it would have implicated the Federal Arbitration Act (FAA). In light of the aforementioned case law, such an implication likely would have resulted in compelled arbitration. Instead, lacking federal jurisdiction and a class-action waiver, Keystone was left to defend a 280,000-person class action in state court.

## The Proper Forum

One of the most significant questions HCPs and payers will need answered, with respect to arbitration clauses or class-action waivers, is which forum they are even able to arbitrate in. Currently, the American Arbitration Association (AAA) will not honor pre-dispute arbitration clauses entered into between HCPs or payers and patients.<sup>21</sup> By contrast, the American Health Lawyers Association (AHLA) will arbitrate disputes between HCPs or payers and patients pursuant to a contractual arbitration clause.<sup>22</sup>

In order to be enforceable, however, AHLA requires that the drafter of the clause give the patient an opportunity to opt-out of it.<sup>23</sup> Specifically, any such clause must “state conspicuously that the health care entity will provide the same care or treatment, without delay, if the agreement is not signed.”<sup>24</sup> Similarly, AHLA also requires that the agreement give the patient the right to revoke it within at least ten days of signing it.<sup>25</sup>

## Enforceability of Class-Action Waivers

In recent years, the Supreme Court has handed down a string of decisions that deal with the overall enforceability of class-action waivers in arbitration agreements. Overall, the High Court has treated class-action waivers favorably. In so doing, the Court has consistently relied on the FAA. The FAA declares that arbitration agreements should generally be “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>26</sup> Whether there is a “ground” that “exist[s] at law or in equity” depends upon the cause of action being asserted. If the claim is based on state law, the Court will analyze the enforceability of an arbitration clause differently than it will if the claim is based on federal law.

*Class-Action Waivers and Arbitration Clauses in Federal Claims*  
In *American Express Co. v. Italian Colors Restaurant*, the Court declared that “courts must rigorously enforce arbitration agreements . . . [in] claims that allege a violation of a federal statute, unless the FAA’s mandate has been ‘overridden by a contrary congressional command.’”<sup>27</sup> In *Italian Colors*, the plaintiffs brought a class-action claim under federal antitrust laws, alleging that American Express had illegally monopolized the credit-card industry. In agreements between American Express and the plaintiffs was a clause that prohibited “any [c]laims” on a class-wide basis.

After examining the federal law at issue (the Sherman Act), the Court concluded that no “contrary congressional command” existed that would preclude a waiver of class-action procedure.<sup>28</sup> Specifically, the Court rejected the respondents’

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argument—that proceeding on an individual basis contravenes the policies of antitrust laws. In response to this argument, the Court found that the antitrust laws “do not guarantee an affordable procedural path to the vindication of every claim.”<sup>29</sup> The Court also based its decision—that no “contrary congressional command” existed—on the fact that the Sherman Act was silent regarding class actions.<sup>30</sup>

In *CompuCredit Corp. v. Greenwood*, the Court interpreted the FAA’s “contrary congressional command” even more strictly than it did in *Italian Colors*. In *Greenwood*, Justice Scalia held that the Credit Repair Organizations Act (CROA) did not contain a “contrary congressional command,” even though CROA requires companies to include in their consumer contracts the following disclosure: “You have a right to sue a credit repair organization that violates the [CROA].”<sup>31</sup> The *Greenwood* majority reasoned that this disclosure only provided consumers a right to receive the disclosure, but not a right to bring a claim in a court of law.<sup>32</sup>

The Second Circuit has followed the Supreme Court’s lead. In *Sutherland v. Ernst & Young LLP*, the Second Circuit held that the Fair Labor Standards Act (FLSA) does not contain a “contrary congressional command” sufficient to preclude enforcement of a class-action waiver.<sup>33</sup> The FLSA contains a provision that states that FLSA claims may be brought “by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.”<sup>34</sup> The *Sutherland* court acknowledged that this language did expressly condone class actions. Nevertheless, the court found that there was no right to a class action under the statute since the FLSA requires plaintiffs to opt-in to such claims.<sup>35</sup>

The above cases demonstrate two salient points. First, the inquiry in determining whether to enforce a class-action waiver in a federal claim asks whether the federal law at issue contains a “contrary congressional command.”<sup>36</sup> Second, and perhaps more importantly, courts have tended to compel arbitration in federal claims despite statutory language that could arguably be deemed a “contrary congressional command.”

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In light of these points, it is important to note that data-breach class actions have in fact been brought under certain federal laws. Some plaintiffs have asserted claims under the Federal Stored Communications Act (FSCA), Fair Credit Reporting Act (FCRA), and Gramm-Leach-Bliley Act (GLBA).<sup>37</sup> To date, no court has addressed whether the FSCA contains a “contrary congressional command” that forbids arbitration of FSCA claims.<sup>38</sup> In the one case to address the presence of a “contrary congressional command” within the FCRA, the court found none.<sup>39</sup> Similarly, no court has addressed whether the GLBA precludes arbitration. Therefore, HCPs and payers can likely invoke arbitration in claims brought against them under any of these laws.

*Class-Action Waivers and Arbitration Clauses in State-Law Claims*  
The Supreme Court analyzes state-law claims differently than federal claims with respect to the applicability of class-action waivers. Rather than asking if there is a “contrary congressional demand,” the Court will determine whether the applicable state’s law contains a “ground” (as expressed in Section 2 of the FAA) that “exist[s] at law or in equity for the revocation of any contract.”<sup>40</sup> This latter phrase has been construed to allow arbitration clauses to be voided by “generally applicable contract defenses, such as fraud, duress, or unconscionability.”<sup>41</sup> However, it does not permit the invocation of defenses “that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”<sup>42</sup>

In *AT&T Mobility LLC v. Concepcion*, the Court emphasized that the FAA preempts state laws that outright prohibit the arbitration of certain types of claims.<sup>43</sup> The Court went on to state that the inquiry becomes more complicated in situations where ordinary state-law contract doctrines—such as unconscionability—“have been applied in a fashion that disfavors arbitration.”<sup>44</sup> Going a step further, the Court boldly declared that “nothing in [the FAA] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”<sup>45</sup> Against this backdrop, the Court held that the FAA preempted California’s “Discover Bank rule,”

which had applied the unconscionability doctrine to invalidate class-action waivers in adhesion contracts. The Court rested its holding on preemption principles—specifically, that the California rule “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>46</sup>

One year later, in *Marmet Health Care Center, Inc. v. Brown*, the Court similarly held that the FAA preempted a West Virginia judge-made rule that prohibited the enforcement of arbitration clauses in nursing-home agreements.<sup>47</sup> The West Virginia rule explicitly precluded arbitration of negligence and wrongful death claims.<sup>48</sup> Relying on *Concepcion*, the *Marmet* Court found that the West Virginia rule “prohibits outright the arbitration of a particular type of claim,” and, therefore, it is preempted by the FAA.<sup>49</sup> The Court remanded the case for the lower court to consider whether the arbitration clauses are enforceable under state-law principles that are not “specific to arbitration.”<sup>50</sup>

Lower courts have followed the reasoning of *Marmet* and *Concepcion*. For example, in *Ferguson v. Corinthian Colleges, Inc.*, the Ninth Circuit held that the FAA preempted a California rule that prevented the arbitration of claims for public injunctive relief because the rule “prohibit[ed] outright” the arbitration of certain claims, as expressed in *Concepcion*.<sup>51</sup> In *Generational Equity LLC v. Schomaker*, the Third Circuit held that a Pennsylvania law that barred foreign businesses from using Pennsylvania courts was preempted by the FAA to the extent it prevented those businesses from confirming an arbitration award in court.<sup>52</sup>

The Supreme Court’s framework for analyzing the FAA’s applicability to class-action waivers in state-law claims is different than its analysis of federal claims. However, as evinced by the above cases, the state-law inquiry is equally deferential to the FAA as the federal-law inquiry. In general, courts will preempt state laws that outright prohibit the arbitration of certain claims. As seen by *Concepcion*, *Marmet*, and *Ferguson*, the FAA will preempt a state law even when that law was promulgated by judicial decision rather than legislative action.

### Benefits of Class-Action Waivers for Health Care Providers in the Digital Age

In light of the above distinction between state and federal law, HCPs and payers should be aware of what law is likely to apply in data-breach claims against them. If federal law applies, a presiding court would be tasked with deciding whether the federal statute contains a “contrary congressional command.” On the other hand, if state law applies, a court’s inquiry would depend upon (1) whether the state’s law “prohibits outright” the arbitration of certain claims, (2) whether ordinary contract doctrines have been applied by the state in a manner that “disfavors arbitration,” or (3) whether the state law stands as an obstacle to the objectives of the FAA. Any one of these grounds would provide a basis for FAA preemption and, consequently, enforcement of waivers.

As previously noted, some classes have asserted claims under federal laws that seem to contain no contrary congressional commands preventing arbitration.<sup>53</sup> Other classes have chosen to proceed exclusively under state law.<sup>54</sup> What does this mean for HCPs and payers? For one, it creates an additional hurdle for HCPs and payers who end up in state court. Fortunately for HCPs and payers, the Class Action Fairness Act (CAFA) will probably provide a basis to remove such claims to federal court.<sup>55</sup> Just last month, a federal district court, relying on CAFA, denied a class' motion to remand their state-law data-breach claim against Blue Cross.<sup>56</sup>

Plaintiffs' use of state law also means that courts will look to relevant state law in determining whether the FAA preempts it. Given the Supreme Court's treatment of the FAA, HCPs and payers should be hopeful (but not naively optimistic) that their class-action waivers will be enforced in data-breach claims. It is not surprising that, until now, HCPs and payers have not considered class-action waivers; HIPAA does not provide a private right of action. With the advent of data-breach class actions, however, the time to implement these contractual waivers is now.

## Drafting the Right Clause

Because of the infancy of data-security breach law, it is impossible for HCPs and payers to foresee what types of claims may be brought against them should they suffer a data breach. With that said, a few guiding principles might help inform the drafting process. First and foremost, HCPs and payers should be cognizant, in drafting arbitration clauses and class-action waivers, that those provisions very well may be analyzed under various states' unconscionability standards. Therefore, class-action waivers, especially, should avoid highly oppressive terms and should include other mechanisms to guarantee procedural fairness to litigants. HCPs and payers should also research the relevant state's law to uncover any cases or statutes that seem to disfavor the FAA or arbitration in general since such laws will trigger FAA preemption.<sup>57</sup>

Lastly, HCPs and payers should become well-versed in the various bodies of federal law that a data-breach class action could be brought under. As seen in *Concepcion* and *Italian Colors*, a court deciding whether to compel arbitration under the FAA will look to a federal statute to see whether it contains a "contrary congressional command." Thus, HCPs and payers should attempt to draft waivers in clauses in light of any potential "contrary congressional commands" present in statutes such as the FCRA and FCSA.<sup>58</sup>

## Conclusion

HCPs and payers subject to data breaches will be left to wade in the quagmire of conflicting state and federal laws. Although this may seem daunting—and inherently unpredictable—HCPs and payers might be able to bring some predictability to litigation by including arbitration clauses and class-action waivers in their agreements with consumers. **C**

# Cases like *Byrne* and *Baum* act as warnings to HCPs and payers that their own HIPAA violations could be used against them in a purely state-law class action.

## About the Authors



**Paul Knag** ([pknag@murthalaw.com](mailto:pknag@murthalaw.com)) practices in the areas of Complex Litigation and Health Care. A cum laude graduate of Harvard Law School, he has written and lectured extensively on a variety of topics including antitrust, health care reimbursement, insurance, arbitration and various other topics. Mr. Knag is the original author of a treatise on HIPAA. He has litigated in a variety of state and federal courts including the United States Supreme Court. He has also handled a wide variety of health care transactional and regulatory issues on behalf of providers including compliance, reimbursement, governance, antitrust, joint ventures, physician contracting and a wide array of other health care issues. Mr. Knag is listed in Best Lawyers and Who's Who, and is currently the Chair of the Health Law Section of the Connecticut Bar Association as well as formerly Chair of the Connecticut Health Lawyers Association.

The author thanks Thomas Bosworth for his assistance with the article. Mr. Bosworth is a third-year law student at Temple University Beasley School of Law in Philadelphia, where he is a Research Editor for the *Temple Law Review*. While in law school, Tom was also selected to compete as a member of Temple Law's National Trial Team. Upon graduation, Tom will serve as a law clerk for a federal district judge in the Eastern District of Pennsylvania.

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## Endnotes

- 1 Nicole Perloth, *The Year in Hacking, by the Numbers*, N.Y. TIMES (Apr. 22, 2013), available at [http://bits.blogs.nytimes.com/2013/04/22/the-year-in-hacking-by-the-numbers/?\\_r=0](http://bits.blogs.nytimes.com/2013/04/22/the-year-in-hacking-by-the-numbers/?_r=0).
- 2 Anna Wilde Mathews & Danny Yadron, *Health Insurer Anthem Hit by Hackers*, WALL ST. J. (Feb. 4, 2015), available at [www.wsj.com/articles/health-insurer-anthem-hit-by-hackers-1423103720](http://www.wsj.com/articles/health-insurer-anthem-hit-by-hackers-1423103720).
- 3 See *In re Anthem, Inc., Customer Data Sec. Breach Litig.*, MDL No. 2617, --- F.3d ---, 2015 WL 3654627 (J.P.M.L. June 8, 2015) (transferring various cases from federal courts in Alabama, California, Georgia, Indiana, and Ohio to the Northern District of California for consolidation into a multidistrict litigation).

# Analysis

- 4 Erin McCann, *Advocate Health Slapped with Lawsuit After Major Data Breach*, HEALTHCARE IT NEWS (Sept. 6, 2013), available at <http://www.healthcareitnews.com/news/AdvocateHealth-slapped-with-lawsuit-after-massive-data-breach>.
- 5 *Id.*
- 6 See, e.g., *Curry v. AvMed, Inc.*, No. 10–cv–24513–JLK, 2014 WL 7801286 (S.D. Fla. Feb. 28, 2014) (approving \$3 million class-action settlement against health care company when two laptops containing patients' sensitive information were stolen from the company's facility); Michael Lipkin, *Stanford, Contractors To Pay \$4M To Settle Data Breach Action*, LAW 360 (Mar. 19, 2014), available at <http://www.law360.com/articles/520220/corrected-stanford-contractors-to-pay-4m-to-settle-data-breach-action> (discussing a California court's approval of \$4.1 million settlement against a hospital's subcontractors that leaked 20,000 patients' medical records).
- 7 See, e.g., *In re Science Applications Int'l Corp. (SAIC) Backup Data Theft Litig.*, 45 F. Supp. 3d 14, 26–27 (D.D.C. 2014) (discussing many courts' conclusions that the "increased risk of harm alone does not confer standing" in data breach cases).
- 8 See, e.g. *In re Target Corp. Data Sec. Breach Litigation*, 66 F. Supp. 3d 1154 (D. Minn. 2014) (holding that customers sufficiently alleged they suffered injury in fact).
- 9 *Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, 102 A.3d 32, 43 (Conn. 2014).
- 10 *Id.*
- 11 See, e.g., *id.* at 45; accord *Baum v. Keystone Mercy Health Plan*, 826 F. Supp. 2d 718, 721 (E.D. Pa. 2011).
- 12 *Id.*
- 13 *Byrne*, 102 A.3d at 46–47.
- 14 *Id.* at 49.
- 15 *Baum*, 826 F. Supp. 2d at 720.
- 16 *Id.* at 719. Keystone, a Pennsylvania corporation, served over 300,000 Medicaid recipients in Pennsylvania. *Id.*
- 17 *Id.*
- 18 *Id.* at 720.
- 19 *Id.*
- 20 *Id.* at 721.
- 21 See AMERICAN ARBITRATION ASSOC. ET AL., HEALTHCARE DUE PROCESS PROTOCOL 1 (1998) [hereinafter AAA RULES], available at [file:///C:/Users/tbosworth/Downloads/Commercial\\_Healthcare%20Due%20Process%20Protocol\\_Guide\\_2010\\_11\\_18.pdf](file:///C:/Users/tbosworth/Downloads/Commercial_Healthcare%20Due%20Process%20Protocol_Guide_2010_11_18.pdf) (declaring, in the third bullet point, that "[i]n disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises") (emphasis added).
- 22 AMERICAN HEALTH LAWYERS ASSOC., RULES OF PROCEDURE FOR ARBITRATION 30, at § 11.5 (2014) [hereinafter AHLA RULES], available at <https://www.healthlawyers.org/dr/SiteAssets/Lists/drsaccordion/EditForm/Rules%20Effective%20April%207.pdf>.
- 23 *Id.* § 11.5(c).
- 24 *Id.*
- 25 *Id.* § 11.5(d).
- 26 9 U.S.C. § 2.
- 27 133 S. Ct. 2304, 2309 (2013) (internal quotation marks omitted).
- 28 *Italian Colors*, 133 S. Ct. at 2309.
- 29 *Id.*
- 30 *Id.*
- 31 *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012).
- 32 *Id.*
- 33 *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 296 (2d Cir. 2013).
- 34 29 U.S.C. § 216(b).
- 35 *Sutherland*, 726 F.3d at 296–97.
- 36 Some cases also refer to the "judge-made" exception to the FAA, which allows courts to "invalidate agreements that prevent the 'effective vindication' of a federal statutory right." *Id.* (citing *Italian Colors*, 133 S. Ct. at 2310). However, courts have been hesitant to invoke this exception. *Id.*
- 37 See *Green v. eBay Inc.*, Civil Action No. 14-1688, 2015 WL 2066531, at \*1 (E.D. La. May 4, 2015) (dismissing FCRA, FSCA, and GLBA claims for lack of standing); see also *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, Civil Action No. 13-7418 (CCC), 2015 WL 1472483 (D.N.J. Mar. 31, 2015) (dismissing data-breach class action brought under FCRA for lack of standing).
- 38 See *Alghanim v. Alghanim*, 828 F. Supp. 2d 636, 657–58 (S.D.N.Y. 2011) (noting that there is not "any precedent regarding whether claims under the [FSCA] . . . are arbitrable").
- 39 *Campbell v. Verizon Wireless, LLC*, Civil Action No. 14-0517-WS-N, 2015 WL 416484, at \*8 (S.D. Ala. Jan. 29, 2015).
- 40 *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011).
- 41 *Id.*
- 42 *Id.*
- 43 *Id.* at 1747.
- 44 *Id.* (emphasis added).
- 45 *Id.* at 1748.
- 46 *Id.* at 1753.
- 47 132 S. Ct. 1201, 1204 (2012).
- 48 *Marmet*, 132 S. Ct. at 1203.
- 49 *Id.* (quoting *Concepcion*, 131 S. Ct. at 1747).
- 50 *Id.* at 1204.
- 51 733 F.3d 928 (9th Cir. 2013).
- 52 No. 14-1291, 2015 WL 758532 (3d Cir. Feb. 23, 2015).
- 53 See *supra* Section II.A for a discussion of these laws.
- 54 See *Vasquez v. Blue Cross*, No. CV-15-2055-MWF (AGR), 2015 WL 2084592 (C.D. Cal. May 5, 2015) (suing under California's data-breach law); *Storm v. Paytime, Inc.*, No. 14-cv-1138, 2015 WL 1119724, at \*2 (M.D. Pa. Mar. 13, 2015) (suing under Pennsylvania's Unfair Trade Practices and Consumer Protection Law).
- 55 Under CAFA, federal courts have jurisdiction over class actions that meet the following requirements: (1) there are more than 100 class members; (2) any class member is diverse from any defendant; and (3) the amount in controversy exceeds \$5 million. See 28 U.S.C. § 1332(d)(2).
- 56 *Vasquez*, 2015 WL 2084592.
- 57 *Cf. Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (holding that the FAA preempted West Virginia case law that prohibited the arbitration of personal injury claims against nursing homes); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (FAA preempts state law's application of unconscionability doctrine to arbitration).
- 58 At least one court has found that the FCRA does not contain a "contrary congressional command" that precludes enforcement of an arbitration clause. *Campbell v. Verizon Wireless, LLC*, Civil Action No. 14-0517-WS-N, 2015 WL 416484, at \*8 (S.D. Ala. Jan. 29, 2015).

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