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The Supreme Court Again Extends the Preemptive Effect of the Federal Arbitration Act

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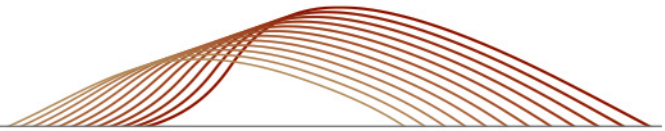
Your binding arbitration clause is very likely now stronger in light of the most recent Supreme Court decision enforcing Federal Arbitration Act preemption. On December 14, 2015, the Supreme Court issued its decision in *DirecTV, Inc. v. Imburgia*. By a 6-3 vote, the Court held that *DirecTV* consumers were bound by an arbitration provision requiring individual arbitration, and reversed a California Court of Appeal decision that had decided otherwise.[1] Concluding that the California Court of Appeal was bound by *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and holding that no court, state or other body may avoid *Concepcion*'s mandate, the Court found that the FAA preempted California's treatment of the *DirecTV* arbitration provision.[2]

The History of the Dispute

The facts of this case are unique, but its lessons are not. *DirecTV v. Imburgia* started in California state court in 2008 when two customers brought a class action alleging that *DirecTV*'s early termination fees violated California consumer protection laws.[3] The customers had entered into a service agreement with *DirecTV* that included a binding arbitration provision with a class arbitration waiver.[4] The language of the arbitration provision provided that the entire provision was unenforceable if the "law of your state" made class-arbitration waivers unenforceable.[5] At that time, the law in California (known as the *Discover Bank* rule, after the case that established it) made such arbitration waivers unenforceable.[6] *DirecTV* originally did not seek to enforce the arbitration provision in light of the *Discover Bank* rule.[7]

While the litigation was pending in California, the United States Supreme Court decided *AT&T Mobility LLC v. Concepcion*, which held that the Federal Arbitration Act preempted the *Discover Bank* rule.[8] At that point, *DirecTV*, citing *Concepcion*, moved to compel arbitration, believing that the class arbitration waiver was now enforceable.[9] The state trial court denied *DirecTV*'s motion.[10]

On appeal, the California Court of Appeal decided that, as a matter of contract law, the parties meant "the law of your state" to mean California law alone, as articulated in *Discover Bank*, irrespective of whether that rule was invalidated in *Concepcion*.[11] The Court of Appeal cited the principle that ambiguity should be resolved against the drafter.[12] The California Supreme Court declined discretionary review. Meanwhile, the Ninth Circuit Court of Appeals decided another case, *Murphy v. DirecTV, Inc.*, which considered the exact same question but reached the opposite conclusion.[13] The United States Supreme Court granted certiorari to resolve the conflict.[14]



The Supreme Court's Decision

Justice Breyer, writing for the majority, explained that the question presented was whether the FAA preempted the Court of Appeal's treatment of the arbitration contract at issue.[15] Because contract interpretation is a matter left to the states, the Court noted that it was bound to accept the California Court of Appeal's interpretation of the provision.[16] Instead, the question the Court resolved was "not whether its decision is a correct statement of California law but whether (assuming it is) that state law is consistent with the Federal Arbitration Act."[17]

Resolving that question required a determination of whether the Court of Appeal's decision placed arbitration contracts on equal footing with other contracts—more specifically, whether interpreting an arbitration provision specifying "the law of your state" as including invalidated laws would result in treating arbitration contracts differently than other contracts.[18] The Supreme Court, citing the lack of precedent in any other contract area interpreting "state laws" to include invalidated state laws, determined this treatment was likely to be specific to arbitration.[19] Additionally, the Supreme Court noted that the Court of Appeal had even couched its decision in language specific to arbitration, "suggest[ing] that the Court of Appeal could well have meant that its holding was limited to . . . arbitration," which would violate the FAA's command that arbitration provisions receive equal treatment.[20] Thus, because the decision did not place arbitration contracts on equal footing with all other contracts, it did not give "due regard . . . to the federal policy favoring arbitration," and was therefore preempted by the FAA.[21]

In a dissent joined by Justice Sotomayor, Justice Ginsburg emphasized that ambiguity should be resolved against *DirecTV*, the drafter of the agreement, and criticized the majority for continuing *Concepion*'s reduction of class arbitration availability to consumers.[22] [23]

DirecTV: Key Takeaways

The *DirecTV* decision offers three important insights. First, after *Concepion*, conventional wisdom indicated that in future arbitration decisions, the Supreme Court would vote along the same 5-4 split. The Court split that way in *Concepion* itself, and in *American Express Company v. Italian Colors Restaurant*, for example.[24] In *DirecTV*, however, Justices Breyer and Kagan switched sides. It now seems clear that there is not an immutable bloc of four anti-arbitration justices, as much post-*Concepion* analysis suggested.

Second, *DirecTV* rejected reliance on a principle frequently employed against companies in contract disputes—that ambiguity in the contract should be resolved against the drafter. Justice Ginsburg relied heavily on this principle in her dissent. The majority, however, disagreed: "[T]he reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was."[25] As a result, contract drafters will have additional support for their arguments, even when an opponent alleges ambiguity in them.

Third, the Court's decision repeatedly chastises state courts for fashioning special rules disfavoring arbitration contracts. The Court emphasized at least seven different times that the FAA requires states to apply to arbitration agreements the same rules that apply to other contracts.[26] *DirecTV* reaffirms the Supreme Court's commitment to a broad application of the preemptive effect of the FAA and its command that states adhere to the federal policy favoring arbitration. Thus, *DirecTV* will serve to further strengthen the already powerful arguments for parties seeking to compel arbitration.

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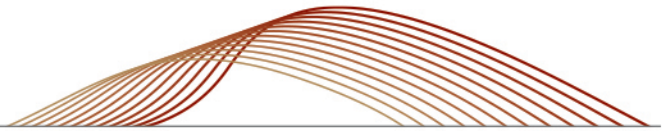

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[1] *DirecTV, Inc. v. Imburgia,* No. 14-462, ---S.Ct. ---, 2015 WL 8546242 (Dec. 14, 2015).

[2] *Id.* at *1.

[3] *Id.* at *3.

[4] *Id.*

[5] *Id.*

[6] *Id.* (citing *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005)).

[7] *Id.*

[8] *Id.* (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)).

[9] *Id.*

[10] *Id.*

[11] *Id.* at *3-4.

[12] *Id.* at *4.

[13] *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1226-28 (9th Cir. 2013).

[14] *DirecTV, Inc.*, 2015 WL 8546242, at *5.

[15] *Id.* at *5-6.

[16] *Id.*

[17] *Id.* at *5.

[18] *Id.* at *6.

[19] *Id.*

[20] *Id.* at *7.

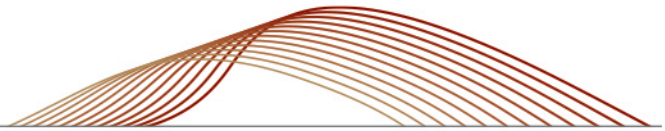
[21] *Id.* at *8 (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989)).

[22] *Id.* at *9-12.

[23] Justice Thomas also wrote a dissent, noting simply that he remained of the opinion that the FAA did not apply to state court proceedings. *Id.* at *9.

[24] *American Express Company v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). The Court in *American Express* actually split 5-3, as Justice Sotomayor did not participate in the case. Her votes in *Concepcion* and *DirecTV* make it likely that she would have been a fourth dissenting vote, had she participated.

[25] *Id.* at *9.



[26] *E.g.*, *id.* at *6 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) ("[W]e must decide whether the decision of the California court places arbitration contracts 'on equal footing with all other contracts.'"); *id.* ("[T]he [California] Court of Appeal's conclusion . . . appears to reflect the subject matter at issue here (arbitration), rather than a general principle that would apply to [other] contracts . . . ."); *id.* at *7 ("[T]he language used by the Court of Appeal focused only on arbitration. . . . Framing the question in such terms, rather than in generally applicable [contract-law] terms, suggests that the Court of Appeal could well have meant that its holding was limited to the specific subject matter of this contract—arbitration."); *id*. ("The contract-interpretation rule applied by the California court "is one courts are unlikely to accept as a general matter and to apply in other [contractual] contexts."); *id.* at *8 ("California's interpretation of the [contract language] does not place arbitration contracts on equal footing with all other contracts.") (citation and internal quotation marks omitted); *id.* (citing *Volt*, 489 U.S. at 476) ("For that reason, it does not give 'due regard . . . to the federal policy favoring arbitration.'"); *id.* (Therefore, the California court's "decision does not rest 'upon such grounds as exist . . . for the revocation of any contract,' and we consequently set that judgment aside.").