

## ***DIRECTV, Inc. v. Imburgia*: Confirming the Enforceability of Arbitration Clauses**

By Steve Kerbaugh



In *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), issued on December 14, 2015, the United States Supreme Court dealt another blow to class action lawsuits by enforcing an arbitration agreement and confirming the validity of class-arbitration waivers. *DIRECTV* is an important case for litigators and transactional attorneys because it further underscores the extent to which the Supreme Court is willing to enforce arbitration agreements.

The *DIRECTV* action was commenced by customers seeking damages for early termination fees. *DIRECTV*'s customer service agreement contained an arbitra-

tion provision and a class-arbitration-waiver clause providing that claims could not be joined or consolidated in arbitration. The practical effect of such a provision is to force customers to personally incur significant fees litigating individual arbitration proceedings regardless of the expected amount of recovery.

California courts have previously found such provisions invalid. In 2005, the California Supreme Court held that waivers of class arbitration in consumer contracts of adhesion involving small amounts of damages were unconscionable and unenforceable. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal.

2005). The *Discover Bank* rule, though, was abrogated in 2011 when the United States Supreme Court held that it was an obstacle to the accomplishment congressional objectives embodied in the Federal Arbitration Act, which preempted the rule. *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

The service agreement in *DIRECTV* provided that the Federal Arbitration Act governed the arbitration provision. Seemingly inconsistently, it also provided that if the "law of your state" makes class-arbitration waivers unenforceable, then the entire arbitration provision is unenforceable. The California Court of

Appeal concluded that, despite the Supreme Court's ruling in *Concepcion*, the class-arbitration waiver in the service agreement was unenforceable under California law. It reasoned that just as parties are free to refer to the laws of different states in their contracts, they are also free to refer to California law as it would have been without the Supreme Court's invalidation of *Discover Bank*. The Court further held that the California law provision trumped the provision in the services agreement referring to the Federal Arbitration Act on the basis of two common law canons of contract construction: (1) specific language governs general language, and (2) courts must construe ambiguous language against the drafter.

The Supreme Court reversed in a six-to-three decision written by Justice Breyer with an ideologically unusual assortment of dissenting Justices in Ginsburg, Sotomayor and Thomas. The Court commenced its analysis by noting that the Federal Arbitration Act is the law of the United States, that *Concepcion* is an authoritative interpretation of the Act and that judges of every state must follow it. But the Court noted that this point of law did not resolve the issue since the Federal Arbitration Act allows parties latitude to determine what law governs, including law governing the enforceability of class-arbitration waivers.

Recognizing that California courts are the ultimate authority on California law, the Supreme Court noted that its task was to determine whether California courts place arbitration contracts "on equal footing with all other contracts." *DIRECTV*, 136 S. Ct. at 468 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). This, the Court found, the California Court of Appeal did not do.

The Court examined whether the language "law of your state" could reasonably be construed to include invalid California law – i.e., the *Discover Bank* rule in light of *Concepcion*. In analyzing the California Court of Appeal's discussion on the subject, the Supreme Court concluded that California courts would not interpret contracts other than arbitration contracts to be governed by

invalidated principles of law. Among other reasons for this conclusion, the Court reasoned that the language of the contract was not ambiguous; the plain meaning of "law of your state" means valid law of your state, not invalid law of your state. The Court also doubted that the California courts would generally interpret "law of your state" to include state laws that conflict with other federal laws – the Equal Protection Clause, for example. Since California's interpretation of the services agreement did not place the arbitration contract on equal footing with all other contracts, the Court concluded that it did not give due regard to the federal policy favoring arbitration and was thus preempted by the Federal Arbitration Act.

*DIRECTV* demonstrates the Supreme Court's willingness to enforce arbitration provisions, even where consumers are effectively deprived of their day in court by agreeing to non-negotiated, take-it-or-leave-it arbitration terms. It further speaks to the Court's lack of tolerance for state efforts to circumvent federal policy

favoring arbitration. And perhaps most importantly, *DIRECTV* serves as important reminder of that cardinal rule of contract drafting: if you want to avoid a dispute, write clearly.

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