

*If you have any questions
about this Advisory,
please contact:*

BETHANY APPLEBY
203.498.4365
bappleby@wiggin.com

JOHN DOROGHAZI
203.498.4421
jdoroghazi@wiggin.com

JEFFREY BABBIN
203.498.4366
jbabbins@wiggin.com

Supreme Court Shuts Down Consumer Class Action and Requires Individual Arbitration of Claims

On December 14, 2015, the United States Supreme Court closed a potential loophole in its earlier ruling that preempted state bans on class-arbitration waivers under the Federal Arbitration Act (FAA). In *DIRECTV, Inc. v. Imburgia* (No. 14-462), the Court reversed the California state courts' refusal to enforce the waiver of class procedures in arbitration and required the two named plaintiffs in a putative state-court class action to individually arbitrate their claims that DIRECTV unlawfully imposed early-termination fees.

Imburgia is the sequel to *AT&T Mobility LLC v. Concepcion*, a 5-4 decision in 2011 that applied FAA preemption to strike down California law that prohibited consumer class-arbitration waivers as unconscionable. See 563 U.S. 333. While that would seem to supply the answer to this latest case, which was pending when *Concepcion* was decided, the California trial and appellate courts found a unique way around the FAA. The consumer contract used by DIRECTV required binding arbitration to resolve disputes but then voided that requirement if the "law of your state" would not enforce a waiver of class arbitration. When the California plaintiffs signed up for their satellite TV service, the "law of [their] state" prohibited the class-arbitration waiver, so they were free to bring their class action in court. After *Concepcion*, DIRECTV sought to compel arbitration because it could now avoid class arbitration. But the state courts interpreted the "law of your state" as evidencing the parties' contractual intent to apply state law without regard to FAA preemption—meaning that DIRECTV ostensibly had a meeting of the minds with California customers to apply that state's dislike of class arbitration waivers, making the

entire arbitration clause void under the contract's own terms.

The Supreme Court granted review and has now reversed in a 6-3 decision. Justice Breyer wrote the majority opinion, even though he had authored the four-Justice dissent in *Concepcion*. He was joined by Chief Justice Roberts and by Justices Scalia, Kennedy, Alito, and Kagan (another *Concepcion* dissenter). Justice Breyer appeared concerned about the integrity of the Court and the state courts' efforts to avoid the divided, yet binding, *Concepcion* decision. Although Justice Breyer conceded that the state courts have the last word on the meaning of the contract, he questioned whether the very steps that the state courts took to construe the contract were themselves preempted by the FAA as evidencing hostility toward arbitration. By construing the contractual phrase "law of your state" as including even invalid state law, the state courts applied (in Justice Breyer's view) an arbitration-specific means of analyzing the parties' contractual intent that could not be found in any other area of the law. Justice Breyer could find no precedent construing the term "state law" in a contract as incorporating, for example, state laws preempted by "federal labor law, federal pension law, or federal civil rights law." The Supreme Court has long held that the FAA preempts state laws that hinder the enforcement of arbitration agreements on grounds that do not apply to contracts generally, and Justice Breyer found the state courts in this case to have tilted their application of canons of contract construction precisely because the contract term related to arbitration. So, the Court held as a matter of federal arbitration law that

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the contract cannot be construed as intending to abide by state laws that *Concepcion* had held were preempted by the FAA. Therefore, the Court reversed the lower courts and directed arbitration to proceed without class procedures.

Two of *Concepcion*'s four dissenters remained as dissenters here, with Justice Ginsburg penning the opinion joined by Justice Sotomayor. Justice Ginsburg acknowledged the Court's precedent, but drew a line in the sand, refusing to take any "further step to disarm consumers, leaving them without effective access to justice." She noted how "routine" it now is "for powerful economic enterprises to write into their form contracts with consumers and employees no-class-action arbitration clauses." Because she would construe the contract against the drafter, and because she thought the phrase "law of your state" is ambiguous, she supported the California courts' construction of the contract as specifically incorporating the law as it stood in that state before *Concepcion*, invalidating waivers of class procedures in arbitration.

Justice Thomas also dissented, but on entirely different grounds. Justice Thomas was in the majority of the 5-4 *Concepcion* decision invalidating the state ban on class-arbitration waivers in consumer contracts. His dissent here took no issue with *Concepcion*. The difference was that *Concepcion* addressed a claim originally brought in federal court, a forum where Justice Thomas is willing to apply the full force of the FAA. The DIRECTV lawsuit, however, was pending in state court, and Justice Thomas held to his longstanding view that the FAA applies

only to federal courts and never requires state courts to enforce agreements to arbitrate. While other Justices had once taken that same view, the others have acquiesced in the Court's jurisprudence, but Justice Thomas has not.

Companies that wish to arbitrate their disputes, but not on a class-wide basis, now have fewer obstacles in their path. But careful attention must be paid to the wording of the contract. DIRECTV was helped by including in its contract a specific reference to the arbitration clause being governed by the FAA. But that reference was nearly undermined by language that did not clearly express its intent to waive class procedures in arbitration. Of course, DIRECTV drafted its contract before *Concepcion*. Armed with *Concepcion* and now *Imburgia*, the drafter of a contract can be more direct and avoid language that might allow the state courts to construe the contract in a manner hostile to arbitration. *Imburgia* is another in a long line of cases in the past few decades where the Supreme Court has upheld the primacy of the FAA over state-law hostility to enforcing agreements to arbitrate.

If you have questions relating to arbitration in franchise, consumer or other contracts, please contact Bethany Appleby or John Doroghazi in our Franchise and Distribution Practice Group or Jeffrey Babbitt in our Appellate and Complex Legal Issues Practice Group. Wiggin and Dana LLP has been at the forefront of litigation and contract issues nationally under the Federal Arbitration Act for over twenty-five years.

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