

BUSINESS LAW TODAY

Keeping Current:

Supreme Court Again Confirms That Class Action Arbitration Waivers Are Valid

By [Levi W. Swank](#), [Thomas M. Hefferon](#), and [Joseph F. Yenouskas](#)

In *DIRECTV, Inc. v. Imburgia*, No. 14-462 (Dec. 14, 2015), the U.S. Supreme Court faced yet another case involving the arbitration of consumer disputes. The court in *DIRECTV* held that a class action waiver contained in an arbitration clause of the contract was valid, even though the contract incorporated state law standards that would have voided the waiver at the time the contract was entered into. The decision continues the court's trend toward enforcement of arbitration clauses, including those containing a waiver of class action proceedings in arbitration. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *American Express Corp. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

Background

DIRECTV was a putative class action filed in California state court seeking damages for early termination fees imposed on consumers in connection with their *DIRECTV* service contracts. The form contract contained an arbitration clause, which also waived class arbitration. Key to the issue ultimately before the Supreme Court, the contract further provided that if the "law of your state" makes waiver of class arbitration unenforceable, the entire arbitration clause would be voided and any dispute would have to be resolved in court.

At the time the case was filed in 2008, *DIRECTV* did not invoke the arbitration clause, because, in 2005, the California Supreme Court had held in *Discover Bank v.*

Superior Court, 113 P.3d 1100 (Cal. 2005), that an arbitration clause waiving class proceedings was unenforceable as a matter of state law. In 2011, however, the U.S. Supreme Court overturned the *Discover Bank* rule, in *Concepcion*. See 563 U.S. at 352. Following *Concepcion*, *DIRECTV* sought to compel arbitration. The trial court held that the arbitration agreement was unenforceable because, "[a]t the time Imburgia filed the complaint in this case, *Discover Bank* was controlling authority." *Imburgia v. Directv Inc.*, 2012 WL 7657788, No. BC398295 (Cal. Super. Feb. 26, 2012). The court further reasoned that California statutory law precluded the waiver of class proceedings, and that *Concepcion* "did not reach the issue of whether the Federal Arbitration Act preempts California law on waivers of statutory representative actions." The California intermediate appellate court affirmed the trial court's ruling that the arbitration agreement was unenforceable notwithstanding *Concepcion* because "a reasonable reader of the customer agreement would naturally interpret the phrase 'the law of your state' as referring to (nonfederal) state law." *Imburgia v. DIRECTV, Inc.*, 225 Cal. App. 4th 338, 346-47 (2014). And "state law" included the invalid *Discover Bank* rule, shorn of any preemptive effect of the Federal Arbitration Act.

The Supreme Court's Decision

In a six-to-three decision, the Supreme Court reversed the California appellate court. The opinion, authored by Justice Breyer, rea-

soned that the reference to the "law of your state" meant the "valid law of your state," and hence the *Discover Bank* rule had not been incorporated into the consumer contract even though "the parties likely believed that the words 'law of your state' included California law that then made class-arbitration waivers unenforceable." It rejected the contrary conclusion reached by the California appellate court, finding the parties' intentions unambiguous in the absence of a clear statement that they had intended to govern their relationship by *invalid* legal principles.

The Supreme Court cited a large number of additional reasons in support of its conclusion that the waiver was valid. Among others, the opinion pointed out that its reading was consistent with other California decisions, which had held that when state law is incorporated into an agreement that incorporation ordinarily includes an intention that any subsequent changes in that law would automatically govern the preexisting contract terms as well. The court similarly rejected the notion that an invalidated principle of state law retained some independent legal force, such that applying "state law alone" rendered the arbitration clause unenforceable. After an analysis of other state contract cases, the court further found that California courts likely would not interpret the phrase "law of your state" in the way the California intermediate appellate court had if the case had arisen in any context outside arbitration. For the appellate

court to have concluded that the “law of your state” referred even to invalid law thus placed the parties’ arbitration clause on a different footing than other California contracts, and so was fatally inconsistent with the recognized principle that a state law may not discriminate against arbitration. And because the court was unable to find a California case interpreting the phrase “law of your state” to include an invalid law, the phrase was not ambiguous and thus “the antidrafter canon would not lead California courts to reach a similar conclusion in similar cases that do not involve arbitration.”

There were two dissents in *DIRECTV*, one by Justice Thomas based on his longstanding view that the Federal Arbitration Act does not apply to state suits, and a second by Justice Ginsburg and joined by Justice Sotomayor.

Justice Ginsburg’s dissent argued that the parties intended the phrase “law of your state” to mean California law “without considering the preemptive effect of federal law.” Otherwise, the dissent reasoned, *DIRECTV* simply “could have employed a clause directly conditioning enforceability of the arbitration agreement on the exclusion of class arbitration” without reference to state law. Because the clause referenced state law instead, the dissent believed that the provision was ambiguous and should be construed against the drafter and in favor of the consumer.

Notably, despite these dissents, two of the four dissenters in *Concepcion* (Justices Breyer and Kagan), were in the majority in upholding the waiver, perhaps reflecting these justices’ commitment to stare decisis.

Implications

While *DIRECTV* arose in a somewhat unique context, the decision is important because it reflects the Supreme Court’s continued adherence to enforcing arbitration clauses as written. The court emphasized that the Federal Arbitration Act “is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it.” And, having taken and decided the case on the merits, the decision

reflects the court’s willingness to police attempts by lower courts and state courts to try and sidestep the force of prior pro-arbitration rulings.

The court’s decision is a significant victory for arbitration advocates, for at least three reasons. First, it may put the final nail in the coffin of the *Discover Bank* rule (and any other similar case law or statutes that had invalidated class action waivers).

Second, and relatedly, the decision removes doubt about the law in California. This is important not only given the state’s prominence, but also given its size; *DIRECTV* settles the question of the validity of arbitration waivers even where arbitration clauses (like the one at issue) dated to the pre-*Concepcion* period and had a choice of law clause picking California law, or where choice of law principles might point toward application of California law.

Third, *DIRECTV* strengthens the *Buckeye Check Cashing, Inc. v. Cardegna* rule, under which anti-arbitration precedents must fall if the decision “does not place arbitration contracts ‘on an equal footing with all other contracts’” (quoting 546 U.S. 440, 443 (2006)). As noted above, citing *Buckeye*, the Supreme Court overturned the California appellate court’s analysis because it could find no precedent for that court’s conclusion and the analysis was at least potentially inconsistent with other California decisions outside of the context of arbitration. This part of the *DIRECTV* decision sets a high bar for advocates who might try to use state law to argue that a class action waiver is invalid. The court’s reasoning suggests that *Buckeye* requires a court to find affirmative precedent in state law invalidating contract terms under closely similar circumstances before such a court can invalidate an arbitration waiver of judicial protections.

Levi W. Swank, Thomas M. Hefferson, and Joseph F. Yenouskas are members of Goodwin Procter’s Consumer Financial Services Litigation Practice, all resident in Washington, DC. They specialize in the defense of financial institutions, and regularly litigate the

enforceability of consumer arbitration clauses in response to putative class actions and impact cases filed in state and federal courts across the country. They also have advised clients on drafting and compliance issues related to arbitration

ADDITIONAL RESOURCES

For other materials related to this topic, please refer to the following.

Business Law Today

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By Robert J. Giuffra Jr., Brent J. McIntosh, Matthew A. Schwartz, and Jeffrey B. Wall

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