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When it Comes to Arbitration Agreement Class Action Waivers, Concepcion is Still Law, Even in California.

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In 2014, *California* state appellate court decision invalidated the arbitration clause in DIRECTV's consumer contracts. California decision was noteworthy because it seemed to fly in the face of the U.S. ***Supreme Court***'s decision in *AT&T Mobility v. Concepcion*, 563 U.S. 333, 352 (2011), which invalidated California's ban on class action waivers in consumer arbitration agreements on the basis that California law was preempted by the ***Federal Arbitration Act (FAA).*** The Supreme Court thought so too, ruling last month in ***DIRECTV, Inc. v. Imburgia*****,** No. 14-462 (December 14, 2015), that *Concepcion* dictates that the California Court of Appeal's interpretation of the DIRECTV contract is barred by the FAA.

The key contractual provision at issue in this case was an arbitration clause in DIRECTV's consumer contracts which mandated that all disputes arising out of the contract be arbitrated on an individual basis only and barred class arbitrations. The contractual arbitration clause provided that it was to be governed by the FAA but specified that "[i]f, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [arbitration clause] is unenforceable." Affirming a lower court decision invalidating the arbitration clause, the California Court of Appeal held that under California state law at the time plaintiffs entered into their consumer contracts with DIRECTV, class arbitration waivers were unenforceable. That being the case, and notwithstanding *Concepcion*, the Court of Appeal found that under the "if, however" provision of the DIRECTV arbitration clause, the entire arbitration provision was unenforceable. *Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190 (2014).

After the California Supreme Court denied discretionary review of the Court of Appeal's decision, DIRECTV filed a petition for certiorari in which it pointed out that the Ninth Circuit had reached the opposite conclusion on the same contract clause in *Murphy v. DirecTV, Inc.*, 724 F. 3d 1218, 1226-28 (2013). The Supreme Court granted certiorari and reversed in a 6-3 decision.

The majority opinion, written by Justice Breyer, agreed with the Court of Appeal that under California law at the time plaintiffs entered into their agreements with DIRECTV in 2008, contractual provisions

waiving classwide arbitration were unenforceable. However, the majority rejected the Court of Appeal's conclusion that despite the Supreme Court's subsequent decision in *Concepcion*, the DIRECTV arbitration clause's reference to the "law of your state" indicated that the parties had selected California state law to govern the arbitration agreement as it existed at the time of contract, *even if* that state law was later found to be preempted by federal law and thus invalid.

The Supreme Court majority held that the contract's reference to "law of your state" unambiguously referred to *valid* California law as interpreted by controlling federal court decisions such as *Concepcion*. Therefore, the majority held, the "if, however" clause was inapplicable because "the law of your state" (i.e., California law), when viewed under the prism of *Concepcion*, did not render class action waiver clauses in consumer contracts unenforceable. The majority further concluded that the California Court of Appeal's interpretation of the contractual "if, however" clause as referring to "state law alone" erroneously rested on an assumption that "state law retains independent force even after it has been authoritatively invalidated" by the Supreme Court. The Supreme Court majority also noted that there was no indication a California court would interpret the phrase "law of your state" to refer to invalid state law in any context other than an arbitration clause, and therefore that the California Court of Appeal decision was inconsistent with the FAA because it failed to place arbitration agreements on "equal footing with all other contracts."

Justice Breyer's majority opinion should not be read too broadly, however, as it does not stand for the proposition that class action waivers never can be invalid. As the majority noted, "the Federal Arbitration Act allows parties to an arbitration contract considerable latitude to choose what law governs some or all of its provisions, including the law governing enforceability of a class-arbitration waiver." The parties could "choose to have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia," or they could expressly choose invalidated California law. However, simply referring to "the law of your state" was insufficient to demonstrate a contractual agreement to abide by invalid state law. Cableworld customers , take note!

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