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# The Supreme Court Enforces Another Arbitration Provision

Yesterday, the Supreme Court released the latest in a line of cases strongly enforcing contractual arbitration provisions. In *DIRECTV, Inc. v. Imburgia*, No. 14-462 (U.S. Dec. 14, 2015), the Court held that an arbitration provision stating that it did not apply if unenforceable under the "law of [the customer's] state" could not be interpreted to encompass subsequently invalidated state law.

## Background

DIRECTV and each of its customers entered into a service agreement that required claims to be resolved in binding arbitration. In addition to requiring arbitration, the provision stated that "[n]either you nor we shall be entitled to join or consolidate claims in arbitration" but that the entire arbitration provision "is unenforceable" if the "law of your state" renders such waivers of class arbitration unenforceable.[1] Another section of the contract stated that the arbitration provision "shall be governed by the Federal Arbitration Act [FAA]."[2]

In 2008, two DIRECTV customers filed suit in California state court seeking damages based on early termination fees that allegedly violated California law. The case proceeded in state court for nearly three years until the Supreme Court's decision in *AT&T Mobility LLC* v. *Concepcion,* 563 U.S. 333 (2011), held that the FAA preempts state laws that render restrictions on class arbitration invalid. Following *Concepcion,* DIRECTV asked the court to send the matter to arbitration. The trial court denied DIRECTV's request, and the California Court of Appeal affirmed.

The Court of Appeal reasoned that California law prohibits waivers of class arbitration, thereby rendering the entire arbitration provision unenforceable by its terms. The court relied on a 2005 California case called *Discover Bank* that refused to enforce a contractual waiver of class arbitration.[3] Although the Supreme Court in *Concepcion* had subsequently held that the FAA invalidated the *Discover Bank* rule as an obstacle to Congress's goal of promoting arbitration,[4] the Court of Appeal applied that rule because it interpreted the arbitration provision's reference to "law of your state" as meaning California law whether or not preempted by the FAA.

## Analysis

In reversing the lower court's judgment, the Supreme Court acknowledged that parties could select any law to govern their contract, including the now-preempted *Discover Bank* rule. It held, however, that

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[1] Slip Op. at 1-2.

[2] *Id.* at 2.

[3] *Discover Bank v. Superior Court*, 36 Cal.4th 148, 162-63, 113 P.3d 1100, 1110 (2005).

[4] *Concepcion,* 563 U.S. at 352.

interpreting the arbitration provision in this case as adopting that rule would run afoul of the FAA's requirement that arbitration provisions be treated the same as any other contractual provisions.

The Court framed the interpretive question before it as whether the arbitration provision's reference to "law of your state" included *invalid* state law. It then pointed to several reasons why interpreting the provision in this way would treat arbitration agreements different from other contracts.

- First, absent any indication to the contrary, such a reference to the "law of your state" unambiguously means *valid* state law.
- Second, California case law has held that contractual references to California law incorporate retroactive changes to the law.
- Third, nothing in the Court of Appeal's reasoning suggested that a California court would interpret "law of your state" in the same way outside the arbitration context, such as if a state law were held to conflict with federal labor or discrimination law.
- Fourth, the Court of Appeal's language focused only on arbitration, framing the question as whether "law of your state" means state law *whether or not preempted by the FAA*.
- Fifth, courts would not generally accept or apply the view that state law retains independent force even after being invalidated by the Supreme Court.
- Finally, the Court of Appeal did not invoke any general principle suggesting that California courts would interpret "law of your state" the same way in other contexts.

Accordingly, the Court concluded that the lower court's interpretation of the arbitration provision was preempted by the FAA for failing to place arbitration agreements "on equal footing with all other contracts."[5] The Court therefore remanded the case for enforcement of the provision.

## Dissents

Justice Ginsberg, joined by Justice Sotomayor, dissented as she would have interpreted the "law of your state" to mean California law without regard to any preemptive effect of federal law. She reasoned that the phrase "law of your state" was ambiguous as to whether it incorporated preemptive federal law and that, under traditional principles of contract, such ambiguity should be resolved against DIRECTV as the provision's drafter, especially given that the *Discover Bank* rule would have applied at the time the parties entered into the arbitration agreement. Justice Ginsburg then decried what she perceived as yet another

[5] Slip Op. at 10 (quoting *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989)).

expansion of the FAA to "further degrad[e] the rights of consumers and further insulat[e] already powerful economic entities from liability for unlawful acts."[6]

Justice Thomas dissented separately to reiterate his view that the FAA does not apply to state court proceedings.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:


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[6] Dissenting Op. at 14.