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Class Action Monitor

U.S. Supreme Court Reaffirms Enforceability of Class Arbitration Waivers in Consumer Class Actions

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Four years after requiring enforcement of class arbitration waivers in consumer contracts in *AT&T Mobility LLC v. Concepcion,*[1] the U.S. Supreme Court recently returned to the issue in *DIRECTV, Inc. v. Imburgia*[2] and rebuked an attempt to evade the mandates of the Federal Arbitration Act (FAA) under the guise of state law contract interpretation. The majority opinion clearly shows that, absent any federal statute to the contrary, arbitration clauses with express class action waivers will be enforced. Such clauses (also referred to as bilateral arbitration clauses) will thus continue to be a powerful tool for companies wishing to reduce potential consumer class action exposure.[3]

Background

Imburgia was filed in California state court in 2008 as a putative class action by customers of DIRECTV, a direct broadcast satellite service provider and broadcaster, challenging early termination fees under its customer agreement. The agreement contained a clause requiring arbitration of all claims relating to the agreement and included a waiver of class arbitration prohibiting customers from aggregating their individual claims in arbitration. Additionally, to avoid a situation where the arbitration provision would be enforced without the class action waiver, the agreement conditioned the arbitration clause's effectiveness on the enforceability of class arbitration waivers in "the law of your [i.e., the customer's] state."[4] At the time the agreement at issue was entered into, class arbitration waivers in consumer standard-form contracts were viewed as unconscionable and thus unenforceable in California under the so-called *Discover Bank* rule.[5]

While the *Imburgia* litigation was proceeding in state court, the U.S. Supreme Court held in *Concepcion* that the *Discover Bank* rule was incompatible with, and preempted by, the FAA.[6] DIRECTV then moved to compel arbitration of the *Imburgia* plaintiffs' claims on an individual basis. Despite the U.S. Supreme Court's invalidation of the *Discover Bank* rule, the California state courts refused to compel arbitration. Applying state-law principles of contract interpretation, the California Court of Appeals determined that the parties intended the phrase "the law of your state" to refer to California law absent FAA preemption. Since California law, absent FAA preemption, would hold class arbitration waivers unenforceable, the state appellate court reasoned that, by operation of the contract's own language, the entire arbitration clause

became unenforceable and the putative class action litigation could proceed in California state court.

Imburgia Holding

In a 6-3 decision, the U.S. Supreme Court reversed, holding that the FAA preempted the state court's interpretation of California law. Justice Breyer's majority opinion carefully framed the preemption issue as a question of federal law prohibiting state law discrimination against arbitration clauses. The majority assumed that the California court correctly applied state law in interpreting the agreement and solely considered whether the California court's interpretation of the agreement impermissibly discriminated against arbitration clauses in violation of the FAA.

The nondiscrimination principle is derived from the text of the FAA, which provides that a written arbitration clause or agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of ***any contract***."[7] Under U.S. Supreme Court precedent construing that provision, courts must place arbitration agreements "on equal footing with all other contracts."[8] The majority in *Imburgia* examined whether the state-law grounds on which the California court relied were applicable to "any contract" (consistent with the FAA) or were instead targeted at arbitration clauses (and, thus, inconsistent with the FAA). It concluded that the California court's "interpretation of this arbitration contract is unique, restricted to that field," and therefore impermissible.[9]

Key Takeaways

The delicate exercise in which the majority engaged in *Imburgia*—accepting the state courts' authority on state law but requiring nondiscrimination to keep them in check—may have been specifically tailored to federal and state courts in California, given their continued resistance to the U.S. Supreme Court's arbitration law precedents.[10] But the decision is instructive in its own right. It confirms that state-law doctrines regarding the validity and enforceability of arbitration clauses and class arbitration waivers may not rest on rationales that single out or target arbitration clauses and thereby treat them differently from other contractual provisions. The Court's application of the nondiscrimination principle in *Imburgia* further suggests that the Court will scrutinize and will not defer to state courts' application of their own law when it runs afoul of the FAA. Such an approach bodes well for the uniform enforceability of arbitration clauses across the United States. At the same time, *Imburgia* illustrates that much still turns on the particular language used in arbitration clauses, and it should serve as a reminder for companies to update their customer contracts (whether located in physical agreements sent to consumers or online terms and conditions) in accordance with their specific dispute-resolute needs. At the end of the day, express class action waivers in arbitration clauses remain one of the most efficient ways to reduce potential class action litigation risk.

1. 563 U.S. 333, 348 (2011).
2. 136 S. Ct. 463, 466 (2015).
3. The trilogy of U.S. Supreme Court decisions upholding class arbitration waivers, *see Am. Express Co. v. Italian Colors Rest.,* 133 S. Ct. 2304 (2013); *Concepcion,* 1563 U.S. 333; *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.,* 130 S. Ct. 1758 (2010), has led to enforcement of bilateral arbitration clauses in a wide range of consumer-protection cases. *See, e.g., Sanchez v. Valencia Holding Co.,* 353 P.3d 741, 757 (Cal. 2015) (state consumer-protection and unfair-competition claims); *Bais Yaakov of Spring Valley v. Houghton Mifflin Harcourt Publishers, Inc.,* No. 7:13-cv-04577 (S.D.N.Y. July 15, 2015) (Telephone Consumer Protection Act claim); Orman v. Citigroup Inc., No. 1:11-cv-07086, 2012 WL 4039850, at *4 (S.D.N.Y. Sept. 12, 2012) (data security claim).
4. *Imburgia*, 136 S. Ct. at 466.
5. *Discover Bank v. Superior Court,* 113 P.3d 1100, 1110 (Cal. 2005).
6. *Concepcion*, 563 U.S. at 348.
7. 9 U.S.C. § 2 (emphasis added).
8. *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443 (2006).
9. *Imburgia*, 136 S. Ct. at 469.
10. That trend has yet to abate. Applying a rule formulated by the California Supreme Court in *Iskanian v. CLS Transportation Los Angeles, LLC,* 327 P.3d 129, 149 (Cal. 2015), the Ninth Circuit recently held that an arbitration clause's waiver of representative actions under the California Private Attorneys General Act was unenforceable and was not preempted by the FAA. *See Sakkab v. Luxottica Retail N. Am., Inc.,* 803 F.3d 425, 431 (9th Cir. 2015).

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