

ARBITRATION REVISITED: PREEMPTION OF CALIFORNIA'S UNCONSCIONABILITY DOCTRINE AFTER *CONCEPCION*

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INTRODUCTION

Courts have often been called upon to resolve conflicts between state law and federal arbitration. In 1925, Congress enacted the Federal Arbitration Act (“FAA”), a legislative framework for enforcing arbitration agreements throughout the United States.¹ The rationale was twofold.² First, Congress wanted to abolish the deep-seated “common law hostility” toward arbitration.³ Second, it sought to mandate enforcement of arbitration by the states.⁴ Toward these ends, Section 2 of the FAA made arbitration agreements generally “valid, irrevocable, and enforceable” unless a court found contractual grounds for revocation.⁵ These “grounds” came to be understood as generally applicable contract defenses, typically the province of state law, but applying the law proved difficult.⁶

Under the Supremacy Clause, federal regulation preempts conflicting state law.⁷ This means that state laws which frustrate the purposes of Congress must yield.⁸ In *AT&T Mobility LLC v. Concepcion*, the Court held that the FAA preempted California’s unconscionability doctrine because it was an obstacle to federal

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1. Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-14 (2015)).

2. *Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984).

3. *Id.*

4. *Id.*

5. 9 U.S.C. § 2 (2012).

6. *See, e.g., Doctor’s Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (describing a number of challenges to arbitration generally).

7. *See infra* Part II.A.

8. *Southland*, 465 U.S. at 16.

regulation.⁹ After *Concepcion*, however, federal and state courts were still sharply divided on the interpretation of arbitration agreements that specifically invoked state law.¹⁰

This Commentary discusses the consequences of *Concepcion* and its implications in *Imburgia v. DIRECTV*, a similar case where the California Court of Appeal refused to enforce an arbitration agreement under the doctrine of unconscionability. Part I summarizes the factual background in *Imburgia*. Part II explores the legislative and statutory bases for the Supreme Court's ruling. Part III explains the California Court of Appeal's rationale and holding. Part IV presents the specific arguments put forth by the Petitioner and Respondent. Part V analyzes the facts in light of the arbitration agreement's plain meaning, the Supreme Court's decision in *Concepcion*, and public policy and concludes the Court should reverse the lower court and hold that federal preemption applies.

I. FACTS

Plaintiff-Respondents Amy Imburgia and Kathy Greiner (“Imburgia”) were customers of Defendant-Petitioner, DIRECTV, a satellite television provider.¹¹ Respondents signed DIRECTV's Customer Agreement (“Agreement”).¹² DIRECTV assessed early termination fees after Imburgia canceled her service contract.¹³ On September 17, 2008, Imburgia filed a class action complaint in California against DIRECTV, claiming the company charged improper early termination fees.¹⁴ Imburgia sought declaratory relief and damages for unjust enrichment, false advertising, and violations of three California statutes, including the Consumer Legal Remedies Act (“CLRA”).¹⁵

Two provisions within DIRECTV's Agreement governed the terms of service and the resolution of disputes.¹⁶ Section 10 contained

9. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011).

10. See *infra* note 78 and accompanying text.

11. Joint Appendix at 59–60, *Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190 (Cal. Ct. App. 2014) (No. B239361).

12. *Imburgia*, 170 Cal. Rptr. 3d at 192.

13. *Id.*

14. *Id.*

15. *Id.* Imburgia alleged DIRECTV violated the Consumers Legal Remedies Act (“CLRA”) CAL. CIV. CODE §§ 1750–1756 (West 2015), the Unfair Competition Law (“UCL”) CAL. BUS. & PROF. CODE §§ 17200–17210 (West 2015), and the California Civil Code, CAL. CIV. CODE § 1671(d) (West 2015).

16. *Id.*

a choice of law provision specifying that the contract would be “governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to [the customer].”¹⁷ Imburgia’s service was supplied in California,¹⁸ making California law applicable.¹⁹ Section 9 provided that parties would resolve disputes solely by arbitration.²⁰ Arbitration would be “governed by the Federal Arbitration Act” and parties waived rights to “arbitrate any claim as a representative member of a class or in a private attorney general capacity.”²¹ Section 9(c)(ii) (hereinafter “the poison pill clause”) stated that if “the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.”²²

When Imburgia signed the Agreement, certain class action waivers were “unconscionable . . . and should not be enforced” under California common law.²³ Thus, DIRECTV did not raise arbitration as one of its seventeen affirmative defenses.²⁴ In 2010, the Supreme Court ruled in *AT&T Mobility LLC v. Concepcion* that the FAA preempted California’s law against class arbitration waivers in adhesion contracts.²⁵ DIRECTV thereby moved in superior court to compel arbitration.²⁶ The court, however, denied the motion, citing the specific invocation of state law in § 10.²⁷ The California Court of Appeal affirmed DIRECTV’s interlocutory appeal²⁸ and the California Supreme Court denied review.²⁹ DIRECTV appealed and the Supreme Court granted certiorari³⁰ on the question of whether “a

17. *Id.*

18. *Id.* at 341.

19. Brief for the Respondents at 2, *DIRECTV, Inc. v. Imburgia*, No. 14-462 (U.S. Mar. 23, 2015) [hereinafter “Brief for the Respondents”].

20. *Id.*

21. *Id.*

22. *Id.* at 2–3.

23. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

24. Brief for the Respondents, *supra* note 19, at 6.

25. *Concepcion*, 131 S. Ct. at 1753. An adhesion contract is a “standard-form contract prepared by one party, to be signed by another party in a weaker position . . . with little choice about the terms.” *BLACK’S LAW DICTIONARY* 390 (10th ed. 2014).

26. *Imburgia v. DirecTV Inc.*, No. BC398295, 2012 WL 7657788, at *2 (Cal. Super. Ct. Feb. 12, 2012).

27. *Id.*

28. *Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 198 (Cal. Ct. App. 2014).

29. Brief for the Respondents, *supra* note 19, at 5.

30. *DIRECTV, Inc. v. Imburgia*, 135 S. Ct. 1547 (2015).

reference to state law in an arbitration agreement governed by the [FAA] requires that the application of state law be preempted by the [FAA].”³¹

II. LEGAL BACKGROUND

A. *The Supremacy Clause and Federal Preemption*

The doctrine of federal preemption is rooted in the Supremacy Clause of the Constitution, which provides for the supremacy of federal law over state law.³² Congress may therefore “preempt, *i.e.*, invalidate, a state law through federal legislation.”³³ Preemption may be express or implicit.³⁴ Implicit preemption includes field preemption, when Congress “foreclose[s] any state regulation in the area,”³⁵ and conflict preemption, when “compliance with both state and federal law is impossible.”³⁶ Conflict preemption occurs when a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”³⁷ Any state laws that “interfere with, or are contrary to, federal law” are invalid.³⁸

B. *The Federal Arbitration Act in Context*

The Federal Arbitration Act is a “liberal federal policy favoring arbitration.”³⁹ Recognizing the “costliness and delays of litigation,” the FAA was “motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.”⁴⁰ Congress specifically intended for the FAA to prevent states from undermining arbitration agreements.⁴¹ It conferred a singular right to enforce arbitration agreements and nothing further.⁴² Congress stacked the deck so greatly in favor of arbitration that the Supreme Court wrote in unambiguous terms:

31. Petition for Writ of Certiorari at *i, 135 S. Ct. 1547 (U.S. Mar. 23, 2015) (No. 14-462).

32. U.S. CONST., art. VI, cl. 2.

33. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015).

34. *Id.*

35. *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012).

36. *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989).

37. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

38. *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985).

39. *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983).

40. H.R. REP. NO. 96-68, at 1 (1924).

41. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

42. See 65 CONG. REC. 1931 (1924) (“It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts.”).

The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.⁴³

Although arbitration proceedings have grown increasingly complex since Congress enacted the FAA in 1925,⁴⁴ the Supreme Court has consistently interpreted the FAA as favoring the enforcement of arbitration.⁴⁵

Under the FAA, arbitration is a matter of contract.⁴⁶ Like other contracts, privately negotiated arbitration agreements are enforced according to the terms of the instrument.⁴⁷ Section 2 is the “primary substantive provision”⁴⁸ and states that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁴⁹ The final clause of this section, known as the “savings clause,” limits the type of defenses that may make arbitration agreements unenforceable.⁵⁰

The savings clause allows a party to invalidate an arbitration agreement based on grounds generally applicable to “any contract.”⁵¹ The clause therefore solely provides for those defenses which apply generally under contract law, such as fraud, duress, or unconscionability.⁵² Defenses that do not apply to “any contract” are barred.⁵³ This includes “defenses that apply only to arbitration”⁵⁴

43. *Moses*, 460 U.S. at 24.

44. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751 (2011) (“[C]lass arbitration was not even envisioned by Congress when it passed the FAA in 1925.”). For a concise explanation of the evolution of federal arbitration since 1925, see JON O. SHIMABUKURO, CONG. RESEARCH SERV., RL30934, THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS 1 (2003).

45. *See, e.g.*, Granite Rock Co. v. Int’l Broth. of Teamsters, 561 U.S. 287, 288 (2010) (stating that Congress’s “national policy favoring arbitration required ambiguity . . . to be resolved in favor of arbitrability”); *see also* Preston v. Ferrer, 552 U.S. 346, 353 (2008) (stating that the FAA’s preemption of conflicting state law was “well-established” and “repeatedly reaffirmed”).

46. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010).

47. 9 U.S.C. § 4 (2012).

48. *Moses*, 460 U.S. at 24.

49. 9 U.S.C. § 2 (2012).

50. *Id.*

51. *See id.* (emphasis added).

52. *Doctor’s Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

53. *See id.* at 686–87 (emphasizing that defenses must apply to any, or every, contract).

54. *Id.* at 687.

because Congress intended to put arbitration “upon the same footing as other contracts.”⁵⁵ Thus, federal law prohibited the courts from “singling out” arbitration provisions as suspect.⁵⁶ Although generally applicable contract defenses may make an arbitration agreement unenforceable, they must not “interfere with . . . federal law.”⁵⁷

C. *The Modern Doctrine: AT&T Mobility LLC v. Concepcion*

In *AT&T Mobility LLC v. Concepcion*, the Court considered whether the FAA prohibits states from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.⁵⁸ Under a similar set of facts to those in *Imburgia*, Vincent Concepcion signed an arbitration agreement which contained a waiver requiring parties to dispute in their “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.”⁵⁹ Concepcion, however, opposed arbitration, arguing that the California Supreme Court’s decision in *Discover Bank v. Superior Court* rendered class arbitration waivers in adhesion contracts unconscionable.⁶⁰ In that case, California held that because class arbitration waivers are “indisputably” and “unfairly” one-sided, they are invalid.⁶¹

The Supreme Court disagreed.⁶² Writing for the majority, Justice Scalia considered the analysis straightforward—conflicting state rules were displaced by the FAA.⁶³ Scalia continued:

Although § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the

55. H.R. REP. NO. 96-68, at 1 (1924).

56. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974); *see also* *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (stating that Congress enacted the FAA to embody the national policy that arbitration agreements are on equal footing with other contracts).

57. *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985).

58. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).

59. *Id.* at 1744.

60. *Id.* at 1745; *see generally* *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005) (quoting CAL. CIV. CODE § 1668 (West 2015)) (“[W]hen the [class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’”).

61. *Id.* at 1108.

62. *Concepcion*, 131 S. Ct. at 1753.

63. *Id.* at 1787.

FAA's objectives. As we have said, a federal statute's saving clause "cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself."⁶⁴

Therefore, otherwise permissible defenses may be preempted if they interfere with the FAA or its interests in promoting "streamlined proceedings and expeditious results."⁶⁵ Justice Scalia further wrote that "[r]equiring the availability of classwide arbitration interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA."⁶⁶ Hence, the Court held that the FAA preempted California's *Discover Bank* rule and unconscionability doctrine.⁶⁷

D. California's Consumer Legal Remedies Act and the New Limits on Unconscionability

California's Consumer Legal Remedies Act ("CLRA") prohibits "unfair methods of competition and unfair or deceptive acts or practices."⁶⁸ As a consumer protection statute, the CLRA states that any individual entitled to bring any action under the CLRA may also bring their claims as a class action suit.⁶⁹ To this effect, the CLRA creates a statutory right to class action litigation.⁷⁰ Section 1751 of the CLRA is an "antiwaiver provision" that reads: "Any waiver by a consumer of the provisions of [the CLRA] is contrary to public policy and shall be unenforceable and void."⁷¹

64. *Id.* at 1748 (citations omitted).

65. *Preston v. Ferrer*, 552 U.S. 346, 357–58 (2008).

66. *Id.* at 1748. The Court relied on predominantly practical concerns in discussing why class arbitration was "inconsistent" with the FAA. Justice Scalia wrote:

"[T]he 'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental.' This is obvious as a structural matter: Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA."

Id. at 1750 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010)).

67. *Id.* at 1744.

68. CAL. CIV. CODE § 1770 (West 2015).

69. *Id.* § 1781.

70. *Sanchez v. Valencia Holding Co., LLC*, 190 Cal. Rptr. 3d 812, 831 (2015).

71. CAL. CIV. CODE § 1751 (West 2015).

Since *Imburgia* was initially decided, the doctrine of unconscionability under California law has changed.⁷² In *Sonic-Calabasas A, Inc. v. Moreno*, however, California’s high court continued to assert unconscionability as a valid defense to enforcement of an arbitration agreement.⁷³ Under the FAA’s savings clause, California claimed an uninterrupted right to apply unconscionability to arbitration agreements that were “unreasonably harsh, oppressive, or one-sided.”⁷⁴ The court therefore interpreted *Concepcion* as barring only “facial” and “as-applied” discrimination against arbitration.⁷⁵ This included the CLRA’s antiwaiver provision.⁷⁶ Because the provision made class arbitration waivers unenforceable, the court in *Sanchez v. Valencia Holding Co., LLC* subsequently reasoned it disfavored arbitration and was preempted.⁷⁷

III. HOLDING

In *Imburgia v. DIRECTV, Inc.*, the California Court of Appeal affirmed the judgment below and held that the Agreement did not require arbitration.⁷⁸ The court reasoned the FAA merely compelled enforcement of contracts “in accordance with the terms thereof.”⁷⁹ Not enforcing arbitration was therefore “fully consistent” with the FAA because the parties had freely contracted to resolve disputes

72. See *Sonic-Calabasas A, Inc. v. Moreno*, 163 Cal. Rptr. 3d 269, 289 (2013) (“What is new is that *Concepcion* clarifies the limits the FAA places on state unconscionability rules as they pertain to arbitration agreements.”).

73. *Id.*

74. *Id.*

75. *Id.* The *Concepcion* court notably used broader terms than those articulated by the California high court. Nowhere in either the majority opinion nor Justice Breyer’s dissent do “facial” or “as-applied” discrimination appear. Rather, the Court’s holding speaks of “obstacle[s] to the full purposes and objectives of Congress.” Any instance of as-applied discrimination would likely constitute an obstacle, but it remains unclear whether something may be an obstacle without “discriminating” against arbitration. The *Concepcion* court’s ruling therefore may still prohibit more than the California rule. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

76. *Sanchez v. Valencia Holding Co., LLC*, 190 Cal. Rptr. 3d 812, 832 (2015).

77. *Id.*

78. *Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 198 (Cal. Ct. App. 2014); The California Court of Appeal was unpersuaded by the Ninth Circuit’s reasoning in *Murphy v. DIRECTV, Inc.*, which reached an opposite conclusion after reviewing the same provision. In that case, the Ninth Circuit granted DIRECTV’s motion to compel arbitration, considering arguments of contract interpretation “largely irrelevant.” The *Murphy* court stated that California’s ban on class arbitration waivers had been preempted by *Concepcion*, wherein federal law became the law of the states. There could be no conflict between them and the poison pill clause was to be viewed under § 2 of the FAA. See 724 F.3d 1218 (9th Cir. 2013).

79. *Imburgia*, 170 Cal. Rptr. 3d at 194 (quoting *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.* 489 U.S. 468, 478 (1989)).

under “the law of [the customer’s] state.”⁸⁰ In *Imburgia*, California law had triggered the poison pill clause, invalidating the arbitration agreement.⁸¹ The court deemed this permissible because the FAA had allowed the parties to “opt-out” of its default rules in some respects,⁸² even if “state rules would yield a different result from . . . the FAA.”⁸³ Thus, the California Court of Appeal concluded that parties could contract to use California law regardless of the FAA’s preemptive effect.⁸⁴

Enforcing the Agreement by its terms, the court considered Section 9 unenforceable because the poison pill clause was excepted from the Agreement’s general adoption of the FAA.⁸⁵ The court maintained that under well-settled principles of contract interpretation, when a specific and a general term conflict, the specific controls the general and defines its meaning.⁸⁶ The issue of enforcing class arbitration waivers was thus considered under California law because the poison pill clause expressly stated it was governed by the law of the customer’s state.⁸⁷ California’s CLRA held waivers of class arbitration unconscionable, but federal law would have permitted such a provision.⁸⁸ The general and specific terms conflicted, but the parties had opted to resolve the issue under state law.⁸⁹ The court held that this invoked the poison pill clause, thereby making Section 9’s arbitration agreement unenforceable.⁹⁰

The court found further support for denying DIRECTV’s motion because ambiguities are ordinarily construed against the drafter, in this case, DIRECTV.⁹¹ The Agreement was unclear insofar as it could be interpreted to demand FAA preemption despite a freely

80. *Id.* at 193.

81. *Id.* at 194.

82. *Id.*

83. *Id.* The court’s analysis relied heavily on *Volt* to reach its decision. In *Volt*, Chief Justice Rehnquist wrote while the FAA was designed to facilitate arbitration, the “principal purpose [was] to ensure that private arbitration agreements are enforced according to their terms.” Parties therefore did not undermine the Act by “[structuring] their arbitration agreements as they [saw] fit.” 489 U.S. at 478–79.

84. *Imburgia*, 170 Cal. Rptr. 3d at 195.

85. *Id.*; see *supra* Part I (discussing the Agreement’s invocation of the FAA under Section 10, which subjected the parties to “applicable federal laws”).

86. *Imburgia*, 170 Cal. Rptr. 3d at 195.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 197.

negotiated and explicit choice of law provision to the contrary.⁹² As the non-drafting party, Imburgia was entitled to her reasonable interpretation.⁹³ The poison pill clause therefore remained in effect and the court ruled that DIRECTV could not compel arbitration.⁹⁴

IV. ARGUMENTS

A. *DIRECTV's Arguments*

DIRECTV argues that the FAA preempts and invalidates California's law against class arbitration waivers.⁹⁵ According to DIRECTV, Congress precluded states from refusing to enforce arbitration agreements when it created a body of substantive federal law of arbitrability.⁹⁶ Under this policy, ambiguities as to the scope of the arbitration clause are resolved in favor of arbitration.⁹⁷ This includes ambiguities concerning the applicability of "inconsistent" state law.⁹⁸ Although DIRECTV notes the interpretation of arbitration agreements is generally a matter of state law,⁹⁹ DIRECTV claims that the FAA provides an exception when state law is inconsistent with federal arbitration law.¹⁰⁰ DIRECTV thus argues that under the FAA, courts are required to rigorously enforce arbitration agreements according to their terms.¹⁰¹ This is necessary, DIRECTV adds, because the FAA's substantive federal arbitration law "serves as an important check on the application of state law, safeguarding the parties' federal arbitration rights."¹⁰²

DIRECTV reasons that the Court of Appeal thus erred in holding that it could not compel arbitration.¹⁰³ It argues that the Court of Appeal based its decision on "a legal nullity" and wrongly applied well-settled rules of contract interpretation.¹⁰⁴ DIRECTV first outlines that the court recognized a conflict between the Act's general

92. *Id.* at 198, n.5.

93. *Id.*

94. *Id.* at 198.

95. Brief for Petitioner at 10, *DIRECTV, Inc. v. Imburgia*, No. 14-462 (U.S. May 29, 2015).

96. *Id.* at 12.

97. *Id.*

98. *Id.* at 10.

99. *Id.* at 13.

100. *Id.*

101. *Id.*

102. *Id.* at 14.

103. *Id.* at 11.

104. *Id.* at 21–22.

adoption of the FAA and the poison pill clause's specific reference to "the law of [the customer's] state."¹⁰⁵ In DIRECTV's view, however, insofar as state law is separate, it is never immune from the ordinary preemptive effect of federal law.¹⁰⁶ Therefore, federal law becomes the law of the states and the Court of Appeal interpreted a conflict when, in fact, the provisions were completely harmonized.¹⁰⁷ Second, DIRECTV states that the court construed ambiguities in contract interpretation in favor of the non-drafting party.¹⁰⁸ To the extent that such a construction could apply, DIRECTV argues that it conflicts with the requirement that ambiguities be resolved in favor of arbitration.¹⁰⁹

DIRECTV acknowledges that the FAA permits enforcement of arbitration agreements according to their terms.¹¹⁰ The Agreement, DIRECTV states, represented an "unmistakable" intent to arbitrate except when the relevant state law would force class arbitration.¹¹¹ Under § 10(b), the parties explicitly adopted the FAA as the governing authority under, providing that the Agreement "shall be governed by the Federal Arbitration Act."¹¹² Therefore, according to DIRECTV, the parties reasonably expected the contract to be interpreted under the FAA.¹¹³ In any event, because state law is never immune from federal preemption, the CLRA's antiwaiver provision carried the force of law that had been repealed, i.e., no force at all.¹¹⁴ Although the FAA does not prevent parties from contracting to abide by nullified law, DIRECTV argues that no such terms appeared in the Agreement.¹¹⁵ As a matter of private contract, DIRECTV claims that the court should have interpreted the Agreement by its terms as compelling arbitration under the FAA.¹¹⁶

DIRECTV therefore argues that the Court should reverse the judgment below.¹¹⁷

105. *Id.* at 21.

106. *Id.*

107. *Id.* at 22.

108. *Id.*

109. *Id.* at 22–23.

110. *Id.* at 11.

111. *Id.* at 10.

112. *Id.* at 14–15.

113. *Id.* at 18.

114. *Id.* at 19–20.

115. *Id.* at 20.

116. *Id.*

117. *Id.* at 24.

B. *Imburgia's Arguments*

Imburgia argues that the Court of Appeal was correct to apply California law because interpreting the FAA as barring enforcement of applicable state law is “unprecedented.”¹¹⁸ Imburgia therefore contends that the FAA requires the result reached by the Court of Appeal.¹¹⁹ First, Imburgia argues the FAA compels enforcement of agreements by their terms.¹²⁰ Second, the FAA does not prevent parties from forming binding contracts under state law.¹²¹ As a result, Imburgia concludes that the FAA does not express a federal policy that necessarily compels construction of any ambiguity in favor of arbitration.¹²² Rather, according to Imburgia, arbitration agreements are enforced “like other contracts” according to their terms and the intentions of the parties.¹²³

Imburgia further states that contracts should not be enforced in contravention of the parties’ intention.¹²⁴ For this reason, Imburgia claims that *AT&T Mobility LLC v. Concepcion* preempted California law only because it “overrode the parties’ own agreement with respect to a central element of the arbitral proceedings.”¹²⁵ In Imburgia’s view, the Court did not invalidate *Discover Bank v. Superior Court* because it was an obstacle to a federal policy favoring arbitration, but because it required class arbitration contrary to the parties’ intentions.¹²⁶ The *Discover Bank* rule thus conflicted with enforcement according to the terms of the contract as required by the FAA and was subject to preemption.¹²⁷

Imburgia also contends that the Court of Appeal’s judgment should stand because it correctly interpreted the terms of the contract as invoking California law.¹²⁸ Imburgia argues that even if the court interpreted “the law of [the customer’s] state” to include the preemptive effect of federal law, the FAA preempts only

118. Brief for the Respondents, *supra* note 19, at 11.

119. *Id.*

120. *Id.* at 11–12.

121. *Id.* at 12.

122. *Id.* at 12.

123. *Id.* at 15 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995)).

124. See Brief for the Respondents, *supra* note 19, at 15–16 (recognizing the role that parties intentions have played in interpretation of contract agreements, notably where the result does not favor arbitration).

125. *Id.* at 16.

126. *Id.*

127. *Id.* at 16–17.

128. *Id.* at 17.

“requirements imposed by positive state law that would override the parties’ own agreement.”¹²⁹ Therefore, Imburgia claims the FAA may invalidate a conflicting state law but does not limit parties’ from a choice to incorporate California’s antiwaiver provision.¹³⁰ Imburgia thus concludes that the FAA seeks to enforce contracts according to the terms as intended.¹³¹

Imburgia rejects DIRECTV’s argument that the FAA preempts California’s invalidation of class arbitration waivers and instead argues that the Agreement ought to be enforced under state law as both parties intended.¹³² According to Imburgia, the FAA has never required preemption because it permits parties to contract using state law and compels enforcement “according to the terms.”¹³³ Imburgia adds that the Agreement in question included the poison pill clause so that it could be used nationwide for all customers.¹³⁴ In doing so, Imburgia claims the poison pill clause inherently recognized that “certain provisions [would] apply in some states but not others,” showing that state law had been explicitly incorporated and it was the intent of the parties to be governed by state law.¹³⁵ Thus, the Agreement was appropriately enforced under the law of California because the FAA did not preempt the parties’ choice.¹³⁶

Finally, Imburgia contends that *Concepcion* is distinguishable because, unlike the present case, the *Concepcion* agreement never incorporated California law.¹³⁷ Instead, one party merely challenged enforcement of the arbitration clause.¹³⁸ Imburgia claims *Concepcion* held that California’s law was preempted only because the parties had not agreed to be bound by it.¹³⁹ Imburgia states the Court therefore did not establish a substantive ban on class arbitration waivers

129. *Id.*

130. *Id.*

131. *Id.* at 21 (quoting *Granite Rock Co. v. Int’l Broth. of Teamsters*, 561 U.S. 287, 303 (2010)).

132. *Id.* at 23.

133. *See id.* at 21–22 (arguing that the Court explicitly rejected the notion that the FAA does not permit application of state law in *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 471 (1989)).

134. *Id.* at 23.

135. *Id.*

136. *Id.* at 24.

137. *Id.* at 25.

138. *See id.* (“[T]he plaintiffs argued that California law overrode the terms of the agreement.”)

139. *See id.* (“As DIRECTV explains, *Concepcion*’s actual holding is that ‘state law cannot *force* people to arbitrate on a classwide basis.’”).

because *Concepcion* dealt with a different issue altogether.¹⁴⁰

Imburgia therefore requests that the Court affirm the judgment below.¹⁴¹

V. ANALYSIS

The California Court of Appeal's decision is flawed for several reasons. First, the plain meaning of the Agreement requires the court to enforce arbitration. Second, the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* prohibits state courts from interpreting class arbitration waivers against arbitration. Third, the California court's ruling creates a negative right against arbitration, in contravention of clearly stated congressional objectives and public policy. For these reasons, the court erred in finding the arbitration clause unenforceable.

A. *The Plain Meaning of the Agreement Requires the Court to Enforce Arbitration*

The plain meaning of the Agreement resolves the issue raised in *Imburgia* in favor of enforcement. This conclusion is inescapable because the Agreement must be read with respect to federal law, which renders the unconscionability doctrine in this case invalid. Through the FAA, Congress established federal regulations for enforcing arbitration agreements across the United States¹⁴² in order to put arbitration "upon the same footing as other contracts, where it belongs."¹⁴³ All such agreements fall within its scope.¹⁴⁴ This includes agreements to be governed by state law principles, because those terms are only given effect under § 4 of the FAA.¹⁴⁵ Similarly, arbitration agreements may be held unenforceable using only generally applicable contract defenses to the extent they are authorized under the savings clause of § 2.¹⁴⁶ Therefore, as the Court of Appeal agrees, parties to an arbitration agreement can never fully

140. *Id.*

141. *Id.* at 46.

142. Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-14 (2012)).

143. H.R. REP. NO. 96-68, at 1 (1924).

144. See Federal Arbitration Act § 1 (defining the broad scope of the FAA).

145. 9 U.S.C. § 2 (2012).

146. *Id.*

“opt-out” of federal regulation.¹⁴⁷ Rather, federal regulation provides the underlying framework for all arbitration.¹⁴⁸

Although the Federal Arbitration Act may give effect to compatible state law, nothing in it suggests an intent to accommodate conflicting doctrine.¹⁴⁹ This is because, as a general principle, “[an] act cannot be held to destroy itself.”¹⁵⁰ State law which would have such an effect on a federal act is preempted under the Supremacy Clause and invalid.¹⁵¹

The Court of Appeal’s application of California’s unconscionability doctrine would destroy federal implementation of the FAA. It would sanction courts’ disfavoring arbitration and could halt enforcement of agreements in California. This is prohibited.¹⁵² Similarly, the court’s reading further interferes with Congress’s intent to put arbitration “upon the same footing as other contracts.”¹⁵³ The state, however, is barred from interfering with a federal program.¹⁵⁴ Thus, the court’s ruling attempts to use its authority to interpret contracts as a means of circumventing federal preemption. Under the Supremacy Clause, this is unconstitutional.¹⁵⁵

The poison pill clause states that if “the law of [the customer’s] state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.”¹⁵⁶ In interpreting this provision, the court may not adopt a view which is unconstitutional. The Court of Appeal’s reading was unconstitutional because it disfavored arbitration and circumvented preemption.¹⁵⁷ This rendered the unconscionability doctrine invalid against the arbitration agreement. Having no other basis under federal or state law not to enforce the Agreement, the Court of Appeal should have compelled arbitration.

147. *Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 194 (Cal. Ct. App. 2014)

148. *Id.*

149. 9 U.S.C. §§ 1–14 (2012).

150. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (quoting *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227–228 (1998)).

151. *See Preston v. Ferrer*, 552 U.S. 346, 357–58 (2008) (stating the FAA preempted otherwise permissible state laws governing arbitration that interfered with its functions).

152. *See Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (prohibiting courts from disfavoring arbitration).

153. H.R. REP. NO. 96-68, at 1 (1924).

154. *Preston*, 552 U.S. at 357–58.

155. *Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984).

156. Brief for the Respondents, *supra* note 19, at 2–3.

157. *See Moses*, 460 U.S. at 24 (stating that courts should, as a matter of federal law, resolve “any doubts” concerning the scope of arbitration in favor of arbitration).

B. Concepcion Prohibits State Courts from Interpreting Waivers Against Arbitration

The issue in *Concepcion* was whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures. The Court found that § 2 preempted California’s rule against class arbitration waivers.¹⁵⁸ In *Discover Bank v. Superior Court*, California had adopted a rule against class arbitration waivers in adhesion contracts because they are “indisputably” and “unfairly” one-sided.¹⁵⁹ *Concepcion* invalidated *Discover Bank* on the grounds that it “interfere[d] with arbitration.”¹⁶⁰ *Concepcion*’s precedent thereby became binding. Under the Supremacy Clause, the California Court of Appeal had no authority to undermine a Supreme Court ruling.¹⁶¹ The message of *Concepcion* was twofold: interpret arbitration agreements in favor of arbitration and do not obstruct federal arbitration.¹⁶² The Court of Appeal ignored both.

The California court further refused to enforce the agreement against conventional wisdom of contract interpretation—to interpret contracts as valid rather than invalid.¹⁶³ Instead, the Court chose to interpret the arbitration agreement “against the drafter,” a canon of construction rooted in the same rationales of unfairness as *Discover Bank*.¹⁶⁴ In this way, the court’s choice to interpret terms against the drafter merely repackages *Discover Bank* toward the same result. Claims that arbitration agreements are generally “unfair” were foreclosed by Congress’s choice to enforce arbitration.¹⁶⁵ The court’s interpretation in *Imburgia* was therefore unreasonable and suggests its motives were improper.

Finally, the facts of *Concepcion* and *Imburgia* are not materially distinguishable. In both cases, one party challenged the enforcement

158. *Concepcion*, 131 S. Ct. at 1753.

159. 113 P.3d 1100, 1108 (Cal. 2005).

160. *Concepcion*, 131 S. Ct. at 1750.

161. See U.S. CONST., art. VI, cl. 2 (affirming federal supremacy).

162. *Id.* at 1749.

163. See generally, Restatement (Second) of Contracts §§ 228–29 (indicating that interpretations making a contract lawful and enforceable are preferred over interpretations that render part or all of the contract unenforceable, illegal, or unreasonable and result in forfeiture).

164. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (“The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result.”).

165. See *supra* Part II.B.

of arbitration that lacked classwide arbitration procedures.¹⁶⁶ Although the Agreement in *Imburgia* invoked state law in the poison pill clause, there was no *valid* basis under state law to render the contract unenforceable.¹⁶⁷ The inclusion of a poison pill clause thus holds no bearing on the Court's reasoning. Rather, the Court's ruling in *Concepcion* addressed a broader issue that common law unconscionability of arbitration could not stand as an obstacle to federal policy.¹⁶⁸ The *Discover Bank* rule and the CLRA's antiwaiver provision are mere refinements of California's unconscionability doctrine and thus fall squarely within the Court's ruling. After *Concepcion*, such defenses were barred. Under the Supremacy Clause, the Court of Appeal decision is invalid because it is contrary to *Concepcion*.¹⁶⁹

C. The Court of Appeal's Decision Confers a Negative Right to Breach Arbitration Agreements Against Public Policy

California courts are further precluded from applying unconscionability to class arbitration waivers because doing so confers a negative right to breach agreements.¹⁷⁰ Such a right would be against public policy. Congress enacted the FAA to provide "streamlined proceedings and expeditious results" as an alternative to litigation.¹⁷¹ As part of this regime, Congress provided individuals with a remedy at law to ensure agreements would be enforced "according to the terms thereof"¹⁷² and on the "same footing" as any other contract.¹⁷³ This was the only right the FAA conferred.¹⁷⁴

The Court of Appeal's interpretation, however, confers a negative right against arbitration and stands as an obstacle to federal

166. Compare *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011) (addressing a challenge to an arbitration agreement absent classwide arbitration procedures under California's unconscionability doctrine), with *Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 192 (Cal. Ct. App. 2014) (considering a challenge to an arbitration agreement not precluded because the parties specifically agreed to be governed by California's unconscionability doctrine).

167. See *supra* Part II.A.

168. *Concepcion*, 131 S. Ct. at 1753.

169. See U.S. CONST., art. VI, cl. 2 (affirming federal supremacy).

170. A negative right is a "right entitling a person to have another refrain from doing an act that might harm the person entitled." BLACK'S LAW DICTIONARY 1519 (10th ed. 2014).

171. *Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008).

172. 9 U.S.C. § 4 (2012).

173. H.R. REP. NO. 96-68, at 1 (1924).

174. See 65 CONG. REC. 1931 (1924) ("It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts.").

implementation. This negative right enables a party to breach a contract solely because it deems the form of arbitration unfair, despite a clear agreement to arbitrate. Were the Supreme Court to adopt this view, it would *sanction* the breach and open the door for other states to do the same. These breaches, however, are against public policy because they undermine the expectations of parties when drafting and would have a chilling effect on negotiations. They also give preference to the choice of some parties over others based on location. As a result, parties would be unable to predict how a court would interpret an agreement and transactional costs would increase since parties would be drawn into court to enforce the *negative right*. Furthermore, a party would have to factor those costs into the price of service, potentially resulting in higher rates for customers nationally or different pricing between localities.¹⁷⁵ Most importantly, it would conflict with Congress's clear public policy favoring the enforcement of arbitration.¹⁷⁶

Finally, it is unclear whether parties' interests would be better protected through class action litigation. In class action suits, damages are frequently high but distributed among a large number of litigants. The payout may ultimately be small. In contrast, individual arbitration procedures often promise individuals guaranteed payouts and subsidize the costs of attorneys fees.¹⁷⁷ This is in exchange for caps on total damages. Such a procedure protects concerns of both parties and facilitates an equitable settlement. Thus, individual arbitration may provide claimants with *more* benefits than would class litigation. The Court should therefore reverse the Court of Appeal's decision in the interest of public policy.

175. Although the FAA does not prohibit any discriminatory pricing, Congress has done so elsewhere under the Communications Act of 1934. *See* Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, § 201 (codified as amended at 47 U.S.C. § 201 (2012)); *see also* Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 223 (1998) (“[T]he policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services.”).

176. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

177. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011) (“The agreement, moreover, denies AT & T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT & T's last written settlement offer, requires AT & T to pay a \$7,500 minimum recovery and twice the amount of the claimant's attorney's fees.”)

CONCLUSION

The decision in *DIRECTV v. Imburgia* largely comes down to competing views of the Federal Arbitration Act. *DIRECTV* argues that the Act preempts and invalidates any state law that frustrates the enforcement of arbitration agreements. *Imburgia* contends that the Act compels consideration of arbitration agreements under state law when those contracts have explicitly and intentionally adopted state law as the governing authority. To the extent that both interpretations are plausible, *Imburgia's* position would effectively sanction states' discrimination against arbitration agreements so long as those states found that the parties invoked hostile state law principles. This construction plainly frustrates the implementation of § 2 and cannot be reconciled. The Court should therefore reverse the California Court of Appeal and, in furtherance of Congress's objectives, reaffirm that states are fully preempted from enforcing agreements under state doctrines that would disfavor arbitration.