Prior to the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the California Supreme Court (and a number of other state courts) had declared that waivers of class-wide arbitration were unenforceable as a matter of state law. But in Concepcion, the Supreme Court held that the Federal Arbitration Act ("FAA") preempts state-law rules requiring the availability of class-wide arbitration. Today, the Supreme Court granted certiorari in *DIRECTV, Inc. v. Imburgia*, No. 14-462, to decide whether an arbitration provision that specifies that it is inapplicable if its ban on class-wide procedures is unenforceable under "the law of [the customer's] state" is governed by state law without reference to FAA preemption, or by state law taking into account the preemptive effect of the FAA.

Respondent Imburgia, a customer of petitioner DIRECTV, Inc. ("DTV"), filed a class action in California state court against DTV in 2007, alleging that DTV improperly charged early termination fees to its customers. DTV's Customer Agreement contained an arbitration clause that specified that it was governed by the FAA, and included a provision requiring that arbitration take place on an individual rather than class-wide basis. That provision also stated that "[i]f … the law of your state would find this agreement to dispense with class action procedures unenforceable, then this entire Section [i.e., the arbitration clause] … is unenforceable."

In *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), the California Supreme Court declared that consumer arbitration agreements are unconscionable under California law unless they allow for class arbitration. In light of Discover Bank, DTV did not invoke the arbitration provision when the lawsuit was filed. Shortly after the Supreme Court decided Concepcion—and held Discover Bank to be preempted by the FAA—DTV moved to compel arbitration. The trial court denied DTV's motion.

The California Court of Appeal affirmed. The Court of Appeal held that the reference in the arbitration provision to "the law of your state" was ambiguous and could mean either (1) the state's law without regard to federal law; or (2) the state's law, as superseded by federal law (such as the FAA). The court held that the reference to "the law of your state" meant the former—i.e., that the preemptive effect of federal law does not bear on the meaning of "the law of your state." Under that interpretation, the California Court of Appeal stated, the law of California is that agreements to dispense with class action procedures are unenforceable, and accordingly that DTV's arbitration clause is unenforceable. The California Supreme Court denied review.

Interpreting the same DTV arbitration provision, the *Ninth Circuit in Murphy v. DIRECTV, Inc*., 724 F.3d 1218 (9th Cir. 2013), reached the opposite conclusion. In Murphy, the Ninth Circuit held that "Section 2 of the FAA, which under Concepcion requires the enforcement of arbitration agreements that ban class procedures, is the law of California and of every other state. The Customer Agreement's reference to state law does not signify the inapplicability of federal law," because under the Supremacy Clause, "the Constitution [and] laws . . . of the United States are as much a part of the law of every State as its own local laws and Constitution." Id. at 1226 (citation omitted). As a result, the Ninth Circuit concluded that the reasoning later adopted by the California court—that "the parties intended state law to govern the enforceability of the arbitration clause, even if the state law in question contravened federal law"—"is nonsensical." Id.

The Supreme Court's decision in Imburgia should help clarify whether a company's good-faith effort to include in an arbitration provision language designed to comply with existing state law risks can have the unintended effect of jettisoning the protections of the FAA.

Absent extensions, amicus briefs in support of the petitioner will be due on May 14, 2015, and amicus briefs in support of the respondent will be due on June 15, 2015. Any questions about the case should be directed to Andrew J. Pincus (+1 202 263 3220) or Archis A. Parasharami (+1 202 263 3328) in our Washington office.

The Supreme Court has also recently invited the Solicitor General to file briefs expressing the views of the United States in the

following cases of interest to the business community:

Nazarian v. PPL EnergyPlus, LLC, No. 14-614;
CPV Maryland, LLC v. PPL EnergyPlus, LLC, No. 14-623;
CPV Power Development, Inc. v. PPL EnergyPlus, LLC, No. 14-634; and
Fiordaliso v. PPL EnergyPlus, LLC, No. 14-694:

The questions presented concern field and conflict preemption under the Federal Power Act in the context of state-directed contracts for energy procurement and annual regional capacity auctions conducted by the Federal Energy Regulatory Commission.

RJR Pension Investment Committee v. Tatum, No. 14-656: The questions presented are: (1) whether the plaintiff bears the burden of proving loss causation in order to recover money damages for a defendant's breach of a fiduciary duty under § 1109 of the Employee Retirement Income Security Act of 1974 or whether the plaintiff can shift the burden on that element to the defendant by carrying its burden on the analytically distinct elements of breach of fiduciary duty and loss to the plan; and (2) whether an ERISA fiduciary with a duty of prudence can be held liable for money damages under § 1109 even though its ultimate investment decision was objectively prudent.