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IN THIS ISSUE

John W. Fletcher and M. Dawes Cooke, Jr. report on a recent United States Supreme Court case in which consumers filed federal statutory claims and sought to avoid a mandatory arbitration provision. The Court held that, because the statute did not evidence a strong intention to override the Federal Arbitration Act's liberal policy favoring arbitration, the clause should be enforced.

The Supreme Court Reaffirms Its Commitment to Liberal Enforcement of Arbitration Clauses

ABOUT THE AUTHORS

John W. Fletcher is a commercial litigation attorney with the firm of Barnwell Whaley Patterson & Helms, LLC in Charleston, South Carolina He can be reached at jfletcher@barnwell-whaley.com.

M. Dawes Cooke, Jr. is a commercial litigation attorney with the firm of Barnwell Whaley Patterson & Helms, LLC in Charleston, South Carolina. He can be reached at mdc@barnwell-whaley.com.

ABOUT THE COMMITTEE

The Business Litigation Committee consists of members involved in business and commercial litigation including business torts, contract and other commercial disputes, e-commerce, antitrust issues, trade secrets and intellectual property, unfair competition and business defamation and disparagement. The Business Litigation Committee helps connect members involved in these areas around the world through networking and referral opportunities; developing and keeping current in the substantive, strategic and procedural aspects of business litigation; and affords members an international forum for sharing current developments and strategies with colleagues. In addition, the Business Litigation committee has formed an IP subcommittee to intently focus on issues important to IP litigators. Among the committee's and subcommittee's planned activities are newsletters, publications, sponsorship of internal CLEs, and Webinars.

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Jennifer P. Henry
Vice Chair of Publications
Thompson & Knight LLP
(817) 347-1733
jennifer.henry@tklaw.com

A recent Supreme Court decision again demonstrates the liberal federal policy of enforcing arbitration clauses. In *Compucredit Corp. v. Greenwood*, No 10-948 (U.S. Jan. 10, 2012), consumers filed a class action suit against a bank that issued credit cards and Compucredit, which marketed those cards. The lawsuit asserted, *inter alia*, claims under the Credit Repair Organizations Act (CROA), 15 U.S.C. §§ 1679, *et seq*. The CROA creates a private right of action, authorizing lawsuits and class actions for the recovery of compensatory damages, punitive damages and attorneys' fees for violation of its provisions. *See* 15 U.S.C. § 1679g(a). The plaintiffs' complaint involved, among other things, allegations that the defendants misrepresented that credit cards could be used to repair poor credit and imposed improper fees that allegedly reduced the advertised credit limit.

The defendants moved to compel arbitration, based on an arbitration provision in the plaintiffs' applications mandating arbitration of "[a]ny claim, dispute or controversy (whether in contract, tort, or otherwise) at any time." The District Court denied the motion, holding that statutory claims under the CROA were not arbitrable. The Ninth Circuit affirmed. However, the United States Supreme Court reversed, in an opinion by Justice Scalia with five Justices joining. Two Justices concurred in the result in a separate opinion, while Justice Ginsburg dissented.

The majority began its analysis by noting that the Federal Arbitration Act (FAA) reflects a liberal federal policy favoring enforcement of arbitration provisions in nearly all cases, including those involving federal statutory causes of action. Nonetheless, the Court noted that an arbitration clause will not be enforced as to a statutory claim where the FAA's mandates are "overridden by a contrary congressional command." *See Shearson/American Express Inc. v. McMahon*, 482 U. S. 220, 226 (1987).

The plaintiffs' argument against enforcement of the arbitration provision was premised upon the contention that the CROA evidenced such a command to override the FAA. This argument relied heavily on two key components of the CROA: (a) a provision requiring disclosure that "[y]ou have a right to sue a credit repair organization that violates" the CROA (*see* 15 U.S.C. 1679c(a); and (b) a nonwaiver provision stating that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer . . . shall be treated as void" (*see* 15 U.S.C. § 1679f(a)). The plaintiffs argued that these provisions evidenced a Congressional intent to bestow a "right to sue," specifically in a court of law. The argument continued that the CROA's granting of the right to sue in court could not be waived by an arbitration provision. The majority rejected these arguments. The Court concluded that the disclosure requirement of Section 1679c(a) did not *create* a "right to sue"; rather, it only *created* the condition that consumers be provided with certain specified information (of which the right to sue under the CROA is only a part). The Court further held that nothing in the CROA created a specific, explicit right to sue *in court*, as opposed to arbitration.

The plaintiffs further suggested that the CROA's civil liability provisions supported a finding that the CROA granted consumers the right to sue in court. Specifically, the plaintiffs relied on the CROA's use of words such as "action," "class action" and "court" as evidencing the intention to override the FAA. The majority rejected this argument, concluding that such terms were "commonplace" in statutes creating rights of action. This language did not show that Congress intended to command that the

FAA's clear mandate of arbitration should be overridden. As the Court observed, it had "repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court."

Thus, the *Compucredit* Court concluded that the arbitration provisions should be enforced in accordance with the FAA. In reaching that result, the Court made clear that the FAA's policy will normally be overriding and that, in the absence of a *very clear statement of contrary Congressional intent*, the courts will enforce an arbitration provision even as to statutory claims. Even the presence of common statutory "buzzwords" will not be sufficient to override the FAA.

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