If They've Told You Once, They've Told You A Thousand Times: The Supreme Court Reaffirms Enforceability Of Arbitration Agreements

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SECTION 2 OF THE FEDERAL ARBITRATION Act (the "FAA") makes agreements to arbitrate disputes "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the reformation of any contract." Since the mid-1980's, the Supreme Court has reinforced on multiple occasions the "liberal federal policy favoring arbitration agreements" derived from Section 2. In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Court established that the FAA pre-empted state laws invalidating arbitration agreements. Consequently, in cases such as *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court has steadfastly rejected challenges by litigants seeking to avoid enforcement of contractual agreements to arbitrate. In its most recent decision construing the FAA, the Court held that even though a federal consumer credit law granted consumers a "right to sue" and decreed any waiver by consumers of rights under the act to be void and unenforceable, the arbitration clause contained in the credit application would be enforced in accordance with its terms. *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012).

Given the Court's consistency in enforcing arbitration agreements under the FAA, counsel who wish to avoid the vagaries of litigation should for the most part be able to achieve that goal by insisting on arbitration clauses in contracts. However, the Court's vigorous support for arbitration may engender a legislative response; should Congress wish to afford certain classes of litigants with guaranteed access to the courthouse, *CompuCredit* provides that "the FAA's mandate [may be] overridden by a contrary congressional command." Thus, Congress retains the power to explicitly include "carve outs" to negate the effect of the FAA and prevent the "waiver" of a judicial cause of action.

A Statutory "Right to Sue" or "Cause of Action" Does Not in itself Invalidate an Agreement to Arbitrate

The *CompuCredit* case addressed whether the terms of the Credit Repair Organization Act, 15 U.S.C. §1679 *et seq*., ("CROA") precluded enforcement of an arbitration agreement in a lawsuit alleging CROA violations. The plaintiffs in the litigation were Visa card applicants who alleged that defendants made misleading representations relating to the credit terms. Each credit application contained a provision that "Any claim, dispute or controversy (whether in contract, tort, or otherwise) any time arising from or relating to your Account, will be resolved by binding arbitration." However, CROA contains a "disclosure required" provision which sets forth a statement that the credit organization must provide to the consumer before execution of the credit agreement. The plaintiffs argued that the required disclosure's statement, "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act," constituted a "right to sue" *in court* for CROA violations. Moreover, CROA contains a "nonwaiver" provision which states "Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter… shall be treated as void and may not be enforced by any Federal or State court or any other person." Affirming the district court's holding that "Congress intended claims under the CROA to be non-arbitrable," the Ninth Circuit ruled that the "right to sue" referenced in the disclosure provision "clearly involves the right to bring an action in a court of law" and that the nonwaiver provision rendered the plaintiffs' agreement to arbitrate unenforceable.

The Supreme Court reversed in an 8-1 decision, with Justice Ginsberg dissenting. Writing for the majority, Justice Scalia rejected the argument that Congress's insertion of a "right to sue" in CROA's disclosure provision provided consumers with a right to bring an action in a court of law. Rather, the "right to sue" meant only that

the consumer had the ability to enforce the credit organization's liability pursuant to the statute; it did not specify that the forum for that enforcement had to be judicial rather than arbitral. Indeed, the Court noted, Congress in using the term "right to sue" could have been contemplating judicial action only in the context of compelling arbitration or confirming or vacating an arbitral award. CROA's terms did not enable a credit consumer to evade an agreement to arbitrate, reasoned the Court, so long as "the guarantee of the legal power to impose liability…is preserved." As to the "nonwaiver" provision, because the Court determined that CROA did not create a right to "initial judicial enforcement," it concluded that the there was no "right of the consumer" that could be waived by an agreement to arbitrate disputes.

Although the plaintiffs argued that CROA's references to "actions" and "court" in its civil liability provision (15 U.S.C. §1679g) evinced Congressional intent that consumers had a "right" to a judicial forum, the Court rebuffed this assertion as well, holding that the references were not explicit enough to constitute a "contrary congressional command" that would trump the presumptive validity of the arbitration agreement. "It is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit. If the mere formulation of the cause of action in this standard fashion were enough to establish the 'contrary congressional command' overriding the FAA…valid arbitration agreements covering federal causes of action would be rare indeed. But that is not the law."

CompuCredit is only the most recent of a string of Supreme Court decisions enforcing arbitration agreements even where the applicable underlying federal statute allows aggrieved parties to bring enforcement "actions." The Court has upheld the arbitrability of disputes under they Clayton Antitrust Act (*Mitsubishi Motors*), the Racketeer Influenced and Corrupt Organizations Act (*Shearson/American Express*), and the Age Discrimination in Employment Act (*Gilmer*). The Court observed that arbitration clauses in credit contracts were in widespread use at the time of CROA's enactment in 1996 and that "had Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what [plaintiffs] suggest. When it has restricted the use of arbitration in other contracts, it has done so with a clarity that far exceeds the claimed indications in the CROA."

The message should be "loud and clear" by this time - the "contrary congressional command" necessary to invalidate arbitration clauses must be explicit and direct to overcome the validity conferred on such clauses under Section 2 of the FAA. The Court's decisions have put the burden on Congress to specifically carve out a legislative exception that would negate a contractual obligation to arbitrate, such as that found in the Automobile Dealers' Day in Court Act ("notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration"). In the absence of such an express exception, parties will not be precluded from arbitrating claims based solely on the legislature's grant of a "cause of action" or "right to sue."

Nevertheless, counsel should remember that *CompuCredit* does not render arbitration clauses entirely invulnerable to attack. Section 2's "savings clause" permits challenges to arbitration agreements "upon such grounds as exist at law or in equity for the reformation of any contract." For instance, an arbitration clause procured through fraud is invalid as a matter of contract law because the requisite "mutual intent" is never formed. Recently, a California federal district court distinguished *CompuCredit* in denying a motion to compel arbitration where the court found that the defendants had engaged in improper class communications when they contacted employees attempting to alter the arbitration provision in the contract after the employees had initiated litigation. *Balasanyan v. Nordstrom, Inc.*, 2012 WL 1944609 (S.D. Cal. May 30, 2012). The *Balasanyan* court held that pursuant to the savings clause, an arbitration clause could be invalidated "on the same basis as used for any type of contract," including the attempt to alter the clause through a post-filing communication to members of the putative plaintiff class.

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