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U.S. Supreme Court Reaffirms Support for Arbitration of Statutory Claims

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The U.S. Supreme Court, enforcing an arbitration clause, found that the "right to sue" language and the references to "court" and "action" in the federal Credit Repair Organizations Act were a "commonplace" means of referring to a cause of action but did not express the contrary congressional command needed to override the pro-arbitration philosophy reflected in the Federal Arbitration Act.

Only a year after its decision in *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011), the U.S. Supreme Court has reiterated the overarching nature of the pro-arbitration policy underlying the Federal Arbitration Act ("FAA"). In *Concepcion*, the Court held (5-4) that the FAA preempted a California rule invalidating as unconscionable many consumer arbitration clauses that contained class action waivers.

Again relying on the underlying principles of the FAA, the Court in *CompuCredit Corp. v Greenwood*, No. 10-948, 2012 WL 43514 (Jan. 10, 2012), dismissed (in an 8-1 decision) arguments that congressional use of terms that connote litigation were sufficient to show an intent to preclude arbitration as a remedy for violations of a federal statute. Beyond its importance to arbitration law involving statutory claims, the Court's language may be useful in enforcing arbitration clauses in private contracts as well.

Plaintiff Wanda Greenwood and other class members had applied for a credit card marketed as useful in improving credit. The application for the card required the applicant to arbitrate any dispute relating to the new account. The issuance of the card was subject to the Credit Repair Organizations Act (CROA), which requires a plain language notice of the consumer's rights under the statute. CROA requires, among other things, a disclosure that "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act." The civil liability section of the statute refers repeatedly to "action," "class action," and "court." The statute also has a non-waiver provision, voiding any waiver by a consumer of a protection or right under the statute.

Greenwood maintained that CompuCredit violated CROA in failing to disclose that much of the advertised available credit would be consumed by fees charged on opening the account. The District Court refused

a request to order arbitration, and the Ninth Circuit affirmed, on the grounds that the language of the statute showed that Congress intended CROA claims to be non-arbitrable.

Justice Scalia rejected the position of the Ninth Circuit that the statutory language manifested congressional intent to give consumers a right to bring an action in a court of law rather than in arbitration. He found that the "right to sue" language and the references to "court" and "action" were a "commonplace" means of referring to a cause of action but did not express the contrary congressional command needed to override the pro-arbitration philosophy reflected in the Federal Arbitration Act. The opinion noted that where Congress intended to restrict arbitration of federal statutory violations, it had done so "with a clarity that far exceeds" the language of the CROA.

While the *CompuCredit* opinion focuses on arbitration of a statutory claim, its language has broader implications. In disposing of the "right to sue" and "court" language as requiring no more than "judicial action compelling or reviewing initial arbitral adjudication," the *CompuCredit* opinion gives added ammunition for the enforcement of arbitration clauses involving only private rights. Loose contractual language referencing litigation will not affect the ability to enforce an arbitration clause in the same contract. Rather, these and similar references may be construed as no more than a reference to a right to judicial action consistent with, but not instead of, the agreement to arbitrate.

Click here to read *CompuCredit Corp. v Greenwood*, No. 10-948, 2012 WL 43514 (Jan. 10, 2012)

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