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Federal Arbitration Act Trumps Credit Repair Organizations Act

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On January 10, 2012, the U.S. Supreme Court ruled that the **Credit Repair Organizations Act** ("CROA" or "the Act"), 15 U.S.C. §1679 et seq., does not preclude the enforcement of an arbitration agreement. **The Federal Arbitration Act** ("FAA"), 9 U.S.C. §1 et seq., requires that an arbitration agreement be enforced according to its terms. Even though the CROA expressly provides for "a right to sue," the Supreme Court held in CompuCredit Corp. v. Greenwood, 565 U.S. ___ (2012), that the FAA controls unless Congress did not provide for arbitration.

The CROA's disclosure provision provides that consumers have a right to sue a credit repair organization that violates the Act. 15 U.S.C. §1679c(a). This disclosure provision, however, does not override the FAA's mandate that established a liberal federal policy favoring arbitration.
In CompuCredit, the U.S. Supreme Court held that the mere contemplation of judicial enforcement in the CROA does not demonstrate that the Act provides consumers with a right to initial judicial enforcement. Courts are required to enforce arbitration clauses, even when federal statutory claims are at issue.

The FAA's mandate can only be overridden by express congressional command. The mere provision of a private cause of action for violation of the Act does not establish a clear congressional intent to override the FAA's mandate. See also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (arbitration agreement with respect to a cause of action under the Age Discrimination in Employment Act enforced),Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987) (arbitration agreement with respect to a cause of action under the Racketeer Influenced and Corrupt Organizations Act enforced), and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (arbitration agreement with respect to a cause of action created by the Clayton Act enforced).

In its ruling in CompuCredit, the U.S. Supreme Court again confirmed that the contractual arbitration of claims satisfies the statutory prescription of civil liability in court under federal statutes that provide for a private right of action.

Implicit Waiver of a Contractual Right to Arbitrate

In Kawasaki Heavy Industries, Ltd. v. Bombardier Recreational Products, Inc., case no. 11-2120

(decided October 21, 2011), the Seventh Circuit addressed the circumstances under which a party can be deemed to have waived its rights to arbitrate under an arbitration agreement.

While federal policy favors arbitration, a party can waive its contractual right to arbitration. Such a waiver can be explicit or inferred by the party's conduct. A waiver of the right to arbitration will be inferred when a party acts inconsistently with the right to arbitrate. In order for a court to make such determination, it must consider the totality of the circumstances.

Within the Seventh Circuit, diligence, or the lack thereof, weighs heavily on a court's finding of waiver. Courts will also consider whether the allegedly waiving party participated in litigation, substantially delayed its request for arbitration, or participated in discovery. While not required, a showing that the non-waiving party was prejudiced by its reliance on the litigious behavior of the allegedly waiving party is relevant to the court's analysis.

A party's participation in litigation creates a rebuttable presumption that the party waived its right to arbitrate. Merely responding to another party's motion that does not resolve the merits of the case, such as challenging the court's jurisdiction to hear a claim, however, is insufficient to trigger the presumption of waiver.

Similarly, failure to file a motion to stay under Section 3 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., or a motion to compel arbitration under Section 4 is not necessarily inconsistent with a party's desire to arbitrate. As long as a party avoids substantive litigation activity, it will not be deemed to have forgone its right to arbitrate.

Lastly, prejudice to the non-waiving party is only considered if such prejudice at issue results from the conduct that constitutes waiver. If the allegedly waiving party's actions are consistent with the intent to arbitration, prejudice is a non-factor.

Statutes of Limitations Do Not Automatically Apply in Arbitration in Florida

While practically all well-drafted arbitration clauses identify the forum and the substantive law that will be applied in the event of a dispute, it is rare for an arbitration agreement to specify what procedural law, including that governing the statute of limitations, will apply to a dispute. The absence of language expressly incorporating the procedural law that applies when a dispute arises could mean that statutes of limitations do not apply to the parties' dispute. Given the significant differences between the court process and the arbitral process with respect to rules of procedure, discovery and evidence, courts are finding that these differences extend to issues of statute of limitations.

Recently, the Second District Court of Appeal in Florida held that Florida's statute of limitations does not apply to claims made in arbitration unless the limitation is expressly adopted in the arbitration agreement. In Raymond James Fin. Services, Inc. v. Phillips, 2D10-2144, 2011 WL 5555691 (Fla. 2d DCA Nov. 16, 2011), the state appellate court held that the Florida's statute of limitations, Fla. Stat. § 95.011, does not apply to arbitrations because an arbitration is not a "civil action" or a "proceeding" as used in the statute.

The arbitration agreement at issue included a provision that it did not limit or waive the application of any relevant state or federal statute of limitations. The Appellate Court held, however, that such a provision was not enough to affirmatively incorporate the state's statute of limitations into the

arbitration agreement. As a practice pointer, in order to avoid any question as to whether the state statute of limitations will apply to arbitration, the agreement should expressly incorporate both the procedural and the substantive laws of the state of the forum or where the cause of action arises

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