

2012

If It Only Had a Heart: Supreme Court Eschews Compassion for Cash-Strapped Consumers in Upholding the Validity of Arbitration Clauses in Credit Repair Contracts

Collin Koenig

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>

 Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Collin Koenig, *If It Only Had a Heart: Supreme Court Eschews Compassion for Cash-Strapped Consumers in Upholding the Validity of Arbitration Clauses in Credit Repair Contracts*, 2012 J. Disp. Resol. (2012)
Available at: <https://scholarship.law.missouri.edu/jdr/vol2012/iss2/9>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository.

If It Only Had a Heart: Supreme Court Eschews Compassion for Cash-Strapped Consumers in Upholding the Validity of Arbitration Clauses in Credit Repair Contracts

*CompuCredit Corp. v. Greenwood*¹

I. INTRODUCTION

In a time of job insecurity, fluctuating household incomes, and mixed signals of economic recovery, Americans have turned to credit as a significant means of payment.² The amount of credit available to a consumer is affected by his credit score.³ A “good” credit score can get a consumer approved for credit and a better score generally correlates with a smaller interest rate, limiting the consumer’s cost of borrowing.⁴ If a consumer’s credit score is too low, a bank may not extend credit at all.⁵ For years, credit repair organizations have promised consumers that they can positively affect these scores, in exchange for payment.⁶ However, due to widespread scamming by deceptive credit repair organizations, Congress heavily regulated the credit repair service industry by enacting the Credit Repair Organizations Act (CROA).⁷

In *CompuCredit Corp. v. Greenwood*, the Supreme Court was faced with the issue of whether consumers’ claims under the CROA can be resolved through contractually required arbitration, or whether the language of the statute requires

1. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668 (2012), *rev’g* 615 F.3d 1204 (9th Cir. 2010).

2. *Consumer Credit Rises More Than Expected in January*, REUTERS (Mar. 7, 2012, 4:29 PM), <http://www.reuters.com/article/2012/03/07/us-consumer-credit-idUSTRE8261TQ20120307> (reporting that the U.S. unemployment rate, though falling “sharply” recently, is still “well above pre-recession levels”; reporting that U.S. household incomes have, in the aggregate, posted both gains and losses in the past few months; and reporting that U.S. consumer credit has increased for the past five months); Jonathan Cable & Kevin Yao, *Global Economy-Europe Drags on World Economy, US Fares Better*, REUTERS (Mar. 1, 2012, 9:06 AM), <http://www.reuters.com/article/2012/03/01/global-economy-wrapup-idUSL4E8E13IO20120301> (reporting that while Europe’s economy is down, Asia’s is showing signs of growth and the U.S. is displaying potential for a “self-sustaining recovery path” from the global recession).

3. Leslie McFadden, *What is a Credit Score?*, BANKRATE.COM (Apr. 22, 2010), <http://www.bankrate.com/finance/credit-cards/what-is-a-credit-score.aspx>.

4. *Id.*

5. *Id.*

6. James P. Nehf, *A Legislative Framework for Reducing Fraud in the Credit Repair Industry*, 70 N.C.L. REV. 781, 798-99 (1992).

7. Credit Repair Organizations Act, 15 U.S.C. § 1679 (2006); *see also* Genevieve Hanft, *Giving Arbitration Some Credit: The Enforceability of Arbitration Clauses Under the Credit Repair Organizations Act*, 79 FORDHAM L. REV. 2761, 2769-70 (2011).

resolution of these claims to occur in federal court.⁸ The Court held that agreements between credit repair organizations (CROs) and consumers may include enforceable arbitration agreements.⁹ This note criticizes the Supreme Court's reasoning, partly inspired by Justice Ginsburg's dissent. In enforcing arbitrability of CROA disputes, the Court has acted contrary to Congress' purposes of the Act: to ensure that consumers are making an "informed decision" when dealing with CROs and to protect consumers from deceptive credit repair services.¹⁰ In light of this decisive interpretation of the CROA, more protection of consumers is required if they are to understand that entering into a credit repair contract will limit the forums in which they can enforce civil liability against CROs who violate the Act.

II. FACTS AND HOLDING

Plaintiffs Wanda Greenwood, Ladelle Hatfield, and Deborah McCleese entered into individual credit card agreements with co-defendant Columbus Bank and Trust (Columbus).¹¹ Co-defendant CompuCredit Corporation (CompuCredit) exclusively marketed and advertised the credit cards for Columbus.¹² Plaintiffs signed up for a credit card offer via a "Pre-Approved Acceptance Certificate" sent in the mail by CompuCredit.¹³ CompuCredit sent plaintiffs various promotional materials in addition to the Acceptance Certificate, which included several representations about the benefits of the card.¹⁴ Despite claiming that "no deposit [was] required" in setting up the account, Columbus charged several fees to the newly opened credit account, effectively reducing the initial \$300 credit limit.¹⁵ Plaintiffs filed a complaint in the United States District Court, Northern California, alleging misrepresentations by defendants and violations of the Credit Repair Organizations Act (CROA)¹⁶ and California state law.¹⁷

8. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668 (2012), *rev'g* 615 F.3d 1204 (9th Cir. 2010).

9. *Id.* at 673.

10. 15 U.S.C. § 1679(b).

11. *Greenwood v. Compucredit Corp.*, 617 F. Supp. 2d 980, 982 (N.D. Cal. 2009), *aff'd*, 615 F.3d 1204 (9th Cir. 2010), *rev'd*, 132 S. Ct. 665 (2012).

12. *Id.*

13. *Id.* The terms of the agreement between the parties were contained on the "Acceptance Certificate." *Id.*

14. *Id.* The promotional materials made representations that defendant's services could help the consumer "rebuild your credit," "rebuild poor credit," and "improve your credit rating." *Id.*

15. *Id.* These fees included "a \$29 finance charge, a monthly \$6.50 account maintenance fee and a \$150 annual fee." *Id.*

16. Credit Repair Organizations Act, 15 U.S.C. § 1679 (2006).

17. *Greenwood*, 617 F. Supp. 2d at 982. Defendants did not dispute that they were a "credit repair organization" under the CROA and thus subject to the provisions of CROA. *Id.* at n.2. The CROA is an act that provides consumers certain protection in their dealings with credit repair organizations. Hanft, *supra* note 7, at 2770. The plaintiffs complained that defendants misled them about several fees associated with opening their accounts, and the detrimental effect that those fees had on the plaintiffs' credit limit. *CompuCredit*, 132 S. Ct. at 668.

The defendants responded by filing a motion to compel arbitration on plaintiffs' CROA claims, pursuant to an arbitration clause in the parties' contract.¹⁸ Plaintiffs argued that the arbitration agreement was void under the CROA because the CROA granted credit consumers a non-waivable "right to sue."¹⁹ The district court denied the motion to compel arbitration, holding that a requirement of arbitration of a dispute under the CROA was "incompatible with [the] CROA's non-waivable right to sue."²⁰ Defendants appealed to the United States Court of Appeals, Ninth Circuit.²¹ The Ninth Circuit affirmed the district court's denial of the motion to compel arbitration, holding that the CROA language "right to sue" should receive its "plain and ordinary meaning."²² The court rejected defendants' argument that Congress used the words "right to sue" as a form of uncomplicated shorthand which would be easier for consumers to understand.²³ Additionally, the Ninth Circuit adopted plaintiffs' argument that Congress intended to provide consumers with a non-waivable right to bring an action in a court of law.²⁴

The United States Supreme Court granted *certiorari* and reversed the Ninth Circuit's decision.²⁵ The Court found that the CROA language informing consumers of their "right to sue" did not create a non-waivable right to bring an action in a court of law.²⁶ It rejected plaintiffs' argument that the CROA "right to sue" language created "a 'right' to bring an action in court" solely on the ground that the provision repeatedly used terms such as "action," "class action," and "court."²⁷ Writing for the majority, Justice Scalia explained that in enacting the CROA, Congress did not "overrid[e]" the federal law of enforceability of arbitration clauses.²⁸

The Court also rejected plaintiffs' argument that the CROA's disclosure provision improperly required credit organizations to mislead customers by promis-

18. *Greenwood*, 617 F. Supp. 2d at 982, 984. The arbitration clause stated, in relevant part: "Any claim, dispute or controversy . . . at any time arising from or relating to your Account . . . or this Agreement . . . upon election of you or us, will be resolved by binding arbitration . . ." *Id.* at 983.

19. *Id.* at 984-85. The "right to sue" language originated in the text of a CROA-mandated disclosure statement that must be provided to consumers prior to execution of the contract. *CompuCredit*, 132 S. Ct. at 669. The required disclosure language states, in relevant part: "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act." Credit Repair Organizations Act, 15 U.S.C. § 1679c(a). The non-waiver provision states, in relevant part: "Any waiver by any consumer of any protection by or any right of the consumer under this subchapter—(1) shall be treated as void; and (2) may not be enforced by a Federal or State court or any other person." Credit Repair Organizations Act, 15 U.S.C. § 1679f(a)(1), (2).

20. *Greenwood*, 617 F. Supp. 2d at 988.

21. *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204 (9th Cir. 2010), *aff'g* 617 F. Supp. 2d 980 (N.D. Cal. 2009), *rev'd*, 132 S. Ct. 665 (2012).

22. *Id.* at 1208, 1214. The Ninth Circuit essentially adopted plaintiffs' argument from the district court: the language of the CROA included a "right" to sue in court which, pursuant to language in another subsection of the CROA, was not waivable by the consumer. *Id.* at 1207-08.

23. *Id.* at 1209-11. The court also rejected defendants' argument that Congress intended for the word "sue" to be interpreted broadly enough to mean "arbitrate." *Id.* at 1208-09.

24. *Id.* at 1214.

25. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 673 (2012), *rev'g* 615 F.3d 1204 (9th Cir. 2010).

26. *Id.* at 669-70.

27. *Id.* at 670.

28. *Id.* at 668-69 (citing Federal Arbitration Act, 9 U.S.C. § 2 (2006)).

ing a “right” that was not actually being provided.²⁹ In addition, the Supreme Court opined that Congress, had it intended to prohibit arbitration in the type of credit agreements at issue, would have done so more expressly in the Act.³⁰ In reversing and remanding the decision of the Ninth Circuit, the Supreme Court held that because the CROA was silent on the question of arbitrability, the FAA requires enforcement of an arbitration agreement according to its terms.³¹

III. LEGAL BACKGROUND

Federal courts have a well-established history of enforcing arbitration agreements out of respect for the parties’ intent and the effectiveness of the arbitral forum. This enforceability applies even when a claim is brought under a federal statute.³² An exception to enforceability exists when Congress “evinces an intent” to prevent a party from waiving their judicial remedies under a Federal Act.³³ Since the enactment of the Credit Repair Organizations Act (CROA) in 1996, federal courts have struggled over the issue of enforceability of arbitration agreements in contracts between consumers and credit providers that fall under the Act’s reach.³⁴

A. Enforceability of Arbitration Agreements in Claims Brought under Federal Statutes

In 1925, Congress enacted the Federal Arbitration Act (FAA) to combat “judicial resistance to arbitration.”³⁵ Section 2 of the FAA renders agreements to settle disputes by arbitration “valid, irrevocable, and enforceable” in commercial transactions.³⁶ However, the validity of an arbitration agreement is subject to “such grounds as exist at law or equity for the revocation of any contract.”³⁷ The Supreme Court has called this section of the FAA “a congressional declaration of a liberal federal policy favoring arbitration agreements.”³⁸

The FAA includes a process by which parties may compel arbitration.³⁹ When one party refuses to arbitrate a dispute, the party wishing to enforce arbitration may seek a federal district court order to arbitrate according to the terms of the parties’ contract.⁴⁰ The Supreme Court has emphasized that a district court is required to compel arbitration once it determines that an agreement to arbitrate the

29. *Id.* at 671. The Court ruled that the language “right to sue” was “a colloquial method of communicating to consumers that they have the legal right, enforceable in court, to recover damages from credit repair organizations that violate the CROA.” *Id.* at 672.

30. *Id.* at 672-73.

31. *Id.* at 673.

32. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 626 (1985).

33. *Id.* at 628.

34. *See Hanft, supra* note 7, at 2791-2803 (examining “the circuit split over the enforceability of arbitration agreements under the CROA”).

35. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

36. Federal Arbitration Act, 9 U.S.C. § 2 (2006).

37. *Id.*

38. *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983).

39. *See* Federal Arbitration Act, 9 U.S.C. §§ 3, 4.

40. *Id.* § 4.

disputed issue exists, and at least one party has failed to comply with such agreement.⁴¹ If a court compels arbitration, then it must stay any related federal court proceedings until the arbitration can occur within the terms of the agreement.⁴²

Federal courts have upheld arbitration agreements even when a party makes a claim under a federal statute.⁴³ In *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, the Supreme Court upheld an agreement to arbitrate a dispute under the Sherman Act.⁴⁴ With a focus on honoring the intent of the parties, the Court extended the pro-arbitration policy of federal courts to claims based on federal statutory rights.⁴⁵ The Court supported this extension of the federal policy by reasoning that the FAA “provides no basis for disfavoring agreements to arbitrate statutory claims.”⁴⁶ The Court described an agreement to arbitrate as a contractual choice by parties to obtain the arbitral benefits of “simplicity, informality, and expedition,” and not as a forfeiture of their “substantive rights afforded by statute.”⁴⁷ By agreeing to arbitrate, a consumer simply selects an alternate forum in which they may vindicate their rights.⁴⁸

While the Supreme Court invoked the pro-arbitration policy of *Moses H. Cone Memorial Hosp.* to enforce an arbitration agreement in *Mitsubishi Motors*, it also identified a “category of claims” that fall into a narrow exception to the rule of liberal enforcement.⁴⁹ According to the Supreme Court’s decision in *Mitsubishi Motors*, agreements to arbitrate should be enforced unless Congress has expressed an intent to “preclude a waiver of judicial remedies” from certain statutory rights.⁵⁰ Courts may look to the text and legislative history of statutes in assessing the presence or absence of such intent.⁵¹ The *Mitsubishi Motors* Court did not

41. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985); Federal Arbitration Act, 9 U.S.C. § 4 (2006) (“The court . . . upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, . . . shall make an order directing the parties to proceed to arbitration . . .”). The Ninth Circuit has described the district court’s analysis in a simple, two-part test: “(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.” *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). If these elements are met, the district court by law has no choice but to compel the arbitration.

42. Federal Arbitration Act, 9 U.S.C. § 3.

43. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985) (enforcing an agreement to arbitrate a claim made under the Sherman Act); *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987) (enforcing an agreement to arbitrate a claim made under the Racketeer Influenced and Corrupt Organizations Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (enforcing an agreement to arbitrate a claim made under the Age Discrimination in Employment Act). These three cases are especially relevant because the Supreme Court used them to support its decision to uphold the arbitration agreement in *CompuCredit*. Each will be dealt with in detail. *See also Hanft, supra* note 7, at 2782-85.

44. *Mitsubishi Motors Corp.*, 473 U.S. at 640.

45. *Id.* at 626-27.

46. *Id.* at 627.

47. *Id.* at 628.

48. *Id.*

49. *Id.* at 627-28.

50. *Id.* at 628 (“Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”).

51. *Id.*

disturb the other longstanding bars to enforcement of arbitration agreements such as fraud or “overwhelming economic power.”⁵²

Relying heavily on the rule announced in *Mitsubishi Motors*, the Supreme Court once again upheld a pre-dispute arbitration agreement in the face of a claim made under a federal statute in *Shearson/American Express, Inc. v. McMahon*.⁵³ The Court determined the issue of whether Congress had intended to except the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Exchange Act from the rule of enforceability of arbitration agreements under the FAA.⁵⁴ As to RICO, the Court found congressional “silence” in the statutory text and legislative history of the Act, and deemed this silence a lack of intent to prohibit the enforcement of arbitration agreements.⁵⁵

As to the Exchange Act, the *McMahon* Court also declined to find the requisite congressional intent to overcome the presumption about enforceable arbitration agreements.⁵⁶ The text of the Act contained a “non-waiver” provision prohibiting contract terms which required “any person to waive compliance with any provision of [the Act].”⁵⁷ In another section of the Act, a jurisdictional provision purported to give exclusive jurisdiction of violations of the Act to federal courts.⁵⁸ Plaintiffs argued that Congress, by including these separate but related provisions, intended for the non-waiver provision to prevent a consumer from waiving exclusive jurisdiction by agreeing to resolve disputes through private arbitration.⁵⁹ The Court reasoned that the non-waiver provision only prohibited the enforcement of agreements to waive *compliance* with the Act.⁶⁰ The jurisdictional provision, the Court determined, did contain any duty with which a party must “comply.”⁶¹ Therefore, the Supreme Court upheld the arbitrability of disputes under the Exchange Act.⁶²

In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court again found no reason to stray from its pro-arbitration stance.⁶³ Applying the *Mitsubishi Motors* test of congressional intent, the Court found no support for plaintiff’s argument that enforcing a pre-dispute arbitration agreement would be inconsistent with

52. *Id.* These and other grounds for precluding the enforcement of an arbitration agreement fall under section 2 of the FAA as “grounds as exist at law or equity for the revocation of any contract.” See *supra* note 37 and accompanying text.

53. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987).

54. *Id.* at 227; Federal Arbitration Act, 9 U.S.C. § 2 (2006).

55. *McMahon*, 482 U.S. at 238-42.

56. *Id.* at 238.

57. *Id.* at 227 (quoting Exchange Act, 15 U.S.C. § 78cc(a) (2006)).

58. *Id.* at 227-28 (quoting Exchange Act, 15 U.S.C. § 78aa(a) (2006)). The Act states in pertinent part:

The district courts of the United States . . . shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder.

Id.

59. *Id.* at 228.

60. *Id.*

61. *McMahon*, 482 U.S. at 228.

62. *Id.* at 238.

63. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

the underlying purposes of the Age Discrimination in Employment Act (ADEA).⁶⁴ Justice White, writing for the majority, even revealed a consistency between the arbitration and the ADEA: the Act's "flexible approach" of pursuing "informal methods of . . . conference . . . and persuasion."⁶⁵ Pointing to its decisions in *Mitsubishi Motors* and *McMahon*, the Court reasoned that arbitrating claims under the ADEA, as with RICO and the Sherman Act, could occur without disturbing the Act's advancement of "important public policies."⁶⁶ The Court also reiterated its position that "generalized attacks on arbitration" are insufficient to overcome the presumption of validity of arbitration agreements.⁶⁷

B. Enforceability of Arbitration Agreements under the Credit Repair Organizations Act

In 1996, Congress passed the Credit Repair Organizations Act (CROA)⁶⁸ to help remedy a situation where credit repair organizations were collecting fees from consumers already in poor financial condition.⁶⁹ The legislative history of the Act reveals Congress' belief that credit repair organizations "pose a greater threat than they are worth."⁷⁰ Congress also drafted the Act in light of society's emphasis on consumer credit history.⁷¹ Congress aimed to combat the consumers' lack of knowledge of the activities of some credit repair organizations.⁷² The solution, Congress decided, was to require these organizations to disclose certain information to consumers and to hold the organizations accountable through the threat of civil liability.⁷³

The CROA regulates the activities of "credit repair organizations"⁷⁴ (CROs) by imposing civil liability on CROs that violate any of four substantive actions.⁷⁵

64. *Id.* at 27-35.

65. *Id.* at 29 (former quotation from the opinion and latter quoting 29 U.S.C. § 626(b) (2006)).

66. *Id.* at 27-28.

67. *Id.* at 30. Among these attacks, plaintiff complained of arbitration's limited discovery, bias amongst arbitral panels, and a lack of public knowledge of arbitral awards. *Id.* at 30-32. The Court staunchly rejected all of them. *Id.*

68. 15 U.S.C. § 1679 (2006).

69. Hanft, *supra* note 7, at 2769.

70. *Id.*

71. *Id.*

72. *Id.*; see H.R. Rep. No. 103-486, at *64 (1994) ("This title seeks to . . . ensure that consumers are provided with necessary information about credit repair organizations so that they can make informed decisions regarding the purchase of their services and to protect the public from unfair and deceptive advertising and business practices by the industry."); 15 U.S.C. § 1679(b)(1), (2) ("The purposes of this subchapter are . . . to ensure that prospective buyers of the services of credit repair organizations are provided with the information necessary to make an informed decision . . . and to protect the public from unfair or deceptive advertising and business practices by credit repair organizations.")

73. See 15 U.S.C. §§ 1679c, 1679g.

74. Roughly, a credit repair organization is business that provides services such as improving consumers' credit ratings and advising or assisting consumers "with regard to any activity or service described [in the Act]." *Id.* § 1679a(3)(A).

75. See *id.* § 1679b(a)(1)-(4). CROs can incur liability under the CROA by making false or misleading statements about consumers' credit scores to certain interested parties. *Id.* § 1679b(a)(1). Such interested parties include any "consumer reporting agency" or creditors or potential creditors of the consumer. *Id.* CROs violate the CROA by advising consumers to alter his or her identity "to prevent display of the consumer's credit record, history, or rating for the purpose of concealing adverse infor-

Among these actions, CROs may violate the act by misrepresenting the services they provide, or defrauding or deceiving “any person in connection with . . . the sale of the[ir] services.”⁷⁶ CROs are required to disclose certain information to a prospective consumer prior to executing a contract.⁷⁷ Several provisions under this section begin with the language, “You have a right to . . .,” and proceed to provide the reader with a description of his rights with respect to his contract with the CRO.⁷⁸ One of these rights is the “right to sue” a violator CRO.⁷⁹ This provision of the CROA has endured much scrutiny in federal litigation.⁸⁰ The Act also contains a broadly-worded non-waiver provision which voids “any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter”⁸¹

A credit repair organization is liable in actual and punitive damages when it engages in one or more “prohibited practices” of § 1679b of the CROA.⁸² An aggrieved consumer may recover actual damages sustained as a result of the violation or the amount he paid to the organization, whichever is greater.⁸³ The civil liability provision also provides for punitive damages in individual or class “actions.”⁸⁴ In both types of actions, the amount of punitive damages is at the discretion of the court.⁸⁵ A party who brings a successful action for actual or punitive damages may also be awarded attorneys’ fees.⁸⁶

Unlike claims under the Sherman Act, RICO, and the ADEA, the Supreme Court had not, until 2012, determined the enforceability of arbitration provisions for claims made under the CROA.⁸⁷ The issue had been considered only three times at the federal circuit court level and three additional times in federal district courts.⁸⁸ The majority of these decisions had been in favor of defendant CROs, enforcing pre-dispute arbitration agreements in CROA-regulated contracts.⁸⁹ The hallmark holding of these decisions has been that the CROA’s language does not

mation” from the same interested parties named in section (a)(1). *Id.* § 1679b(a)(2). *See also id.* § 1679g (CROA provision establishing civil liability for violations of the Act).

76. *Id.* § 1679b(a)(3), (4).

77. *Id.* § 1679c.

78. *Id.* § 1679c(a).

79. The provision states, in pertinent part: “You have a right to sue a credit repair organization that violates the Credit Repair Organizations Act.” *Id.*

80. *See generally* Hanft, *supra* note 7.

81. 15 U.S.C. § 1679f(a).

82. *Id.* § 1679g(a)(1)-(3); *see also id.* § 1679b (prohibited practices under the CROA).

83. *Id.* § 1679g(a)(1)(A), (B). A party who successfully enforces liability against a violator is entitled to his costs and attorneys’ fees. *Id.* § 1679g(a)(3).

84. *Id.* § 1679g(a)(2).

85. *Id.* § 1679g(a)(2)(A), (B). The statute enumerates four factors “the court shall consider.” *Id.* § 1679g(b).

86. *Id.* § 1679g(a)(3).

87. Hanft, *supra* note 7, at 2791; *see* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012), *rev’g* 615 F.3d 1204 (9th Cir. 2010) (enforcing an arbitration agreement between parties who contracted under the CROA).

88. Hanft, *supra* note 7, at 2792-2803.

89. *See CompuCredit*, 132 S. Ct. at 673; *Gay v. Creditinform*, 511 F.3d 369, 382 (3d Cir. 2007) (holding that arbitrating claims under the CROA is not in conflict with enforcing the Act); *Picard v. Credit Solutions, Inc.*, 564 F.3d 1249, 1255 (11th Cir. 2009) (holding that the CROA’s language does not prohibit arbitration); *Rex v. CSA-Credit Solutions of Am., Inc.*, 507 F. Supp. 2d 788, 798 (W.D. Mich. 2007) (holding that the CROA disclosure statement merely entitled consumers to receive the statement and did not create any other rights).

create a non-waivable “right to sue” in court.⁹⁰ Courts also focused on the federal courts’ long line of decisions enforcing arbitration agreements when claims were brought pursuant to other federal acts.⁹¹

In affirming the denial of a motion to compel arbitration of a CROA claim, the Ninth Circuit became the first and only federal circuit to recognize that the CROA provides consumers with a non-waivable right to sue in court.⁹² The court found evidence of Congress’ intent to establish a consumer’s non-waivable right to bring an action in the text of the CROA, citing the repeated use of terms like “action” and “court” in the Act.⁹³ The Ninth Circuit also used the “plain and ordinary meaning” of the terms “arbitration” and “sue” to exclude the possibility of arbitration from a non-waivable “right to sue.”⁹⁴

IV. INSTANT DECISION

A. *Majority Opinion*

The United States Supreme Court granted *certiorari* to defendants to determine whether the Credit Repair Organizations Act (CROA) prohibits arbitration agreements in a suit alleging violations under the Act.⁹⁵ The primary disagreement the Court had with the decision of the Ninth Circuit involved judicial interpretation of the CROA’s “right to sue” language.⁹⁶ The Ninth Circuit held that the CROA-required disclosure statement provided to consumers by credit organizations gave consumers a *right* to bring an action in a court of law.⁹⁷ Another section of the CROA rendered void any waiver of a “protection . . . or any right of the consumer.”⁹⁸ The Ninth Circuit reasoned that these provisions, when considered together, precluded enforceability of arbitration provisions in CROA contracts.⁹⁹ The Supreme Court reversed, providing its own reading of the Act’s language under which arbitration was not precluded and pointing out a lack of congressional intent to prohibit arbitration clauses in CROA contracts.¹⁰⁰

The Supreme Court interpreted the CROA’s disclosure requirement as only imposing an obligation on credit repair organizations (CROs) to provide consumers with the specific statement written in the statute and not by its language creating a right of the consumer to bring an action in court.¹⁰¹ Section 1679c’s im-

90. See, e.g., *Gay*, 511 F.3d at 382.

91. Hanft, *supra* note 7, at 2796. See, e.g., *Gay*, 511 F.3d at 383-85 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); see also *supra* Part III.A.

92. *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204, 1214 (9th Cir. 2010), *aff’g* 617 F. Supp. 2d 980 (N.D. Cal. 2009), *rev’d*, 132 S. Ct. 665 (2012); see also Hanft, *supra* note 7, at 2799 (“[T]he Ninth Circuit . . . thereby creat[ed] a definitive split among the circuits on the issue.”).

93. See *Greenwood*, 615 F.3d at 1211.

94. *Id.* at 1208 (citing BLACK’S LAW DICTIONARY 112, 1473 (Bryan A. Gardner ed., 8th ed., 2004)).

95. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668 (2012), *rev’g* 615 F.3d 1204 (9th Cir. 2010).

96. See generally *id.* at 669-73.

97. *Id.* at 669-70; see Credit Repair Organizations Act, 15 U.S.C. § 1679c(a) (2006).

98. 15 U.S.C. § 1679f(a)(1).

99. *CompuCredit*, 132 S. Ct. at 669.

100. See *id.* at 670-73.

101. *Id.* at 670. As the majority argument goes, “the only consumer right [that the CROA] creates is the right to receive the statement, which is meant to describe the consumer protections that the law

portance is that it alone provides consumers with certain information (their right to enforce liability) that they may only know from reading the disclosure statement.¹⁰² According to the majority, a consumer's power to bring a suit against a credit organization under the CROA comes from 15 U.S.C. § 1679g(a), which states that violators of the CROA "shall be liable" in actual and punitive damages.¹⁰³ The majority reasoned that if the "right to sue" language indeed created a right of the consumer, it would be "strikingly out of place in a section that is otherwise devoted to giving the consumer notice of rights created elsewhere . . ." ¹⁰⁴ The Court also suggested that Congress, had it *intended* to block arbitration in CROA-regulated contracts, "would have done so in a manner less obtuse than what [plaintiffs] suggest."¹⁰⁵

The Court also rejected plaintiffs' argument that the CROA contains the requisite congressional intent to "overrid[e] the FAA."¹⁰⁶ To overcome the federal courts' presumption in favor of arbitration, plaintiffs had to prove that there was a "congressional command" to override the FAA.¹⁰⁷ Plaintiffs argued that Congress' repeated use of words like "action," "class action," and "court" was sufficient to establish intent to provide consumers with a "right" to bring an action in court.¹⁰⁸ The Court rejected this display of intent, stating that "[t]hese references cannot do the heavy lifting that [plaintiffs] assign them."¹⁰⁹ Three cited Supreme Court cases in particular supported the notion that arbitration was an acceptable forum for consumers to vindicate their right to enforce civil liabilities under a federal act.¹¹⁰ The Court called the civil liability provision of the CROA a "mere 'contemplation' of suit in any competent court," and stated the language did not prevent a "reasonable forum-selection clause" as long as the consumer retained his "legal power to impose liability" under 1679g.¹¹¹

Faced with a case of first impression at this level, the Supreme Court held that the CROA's language did not prohibit the enforcement of arbitration agreements

elsewhere provides." *Id.* Other statements that consumers have the "right to receive" (according to the majority) include a right to "dispute inaccurate information in your credit report[,] . . . a right to obtain a copy of your credit report[, and] . . . [a] right to cancel your contract . . . within 3 business days . . ." 15 U.S.C. § 1679c(a); *CompuCredit*, 132 S. Ct. at 670.

102. *CompuCredit*, 132 S. Ct. at 670. This is a major point of contention between the majority opinion and the dissenting opinion. See *infra* Part IV.B. Later in the majority opinion, the Court opined that consumer interpretation of the "right to sue" language would be "a colloquial method of communicating to consumers that they have the legal right, enforceable in court, to recover damages from [CROs] that violate the CROA." *Id.* at 672. Therefore, the language does not "require[] . . . the [CROs to] mislead consumers" as the plaintiffs suggest. *Id.* at 671.

103. See *id.* at n.2; 15 U.S.C. § 1679g(a)(1), (2). The majority believed that the only reason § 1679c should be mentioned at all in a suit is if the credit organization failed to make the required disclosures. *CompuCredit*, 132 S. Ct. at n.2.

104. *CompuCredit*, 132 S. Ct. at 670.

105. *Id.* at 672. In this section of the opinion, the majority provided examples of federal statutes in which Congress used express language to bar or at least restrict the enforceability of arbitration agreements.

106. *Id.* at 670 (citing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

107. *Id.* at 667 (citing *McMahon*, 482 U.S. at 226 (1987)).

108. *Id.* at 670.

109. *Id.*

110. *Id.* at 670-71. The three cases, *Mitsubishi Motors Corp.*, *McMahon*, and *Gilmer* are described above. See *supra* Part III.A.

111. *CompuCredit*, 132 S. Ct. at 671. (citing 15 U.S.C. § 1679g (2006)).

between CROs and consumers.¹¹² The disclosure provision, together with the non-waiver provision, did nothing more than provide consumers with a right to information—not a non-waivable right to bring an action in court.¹¹³ The Act's text and legislative history did not point to a requisite "contrary congressional command" that arbitration prevents an adequate vindication of plaintiffs' rights under the Act.¹¹⁴ The Supreme Court reversed the Ninth Circuit's affirmation of the denial of defendants' motion to compel arbitration because it found nothing in the CROA that overrides the pro-arbitration policy of the federal courts.¹¹⁵

B. Dissenting Opinion

Justice Ginsburg filed a dissenting opinion explaining why she would have affirmed the decision of the Ninth Circuit and prohibited arbitration of plaintiffs' claims.¹¹⁶ The dissent suggests that the majority erred by not considering the context in which the disclosure statement would be read by consumers.¹¹⁷ Ginsburg believed that consumers, the "target audience in the CROA," would read the "right to sue" language to mean "the right to litigate in court," and opined that Congress expected this when they passed the CROA.¹¹⁸ According to the dissent, the text of the Act evidences Congress' intention to prohibit "mandatory, creditor-imposed, arbitration of CROA claims."¹¹⁹ Ginsburg agreed with the Ninth Circuit that the CROA language itself provided consumers with a non-waivable right to sue.¹²⁰

The dissent also suggests that the majority misapplied precedent.¹²¹ Ginsburg explained that the CROA is distinguishable from federal acts like RICO and the ADEA in that it has a disclosure requirement that obligates CROs to inform consumers of their "right to sue" an organization that violates the Act.¹²² Additionally, acts like RICO and the ADEA do not contain a non-waiver provision analogous to the CROA's.¹²³ The majority erred by not reading the statute "as a whole," according to the dissent.¹²⁴ Specifically, the majority failed to read the disclosure provision "in concert" with the civil liability provision.¹²⁵ Ginsburg argued that

112. *Id.* at 673.

113. *Id.* at 670.

114. *Id.* at 670-71 (citing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

115. *Id.* at 673.

116. *Id.* at 676 (Ginsburg, J., dissenting). Evidencing her disdain for the majority's conclusion, Ginsburg referenced the majority's decision as permitting CROs to "escape suit by providing in their take-it-or-leave-it contracts that arbitration will serve as the parties' sole dispute-resolution mechanism." *Id.*

117. *Id.* at 678.

118. *Id.* at 676, 678. Ginsburg pointed out that in the "Findings" provision of the CROA, Congress described credit repair consumers as "inexperienced in credit matters" and having "limited economic means." *Id.* at 678; 15 U.S.C. § 1679(a)(2). Ginsburg thought that the majority's reading of the "right to sue" language was how a lawyer might think. *CompuCredit*, 132 S. Ct. at 676.

119. *CompuCredit*, 132 S. Ct. at 677.

120. *Id.* at 676.

121. *Id.* at 679.

122. *Id.* "The CROA differs from [RICO and the ADEA because] . . . [t]he Act does not merely create a claim for relief. It *designates* the claim as an action entailing a "right to sue". . . . *Id.* (emphasis added).

123. *Id.* (citing 15 U.S.C. § 1679f (2006)).

124. *Id.* at 678 (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)).

125. *Id.* (citing 15 U.S.C. §§ 1679c(a), 1679g).

the majority's reading of the CROA "scarcely advances the Act's goals" of protecting consumers from "unfair or deceptive advertising and business practices."¹²⁶

Finally, the dissent alleges a flaw in the majority's argument that Congress would have been more express in prohibiting arbitration had that been its aim.¹²⁷ The majority, showing that Congress has in the past been explicit in prohibiting arbitration of claims under federal acts, cited acts that were passed six and fourteen years after the CROA.¹²⁸ Citing language from a Supreme Court case, Ginsburg pointed out that the Court has previously issued a warning about inferring intent of a current Congress from the views of a prior one.¹²⁹

V. COMMENT

In *CompuCredit*, the Supreme Court applied seemingly relevant precedent, but ultimately misinterpreted Congress' intent in enacting the Credit Repair Organizations Act (CROA). The majority opinion's fatal flaw, as pointed out by Justice Ginsburg in her dissent, is that it overlooks the group of consumers which the CROA seeks to protect.¹³⁰ The result is unjust for consumers, and further action by Congress is required if consumers are going to be fully protected against deceitful credit repair companies. Part A of this section examines the Supreme Court's misinterpretation of Congressional intent in *CompuCredit*. Part B suggests a solution for consumers of credit repair services despite the Supreme Court's decision in *CompuCredit*.

A. The Supreme Court Misinterpreted Congress' Intent in *CompuCredit*

In *CompuCredit*, the Supreme Court provided its interpretation of Congress' intent in drafting the CROA.¹³¹ The Court read the statute as if it was written for its members—legal scholars. The problem with this reading is that the specific portion of the statute in dispute, a mandatory disclosure statement, was written specifically for *consumers* to read prior to contracting with credit repair organizations (CROs).¹³² Congress' request for such a level of transparency underlines their commitment in the CROA to curbing underhanded behaviors of such organizations. The Supreme Court's misinterpretation of the crucial words "right to sue" has resulted in an illogical and detrimental result for consumers.

126. *Id.* at 678-79 (citing 15 U.S.C. § 1679(b)).

127. *Id.* at 679.

128. *Id.*

129. *Id.* (citing *U.S. v. Price*, 361 U.S. 304, 313 (1960)).

130. *Id.* at 676 (Ginsburg, J., dissent).

131. *Id.* at 670-72 ("[The disclosure statement] imposes an obligation on credit repair organizations to supply consumers with a specific statement set forth . . . in the statute. The only consumer right it creates is the right to receive the statement, which is meant to describe the consumer protections that the law elsewhere provides.") (emphasis original).

132. 15 U.S.C. 1679c(a) (2006) ("Any credit repair organization shall provide any consumer with the following written statement before any contract or agreement between the consumer and the credit repair organization is executed . . .") (emphasis added).

CROs emerged in the 1980s as consumers increased the amount of credit used to purchase goods and services.¹³³ As credit usage increased, consumers dealt more often with credit reporting agencies, and their frustration ensued as consumers were dissatisfied with their credit ratings.¹³⁴ CROs promise consumers assistance in improving their credit rating in exchange for payment.¹³⁵ CROs attempt to accomplish this by sending letters to credit reporting agencies, challenging the accuracy of information contained in the consumer's credit report.¹³⁶ Under the Fair Credit Reporting Act, if credit reporting agencies do not verify the accuracy of the information within a 30-day timeframe, it must be deleted until its accuracy can be verified, thereby causing a positive impact on the consumer's credit score.¹³⁷ However, due to the low success rate of this strategy, CROs charge various fees to consumers to profit on their service regardless of its effectiveness.¹³⁸ Preying on consumers who already have credit problems, some particularly deceptive CROs misrepresent what services they provide and convince consumers to pay for services that they do not perform.¹³⁹

Congress enacted the CROA to remedy this problem of CROs taking advantage of consumers in difficult financial situations.¹⁴⁰ The statutory purposes of the CROA are twofold.¹⁴¹ First, the Act seeks to ensure that consumers receive necessary information about CROs in order "to make an informed decision" with respect to credit repair services.¹⁴² Second, the Act seeks to protect credit repair consumers from "unfair or deceptive" practices of CROs.¹⁴³ Congress' methods for accomplishing its purposes are requiring a mandatory disclosure statement from CROs to consumers detailing consumers' rights and making civil remedies available for consumers when CROs violate the Act.¹⁴⁴ Hence, the disclosure statement is a vital tool for Congress in accomplishing its purposes.

In *CompuCredit*, the Supreme Court determined the legal ramifications of a particular provision of the disclosure statement, the consumer's "right to sue."¹⁴⁵ The majority held that the legal force of the disclosure statement is that it creates a consumer's right to *receive* the information contained in it.¹⁴⁶ The Court dismissed plaintiffs' argument that the "right to sue" as printed in the disclosure statement created a separate "right" of the consumer to bring an action in court.¹⁴⁷ Thus,

133. Nehf, *supra* note 6, at 798.

134. *Id.* A credit score is a three-digit number that predicts the risk that a debtor will become delinquent on his financial obligations in the next two years. McFadden, *supra* note 3.

135. 15 U.S.C. § 1679a(3)(A).

136. Nehf, *supra* note 6, at 800. For a detailed explanation of how credit organizations exploit the Fair Credit Reporting Act, *see id.* at 786-803.

137. 15 U.S.C. § 1681i(a)(1)(A); Hanft, *supra* note 7, at 2768-69; Nehf, *supra* note 6, at 800-01.

138. Hanft, *supra* note 7, at 2769.

139. Carol Odell, *Credit Repair Trickery...Says Carol*, Consumer News and Opinion Blog, Better Business Bureau, BETTERBUSINESSBUREAU.ORG (Mar. 8, 2012), <http://www.bbb.org/blog/2012/03/credit-repair-trickery-says-carol/>.

140. Hanft, *supra* note 7, at 2769; *see also id.*

141. 15 U.S.C. § 1679(b).

142. *Id.* § 1679(b)(1).

143. *Id.* § 1679(b)(2).

144. *Id.* §§ 1679c, 1679g.

145. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012), *rev'g* 615 F.3d 1204 (9th Cir. 2010).

146. *Id.* at 669-70.

147. *Id.*

because there is no “right to sue,” the language in the disclosure statement is not a non-waivable provision of the act under § 1679f, and parties are free to contract for arbitration.¹⁴⁸ The Court cited several cases to support its conclusion that arbitration was an adequate way for consumers to enforce statutorily-prescribed civil liability.¹⁴⁹

The main problem with the Court’s analysis is that its interpretation of the language is contrary to the purpose of the Act itself. As Justice Ginsburg points out in her dissent, the majority failed to consider the probable impact of the language of the disclosure statement on the intended reader.¹⁵⁰ The manner in which a consumer interprets the disclosure language is crucial to the function of the CROA. If the purpose of the Act—and more specifically the disclosure statement—is to inform consumers so they are better prepared to deal with CROs, then the language should be interpreted in a way that is consistent with how a consumer would interpret the language.¹⁵¹ A consumer is not better prepared to deal with CROs if the rights that are explained to them do not actually exist. When a consumer is told he has a “right” under a federal act, and statutory language in the same act dictates that no protections of the act may be waived, then permitting a service-provider to draft and enforce a contract abridging one of those protections is an abhorrent result. It is incomprehensible that Congress intended to equip consumers with a weapon while allowing CROs to subtly reserve the right to throw up the near-impenetrable shield of the federal courts’ pro-arbitration policy.¹⁵²

Moreover, the CROA was drafted to protect consumers from deceptive CROs by heavily regulating what services CROs can perform and what promises they may make to consumers. It seems very relevant that the CROA requires CROs to provide the disclosure statement as a separate document *prior* to executing a con-

148. *Id.* at 673; 15 U.S.C. § 1679f.

149. *CompuCredit*, 132 S. Ct. at 670-71 (“Thus, we have repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court.”).

150. *Id.* at 676 (Ginsburg, J., dissenting). Justice Ginsburg suggested that the majority’s reading of the language was “comprehensible to one trained to ‘think like a lawyer.’” *Id.* Clearly the average consumer-reader of the disclosure statement is not going to be so trained.

151. *See id.* (Ginsburg, J., dissenting) (“Recall that Congress’ target audience . . . is not composed of lawyers and judges [who are] accustomed to nuanced reading of statutory texts, but laypersons who receive a disclosure statement in the mail.”). Inexplicably, the majority, despite ultimately deciding that the placement of the words “right to sue” did *not* create an actual right under the statute, suggested a consumer interpretation not unlike Justice Ginsburg’s:

[The “right to sue” language] is a colloquial method of communicating to consumers that they have the legal right, enforceable in court, to recover damages from [CROs] that violate the CROA. We think most consumers would understand it this way, without regard to whether the suit in court has to be preceded by an arbitration proceeding.

Id. at 672.

152. *See generally* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 660-74 (1996). Lauren Saunders, managing attorney for the National Consumer Law Center, has urged that in light of *Greenwood*, the Consumer Financial Protection Bureau needs to “stop companies from using forced arbitration clauses to hide from the law.” *U.S. Supreme Court High Fee Credit Card Decision Lets Predatory Lenders Escape Justice*, NATIONAL CONSUMER LAW CENTER (Jan. 10, 2012), http://www.nclc.org/images/pdf/credit_cards/pr_NCLC_SCOTUScompucredit_FINAL_Jan1012doc.pdf.

tract with the consumer.¹⁵³ This mandate of blatant transparency illustrates Congress' fear of CROs' motive to deceive vulnerable consumers. Even more, part of the goal of the legislation was to discourage the practice altogether. It seems illogical that Congress, disfavoring CROs in general,¹⁵⁴ would require CROs to tell consumers that they had the "right to sue" while simultaneously allowing CROs to bury arbitration provisions in the physically-separate contract.¹⁵⁵ The CROA exists to help *consumers* gain a foothold in understanding and negotiating the terms of credit repair services, not CROs.

B. In the Aftermath of CompuCredit, Consumers Need Further Protection

Notwithstanding the Court's misinterpretation of Congressional intent in *CompuCredit*, there is another reason that the outcome of this case is unsatisfactory. When the Court determined that the CROA was "silent" with respect to arbitrability, it enforced the arbitration agreement, referencing the familiar "liberal federal policy" in favor of arbitration.¹⁵⁶ However, the "liberal federal policy" in favor of arbitration should not be applied with equal liberality in every type of contract. Credit repair contracts, like those in *CompuCredit*, are good examples of contracts to which the policy should be applied more conservatively, because there are good reasons to keep disputes between CROs and consumers out of arbitration. Even if arbitration agreements are permitted, they need to be more visible and comprehensible for consumers.

In credit repair contracts, some of the justifications for the federal pro-arbitration policy are mitigated or altogether absent.¹⁵⁷ One such policy justification is that the validity of arbitration agreements receives support from the freedom of parties to contract as they desire.¹⁵⁸ This justification is rational when two parties have similar bargaining power and sophistication.¹⁵⁹ Freedom to contract how such parties see fit enables them to reduce uncertainty by agreeing on what to do with respect to specific contingencies, and to act free from government restraints, which leads to increased efficiency.¹⁶⁰ These benefits can be realized when the parties both understand and contribute to the drafting of terms, because the natural bargaining process is maintained. Credit repair contracts, however, are

153. 15 U.S.C. § 1679c ("Any [CRO] shall provide any consumer with the following written statement before any contract . . . is executed . . .").

154. See *supra* note 71 and accompanying text.

155. *CompuCredit*, 132 S. Ct. at 678-79 (Ginsburg, J., dissenting) ("The Court's interpretation . . . enables the very deception Congress sought to suppress. Today's decision permits credit repair organizations to deny customers, through fine print in a contract, an important right whose disclosure is decreed in U.S. Code.").

156. *Id.* at 673, 669.

157. See Sternlight, *supra* note 152, at 634-44 (proposing a federal arbitration policy under which "the [Supreme] Court should . . . apply the FAA . . . to accept binding arbitration where it is fair and has been accepted by the parties, and to reject binding arbitration where it has been foisted unfairly upon a weaker party").

158. *Id.* at 675-76.

159. *Id.*

160. *Id.*

adhesive in nature,¹⁶¹ and consumers are not truly contracting with full knowledge of the terms of the contract.¹⁶²

The “freedom” consumers have in a contract with CROs is a sham at best. Contrary to the required plain language of the disclosure statement, there is no federal mandate for CRO arbitration clauses to be as clear. There is little guarantee that consumers will not only read but also understand the “legal sophistication” of an arbitration clause.¹⁶³ In credit repair contracts, consumers may not fully appreciate that arbitration, despite sometimes offering a faster, cheaper method of dispute resolution,¹⁶⁴ can lead to less discovery and proceedings largely dictated by the more sophisticated party.¹⁶⁵ Consumers will not have an opportunity to weigh these pros and cons without better notice of arbitration clauses in credit repair contracts. If the Supreme Court wants to enforce arbitration contracts, then Congress needs to step in and mandate a similar disclosure statement-type transparency for arbitration clauses, too.

This problem of unfairness to consumers has not been completely ignored by the U.S. government. Congress already expressed its concern for credit consumers in the language of the CROA itself, finding that CROs were causing a “financial hardship” on consumers “of limited economic means . . . who are inexperienced in credit matters.”¹⁶⁶ Additionally, consumer groups have spoken out against *CompuCredit*’s result.¹⁶⁷ These groups are pushing for the Consumer Financial Protection Bureau to fast-track its study on restricting mandatory pre-dispute arbitration.¹⁶⁸ Once the study is completed, the Bureau can impose regulations prohibiting or limiting arbitration agreements, as long as the regulations are consistent with the study.¹⁶⁹ In Congress, similar bills sit in each house that could make mandatory pre-dispute arbitration clauses unenforceable in consumer contracts, among others.¹⁷⁰

The Supreme Court’s decision in *CompuCredit* reads primarily as another eulogy for choice-of-forum in a supposedly consumer-protecting federal act. It appears the Court shirked common sense and applied a federal policy that is too broad in some cases. The Court refused to interpret the language of the disclosure statement like an intended reader of the statement, thus frustrating Congress’ intent to inform consumers. Congress must respond by providing additional protec-

161. *CompuCredit*, 132 S. Ct. at 676 (Ginsburg, J., dissenting) (describing credit repair organizations’ contracts as “take-it-or-leave-it”).

162. See Sternlight, *supra* note 153, at 675-77 (arguing that the Supreme Court’s preference for arbitration is not always supported by the “freedom of contract rationale”).

163. *Id.* at 676 (“With respect to arbitration agreements in particular, even a consumer who reads the clause might well lack the legal sophistication to understand its significance . . .”).

164. *Id.*

165. *Id.*

166. 15 U.S.C. § 1679(a)(2) (2006).

167. *U.S. Supreme Court High Fee Credit Card Decision Lets Predatory Lenders Escape Justice*, NATIONAL CONSUMER LAW CENTER (Jan. 10, 2012), http://www.nclc.org/images/pdf/credit_cards/pr_NCLC_SCOTUScompucredit_FINAL_Jan1012doc.pdf. As one opponent of mandatory pre-dispute arbitration has said, “Forced arbitration puts a thumb on the scales of justice in favor of predatory lenders . . .” *Id.*

168. *Id.*

169. *Id.*

170. Garen E. Dodge et al., *Ban on Mandatory Predispute Arbitration Again Proposed in Congress*, MARTINDALE.COM (May 27, 2011), http://www.martindale.com/civil-rights-law/article_Jackson-Lewis-LLP_1289464.htm.

No. 2]

If It Only Had a Heart

643

tion under the CROA. If consumers' express "right to sue" is not going to be honored, then they deserve the right to a clear explanation of the forum to which they are headed when the predatory CROs go back on their word.

VI. CONCLUSION

The Supreme Court has once again stood by its policy of favoring arbitration, this time at the expense of the consumer. The result in *CompuCredit* is a small travesty in that the nation's highest court has let consumers down. The majority ignored, or at the very least misunderstood, Congress' desire to protect vulnerable consumers in credit repair contracts. Justice Ginsburg's dissent pokes several holes in the majority's argument, including their refusal to read the disclosure statement the way it was intended to be read. In light of this decision, consumers need additional protection from arbitration clauses buried deep into contract terms by often deceptive credit repair organizations. Congress can remedy this problem in a way that reinforces the purposes of the CROA. If Congress requires CROA-level transparency of arbitration clauses in credit repair contracts, it can still accomplish its goal of ensuring that consumers make informed decisions about credit repair.

COLLIN KOENIG