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The NLRB's New Prohibition of Class Action Waivers in Arbitration Agreements

Assessing the Impact on Union and Non-Union Employers and Future Class Action Proceedings

WEDNESDAY, MARCH 14, 2012

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Henry D. Lederman, Shareholder, **Littler**, Walnut Creek, Calif.

William J. Emanuel, Shareholder, **Littler**, Los Angeles

Gavin S. Appleby, Shareholder, **Littler**, Atlanta

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HENRY LEDERMAN/ GAVIN APPLEBY / WILLIAM EMANUEL

D.R. HORTON & ARBITRAL CLASS ACTION WAIVERS

Biography

Henry D. Lederman has devoted his practice almost exclusively to employment law counseling, litigation, and appeals, including those related to the drafting and enforcement of arbitration statutes. Henry recently appeared before the United States Supreme Court and prevailed on behalf of his client in a matter involving the enforcement of an arbitration agreement.

Biography

Gavin S. Appleby advises and represents employers in a broad range of employment law matters, from defending single-plaintiff and class action employment cases to offering advice on difficult employment issues and labor relations matters. He also has significant experience with NLRB charges, union campaigns and preventive training related to NLRB issues. In addition, Mr. Appleby is experienced in implementing legal compliance measures and ADR programs, and has handled more than 300 arbitrations during his career.

Biography

William J. Emanuel has decades of experience representing employers at the NLRB and in related litigation. He is currently writing an amicus brief in the Fifth Circuit appeal of the NLRB's *D.R. Horton* decision on behalf of a trade association. Following the *Horton* decision, he has filed briefs on that issue for employers in support of federal court motions to compel arbitration and he is defending *Horton*-related charges at the NLRB involving arbitration opt-out clauses.

NLRB's New Role in Mandatory Arbitration—How Did This Happen?

- NLRB and its historically varying political views.
- Current Board's efforts to expand NLRA to non-union world.
- What is "protected concerted activity"?
- What does this have to do with arbitration agreements?

The Issue

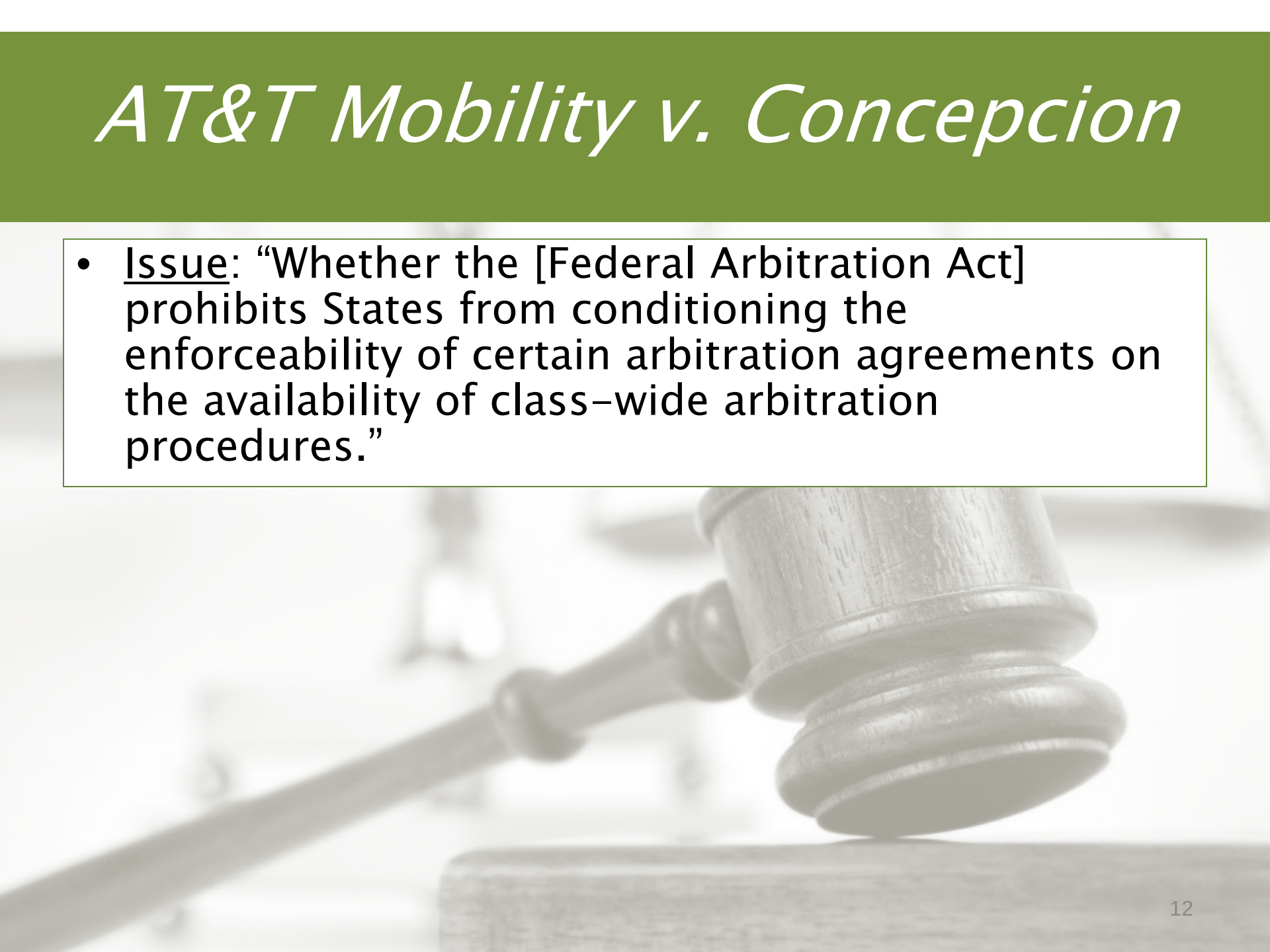
Employers may – or may not – now be able to eliminate the risk of class, collective and/or representative actions by establishing agreements to arbitrate individual claims only.

The Cases

- *AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740 (2011)
- *Compucredit Corp. v. Greenwood,* 2012 U.S. Lexis 575 (U.S. Jan. 10, 2012)
- *D.R. Horton,* 357 NLRB No. 184 (Jan. 3. 2012)

AT&T Mobility v. Concepcion

- Issue: "Whether the [Federal Arbitration Act] prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures."



AT&T Mobility v. Concepcion

- Holding: California law limiting the enforcement of class action waivers in arbitration agreements "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

AT&T Mobility v. Concepcion

- "Principal purpose" of the FAA is to "ensure that private arbitration agreements are enforced according to their terms."
- Parties may agree to limit issues subject to arbitration.
- *California's Discover Bank* rule improperly targets adhesion contracts and applies arbitrary rules.
- FAA preempts contrary state law.

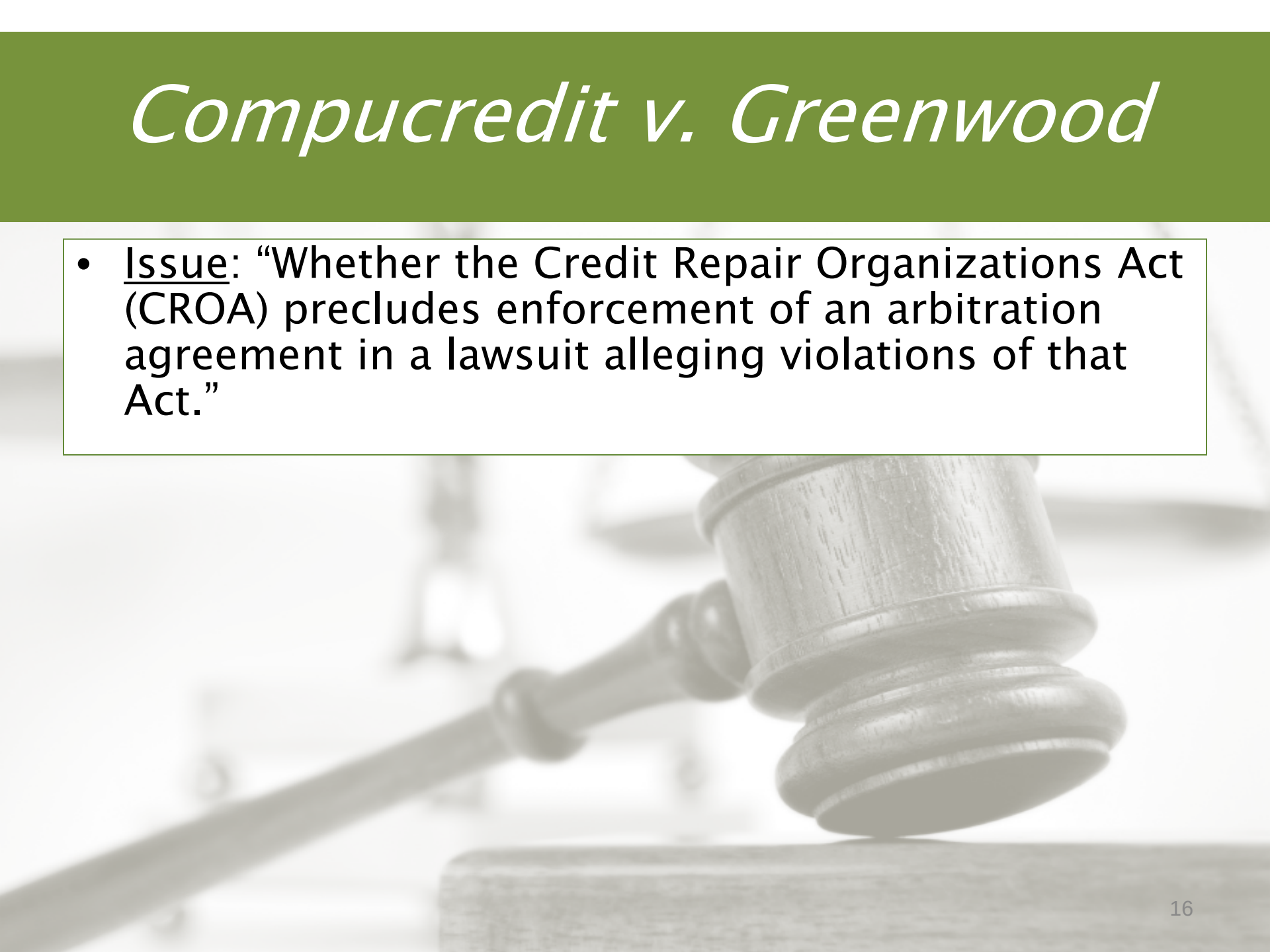
After *Concepcion*

- *Concepcion* has been applied in the employment context:
  - *E.g. Green v. Super Shuttle Inc.*, 2011 U.S. App. LEXIS 18483 (8th Cir. Sept. 6, 2011);

- Following *Concepcion*, the U.S. Supreme Court vacated *Sonic Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659 (2011), a case which invalidated an arbitration agreement in the employment context.

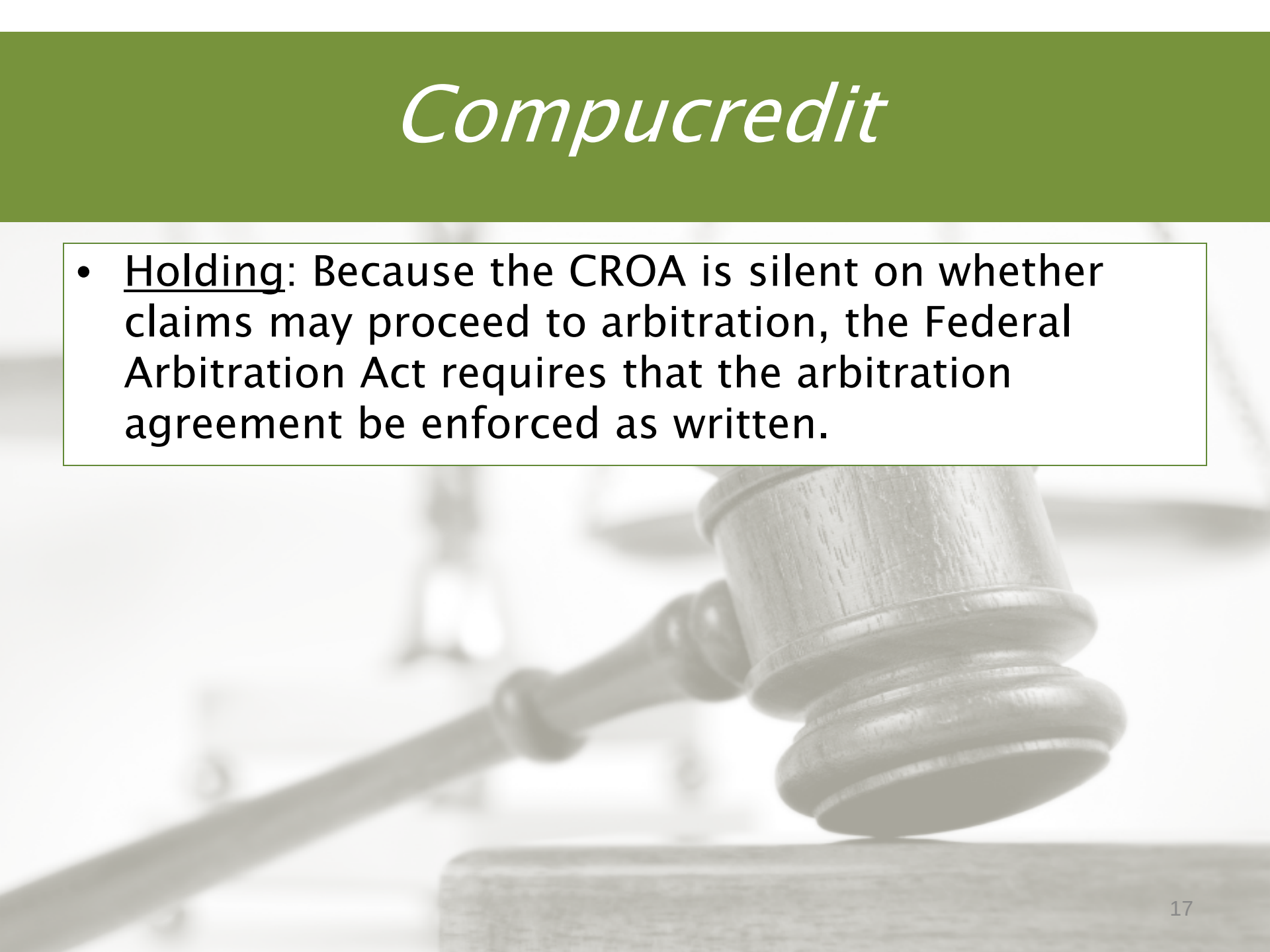
Compucredit v. Greenwood

- Issue: "Whether the Credit Repair Organizations Act (CROA) precludes enforcement of an arbitration agreement in a lawsuit alleging violations of that Act."



Compucredit

- Holding: Because the CROA is silent on whether claims may proceed to arbitration, the Federal Arbitration Act requires that the arbitration agreement be enforced as written.



Compucredit

- General language in a statute giving a "right to sue" does not preclude arbitration.
- "Had Congress meant to prohibit these very common provisions [arbitration] in the CROA, it would have done so in a manner less obtuse than what respondents suggest."
- Silent statute ≠ Non-enforcement of arbitration agreement
- Does NLRA specifically address arbitration under FAA agreements?

NLRB General Counsel Memo GC-10-06

- Issued on June 16, 2010
- Applies to non-union employees
- Recognizes that the United States Supreme Court "determined that an employer can require an employee, as a condition of employment, to channel his or her individual non-NLRA employment claims into a private arbitral forum."
- BUT...

NLRB General Counsel Memo GC-10-06

- In order for a class action waiver to be valid, it must contain specific language.
- Employee retains the right to exercise Section 7 rights.
- Employees will not be retaliated against for concertedly challenging class action waiver by filing class or collective actions.
- But, employer may enforce its class action waiver.

Not So Fast...

D.R. Horton, Inc., 357 NLRB No. 184 (Jan. 3. 2012)

- National Labor Relations Board: employees have the right to engage in "concerted, protected activity."
- Class actions are such activity.
- Arbitration agreement requiring an employee "as a mandatory condition of employment" to waive the right to bring a class action violates the NLRA.
- GC 10-06 expressly repudiated.

According to the NLRB

- Employment class actions, as distinguished from those involving consumers (as in the *AT&T Mobility* case), are limited in scope, and thus, "class-wide arbitration is . . . far less cumbersome and more akin to an individual arbitration proceeding."

- The ruling only applies to "employees" as defined by the National Labor Relations Act — supervisors, for example are <u>not</u> covered by the NLRA.

What's Next?

- Decided by a two-member board.
  - One member's appointment may have been expired.
- An appeal is pending at the 5th Circuit.
- Courts are already grappling with application of *Horton* to pending claims:
  - *LaVoice v. UBS Financial Services, Inc.*, Case No. 11 Civ. 2308 (S.D.N.Y. Jan. 13, 2012)
  - *Johnmohammadi v. Bloomingdale's Inc.*, Case No. 11-cv-6434 (C.D. Cal. 2012).

Attacking *Horton*

- The NLRA must accommodate the FAA:

  - *Southern S.S. Co. v. NLRB,* 316 U.S. 31(1942)

- ("[T]he Board has not been commissioned to effectuate the [NLRA's] policies . . . so single-mindedly that it may wholly ignore other and equally important Congressional [objectives]."

- "Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of [the Board] that it undertake this accommodation . . . ."

  - *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002)

- "Where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield."

Attacking *Horton* Cont.

- Reading the NLRA to hold that the class action *procedural* device overrides the *substantive* right to enforce arbitration agreements conflicts with the Rules Enabling Act.

- *Horton* ignored the effect on national and even state-wide class proceedings that involve hundreds or thousands of employees.

- *Wal-Mart Stores, Inc. v. Dukes*, involved a certified class of approximately 1.5 million employees.

Attacking *Horton* Cont.

- The practical consequence of requiring class arbitration would force the abandonment of workplace arbitration and harm both employees and employers.

- Arbitration is a mutually beneficial means of dispute resolution.

Attacking *Horton* Cont.

- The NLRB's reliance on the Norris LaGuardia Act
  - NLRB lacks jurisdiction over Norris LaGuardia.
  - NLRB's analysis is erroneous.

How is Plaintiffs' Bar Responding?

- *Horton* as defense to motions to compel arbitration
- Unfair labor practice charges at the NLRB

Effect of Opt-Out Clause

- Makes an agreement voluntary.
  - *Horton* only addressed an arbitration agreement that "required" class waiver "as a condition of employment."
  - Unfair labor practice under Section 8(a)(1) of the NLRA requires proof that an employer has "*interfere[d] with, restrain[ed], or coerce[ed]* employees in the exercise of the rights guaranteed" in Section 7 of the NLRA.

Effect of Opt-Out Clause Cont.

- Possibly leaves open an avenue for class litigation.
- Agreement falls outside of *Horton*'s purview and because not mandatory does not violate the NLRA.

Effect of Opt-Out Clause Cont.

- Makes an agreement consistent with Section 7 "Right to Refrain"
- Section 7 of the NLRA provides that employees "shall have the right to engage in other concerted activities . . . *and shall also have the right to refrain from any or all of such activities*."

Elements of a Post-*Concepcion* Arbitration Agreement

- FAA governs
- Coverage (wage/hour, discrimination)
- Carve outs
  - Administrative (EEOC/NLRB)
  - Claims (NLRA, Dodd Frank, Franken DoD)
- Selection of arbitrator (mutual agreement)
- Arbitrator qualifications (member of local bar, retired from local judiciary – see 9 U.S.C. 5)

Elements of a Post-*Concepcion* Arbitration Agreement

- Venue (close to where employee last worked for company)
- Express class waiver
  - Court decides validity
  - Non-severability
  - NLRB section 7 disclaimer
- Remedies (individual only)
- Opt-out clause?

Elements of a Post-*Concepcion* Arbitration Agreement

- Know the law on arbitration and monitor developments in arbitration law
- Implement an effective arbitration program
- Identify a workable and effective implementation policy
- Enforce the arbitration program

The Rollout

- Stand-alone agreement with wet signature (gold standard)
- Stand-alone policy – no signature/electronic signature or acknowledgment only
- Policy in handbook ("this is not a contract")
- What to do with employees who refuse to sign…

Unionized Employers?

- Practical impact of *Horton* on Unionized employers?

To Summarize—Key Points re Horton

- Unprecedented expansion of NLRB's jurisdiction.
- Disregards policy of Federal Arbitration Act.
- Attempts to overrule Supreme Court precedent.

To Summarize—Key Points re Horton

- Should be contested in multiple forums.
- Should be distinguished when opt-out exists.
- Should be minimized by review/revision of policies.

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