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Contents

Five Steps on How to Collect Your Judgment from a Recalcitant Defendant

By Sylvia S. Bolos and Gary M. Victor

Introduction

You sued the defendant for a consumer protection violation. The defendant offered a pittance early on which you reasonably rejected. As the litigation continued, the defendant put all obstacles imaginable in your way. Despite these impediments, you have persisted and have ended up victorious. You now possess a six-figure judgment against the defendant. You hoped that the defendant would simply fork over the money. As one might expect, that hope went unfulfilled. Your role has now changed. You are no longer just a consumer law litigator, you are now a debt collector. Although the term "debt collector" is often seen as an anathema by consumer lawyers, like it or not that is what you have become, and you need to know how to go about collecting your judgment. If you are unable to collect, all your time in litigation will have been for naught. Additionally, ineffective collection efforts will be a waste of time and resources. This article will discuss five steps which will assist you on your collection path.

1. Know your defendant

You probably collected a good deal of information about your defendant during the litigation, but when it comes to collecting your judgment, the more information you have about the defendant, the better. If you have not done so yet, start with the corporate filings; review each year's filings in your current state, any state where he has demonstrated connections, and also Delaware, New York, and Florida. Research each identified officer and the addresses provided; the earliest filings almost always include a residential address. If feasible, hire a private investigator. However, be careful to avoid any private investigator that uses credit reports as that would constitute an impermissible access. A good report by a private investigator typically provides the full legal name, date of birth, driver's license number, Social Security Number, real property, automobile, employment and spousal information. If there's a divorce identified, pull the divorce filing and look for additional assets.

2. Use Discovery

As you cannot know when commencing litigation whether your defendant will prove recalcitrant in paying any future judgment, discovery during the litigation should be directed, at least in part, toward future collection efforts. When sending interrogatories, requests for production and deposition notices ask about the underlying facts but also ask for information that will further any potential collection. This includes Social Security Numbers, financial institutions, payroll service companies, accountants, bookkeepers, tax preparers, previous employers, affiliated businesses, business tax identification numbers, prior addresses, etc. If the defendant is participating in litigation or, as is more often the case, being uncooperative, take full advantage of discovery. Whenever important collection information is being withheld, notice the depositions of his employees and ask him how they are paid, what banks the funds come from, what payroll services are used, what tax identification number appears on his W9, etc. When you have not acquired sufficient collection information during the initial litigation, you may able to secure it with a post-judgment debtor-creditor exam. If the defendant refuses to appear, compel his appearance. Don't be afraid to notice the deposition of his counsel. And certainly consider issuing discovery and a writ of garnishment to his counsel; after all, defense attorneys do not work for free.

3. Bring a Motion for Defendant's Credit Reports

Those consumer advocates that deal with credit reporting problems know that credit reports indicate more than a mixed file or identity theft; they chronicle an individual's entire financial life. Defendant's credit reports can be secured from Trans Union, Experian, Equifax, Lexis Nexis, Early Warnings, and Accurint to find the financial information you need to facilitate collection. However, make sure that you don't violate the law while you're at it. If you want the credit reports, you will need to file a motion with the court to obtain them.[1] Once the court enters the order, issue subpoenas to each of your bureaus of choice and enclose the court order. After you have the reports, issue discovery and writs of garnishment to every financial institution identified on the report—don't overlook the inquiry log. Remember, time is of the essence as you've dutifully sent copies of the subpoena responses to the defendant, so you have to beat them to the bank.

4. Ask Third Parties

Defendants, like everyone else, have to pay their bills. For example, they pay their water bills, telephone bills, their landlord, the holders of their car notes, and their employees. Research should disclose the addresses of these creditors and employees. You can issue discovery to any of these parties that may be able to provide information which will further your collection efforts. Be sure to ask specifically for payment information—how defendant pays these third parties—and secure copies of those payments. If discovery discloses former employers, issue discovery to them as well. There might be a company investment account worth finding out about. Also, prior employers might have paid the defendant by direct deposit and you can look into the direct deposit arrangement to identify a banking relationship worthy of further investigation.

5. Follow Defendant's Payments

Once you have identified as many third parties fiscally involved with the defendant as possible, you are on your way to building a money trail. With discovery responses including checks and wire transfers in your hands, you now know the

banks involved. Issue writs of garnishment and discovery to the banks. Ask for front and back copies of checks written on the account and checks deposited to the account. Ask for monthly statements and question each electronic transfer in and out. Money coming in is coming from somewhere, likely a source worth issuing a writ of garnishment too. Money going out could be an indicator of a defendant's liquidating or sheltering his assets to attain judgment proof status. Follow one bank to the next.

Conclusion

Perhaps you, and certainly several of your consumer advocate colleagues, have litigated against debt collectors. In doing so, one learns what not to do in collecting a debt. Once you have worked long and hard to achieve a money judgment and are confronted with a recalcitrant defendant unwilling to pay, you must become a debt collector in order to enforce that judgment. This is a position with which consumer advocates are generally both unfamiliar and uncomfortable. You need to know the right things to do as a debt collector to collect on your judgment. In theory, you should be considering collection at the outset of every case. Be advised that collection work is not for the faint of heart. However, providing you act legally, you can adapt to your advantage against your defendant some of the exact same plays that debt collectors run against consumers every day. If you follow the steps outlined above—1) know your defendant; 2) use discovery; 3) bring a motion for credit reports; 4) ask third parties; and 5) follow defendant's payments—you will have an action plan and a better chance of collecting on your judgment. Happy hunting!

Endnotes

1 See Fed R Civ P 69(a)(2) and *Bryant v Meade & Associates, Inc*, 2016 WL 7178735.

Writing FCRA Dispute Letters

By Ian B. Lyngklip

Introduction

Generally, the first reaction of a consumer who notices inaccurate information on a credit report is to dispute that information with the party that furnished the information. If this is the only action the consumer takes to correct the report, then the consumer will have no remedy at all should the item remain on the credit report. This is because the Fair Credit Reporting Act (FCRA) established preconditions to a consumer's right to sue that are counterintuitive to the average consumer. To protect a consumer's rights under the FCRA, dispute letters must be sent to the credit bureau reporting the information rather than the furnisher of the inaccurate information. Dispute letters sent to credit bureaus not only protect a consumer's right to sue under the FCRA, they can operate as a type of "last chance" letter, giving the credit bureaus notice and an opportunity to stop their inaccurate reporting and fix the problem. When presented with clients that come in complaining of inaccurate information on credit reports, it is essential that you as their attorney understand what must be contained in dispute letters. This article will address some of the practical rules for preparing consumer dispute letters under the FCRA.

Why Write a Dispute Letter?

Under the Fair Credit Reporting Act, consumers have the right to dispute any information in their credit file which they believe to be inaccurate. By submitting a dispute to the credit reporting agency, the consumer puts the bureau on notice that they are publishing inaccurate information and provides the bureau with an opportunity to stop. Secondly, by writing the dispute letter the consumer begins the process of perfecting his rights under the Fair Credit Reporting Act. Unless the consumer has written to the credit reporting agency, there is no claim under the FCRA against the creditor, and any claim against the bureau rests on shaky ground. If the consumer directs a dispute letter to a credit bureau, both the bureau and the furnisher of the credit information may be held liable. So in order to preserve all the consumer's claims, the attorney should write a dispute letter to all credit bureaus reporting the inaccurate information. These letters should be sent certified, return receipt requested and should include the information discussed below.

Who Writes the Dispute Letter?

While nothing prohibits an attorney from sending a dispute on behalf of a client, prudence dictates that the consumer

6/7/2017: The title for this article has been corrected. It had been mislabeled *Writing GCRA Dispute Letters*.

sign the dispute letter and send it himself under the attorney's supervision. In the past when attorneys have sent letters on behalf of the consumer, the opposing parties have sought to disqualify the attorney as a material witness in the case, leaving the consumer without an advocate to advance the case.[1] While the attorney can draft the letter and mailing documents for the consumer, the consumer should sign and send the letter, leaving the consumer in a position to authenticate the dispute letter and testify that he properly mailed it.

A number of attorneys who have been concerned about "ghost writing" the letter have included a notation at the top of the letter indicating that the attorney provided the letter to the client: "My attorney drafted this letter for me to give to you." Litigation practice involving letters like these has yet to reveal any problems with these notations, which also establish that the client had a problem serious enough to seek counsel, and ensure that the attorney involvement is not hidden from the defendants.

Sending the Dispute to the Credit Bureau and the Furnisher

To be clear, the FCRA authorizes consumers to tender disputes directly to data furnishers, like banks, debt collectors, and finance companies.[2] But a consumer's direct dispute to the furnisher will not trigger any private right of action.[3] Thus, if the only thing that a consumer does is to write a letter to a furnisher of credit data, then that consumer will have no more claims—and certainly no better claims—than before the letter was written. Instead, the consumer should tender his dispute letter to each of the credit bureaus that has reported the false credit information. Once the CRA has received the dispute, it will forward a summary of the dispute to the furnisher, which will trigger an enforceable duty on the part of that furnisher to conduct an investigation.[4]

While sending a letter to the furnisher will not trigger an enforceable statutory duty or give rise to a cause of action, there are other important reasons to send a *copy* of the dispute letter to the furnisher under a separate cover letter. First, the furnisher does have a duty to conduct an investigation using all materials that are reasonably available to it. This can mean a dispute letter that has been copied to it by the consumer. Thus, by sending a copy of the dispute to the furnisher, the consumer insures that the furnisher will have a complete copy of all materials, not only what the credit bureau forwards with its own notice of the dispute. Thus, the furnisher will have all the necessary documents and information when it conducts its dispute investigation. To the same end, if the letter to the furnisher contains information which no reasonable person could have ignored, that letter can enhance the likelihood of a punitive damage recovery.

Include Relevant Documents

Whenever you write disputes on behalf of your client, you should include documentation that supports your client's dispute. If you are reporting an identity theft, you should be sure to include any information, affidavits, or police reports relating to the theft. If your client has been a victim of a mixed file, you should include copies of any documents showing the problem, which may include subscriber copies of reports, tri-merges, or consumer disclosures. If your client has won a court case about the dispute, include those papers as well. Most importantly, your client should include any documents demonstrating that he is correct and telling the truth about any disputed credit item and refers to him by name in the letter. Bureaus are notorious for losing enclosures and exhibits, and claiming they were never sent. As such, any included documents should be listed on the enclosure line.

Credit bureaus have duty to include this relevant information along with their notice of dispute to the furnishers.[5] That relevant information can now include the documents sent by the consumer. As such, both the credit bureaus and furnishers must review any documents included with your client's disputes.

Keeping Copies

Often enough, the credit bureaus will misplace disputes and never act on them. In those instances, the only record of a dispute will be the one that the attorney maintains on behalf of the client. So, your client should send his dispute by certified mail return receipt requested, and make a complete photocopy of the dispute in the exact form that it was sent to the bureaus. That copy should include all exhibits that were included with the dispute. This copy should be stored in a safe place so that it can be easily retrieved if you have to refer to it again or need it for evidence.

Understanding Where Disputes Go

Your client's dispute letter may ultimately serve double duty. At the outset, your client's dispute will initially arrive at a credit bureau's data processing boiler room. The credit bureau employees that receive your client's dispute letter will have no real information about your client's dispute. As such, the dispute that you prepare for your client must be self-contained and have enough information to convey its message without reference to information beyond the letter. In our office, the test we use is to review the letter with an outsider, and if the outsider can understand the nature of the dispute and that your client is right, then you have done your job correctly.

Second, your ultimate audience will most likely later include the judge and jury, and opposing counsel. Remember at all times: You are drafting what will likely become a trial exhibit, one which your client will have to testify about at trial

and deposition. It must be absolutely accurate and the clients must understand the letter in a way that they can explain it by themselves while testifying. That said, clients and juries rarely understand a dispute letter that uses legalese and has statutory citations. Instead, they will feel more comfortable and more likely will understand plain language in those dispute letters.

Detailing the Dispute

Hit the high points and don't dwell on irrelevancies. A letter which tries too hard to show righteous indignation may cause the jury to tune out. At the same time, your dispute should contain enough facts and details to support the credibility of your dispute. The more details your client provides, the more credible his dispute will appear. Details should relate directly to things that will undercut the furnisher's reliability. Details like names, phone numbers, e-mail addresses, and contact information add to the credibility and duty of the responding parties.

Creating a Declaration

One of the best ways to bolster the credibility of your client's dispute and ensure its admissibility is to have your client sign the letter under penalty of perjury as a declaration. Unlike affidavits, declarations do not need a caption, a case number, or signature in the presence of a notary.[6] While a declaration does not require any of the legal trappings of an affidavit, it has the same legal force when submitted in federal court. In addition to these benefits, the fact that your client has submitted a declaration in connection with a dispute provides a forceful jury argument concerning the reliability of the dispute.

Providing Exemplars

In those cases where you have available a falsified signature, be sure to include exemplars of your client's signature. Providing these pieces of evidence will invite the CRA—and a jury if necessary—to perform a comparison on its own.

Demand that All Information be Forwarded

The FCRA provides consumers with certain rights to information from both credit bureaus and companies that provide information to those credit bureaus. When disputing information directly to the company that has opened an account related to an identity theft, the consumer is entitled to receive copies of all the account documents and billing statements related to that account.[7]

Similarly, when disputing to a credit bureau, the consumer may request information about the process that was used to verify any account information.[8] This provision applies to all disputes to bureaus, not just those related to identity theft.

Providing Contact Information

Include relevant contact information for your client, including a cell phone number and e-mail address. Let the bureau know that your client is ready, willing, and able to help or provide more information that may be necessary.

Referring to Prior Disputes

In many instances, clients will have disputed the same item before arriving at your office. Moreover, the disputed item may have already been removed by the bureau, only to reappear. If this is the case, then make sure that you include a reference to the prior disputes by date, as well as the results and any documents from the last round of disputes.

Refer to Prior Account Numbers when Available

In many instances, furnishers of credit data will change account numbers of accounts held by consumers. These changes can play havoc with the consumer's ability to track his own credit file. For instance, when a credit card account is compromised by fraud, the credit card company will typically close that account, open a new account and transfer all account charges to the new account. At the same time, debt collectors who buy accounts typically assign each account a new account number when that account is received and boarded into its systems. When any of these things happen, the consumer may no longer recognize his or her own account. By the same token, if an account has reappeared on a consumer report, many times the consumer reporting agencies do not correlate accounts according to their prior account numbers. Consequently, consumers may have to re-dispute these items. In cases where the consumer knows the prior account numbers used to identify a disputed debt, you should include these account numbers in your dispute along with the name of the company that gave the account that number.

Asking for Appropriate Corrections and a Reason

So, when you draft your client's dispute, be sure to include appropriate requests for help and correction of the report. These requests can include asking for the contact information of the parties that the bureaus have spoken to and identification of other resources. These requests, while often ignored by the CRA, can help to establish that the bureaus have thrown roadblocks in your client's path that hindered remedying the situation.

Including identification

The CRAs have, of late, begun demanding an excessive amount of identification from consumers before providing disclosures. They have also begun demanding that this iden-

tification be provided before investigating disputes in some instances. If this happens, your client's dispute can be delayed by several months. You can head off these problems for your client by including identification in your dispute or request for a report. You should include at least one form of government-issued identification and a current bank statement or utility bill.

Conclusion

Writing dispute letters concerning credit damage is a necessary step to perfect a client's rights under the FCRA. More importantly, these letters will serve as the cornerstone evidence for your client's claims that a credit bureau or data furnisher has failed to properly investigate the consumer's dispute. By drafting well-supported, plain language dispute letters, attorneys can enhance the client's chances of prevailing. If a juror is left scratching his head, wondering how anyone could have verified the obvious mistake outlined in your client's dispute letter, that same juror is all the more likely to return a verdict in the client's favor. Attorneys should take the time necessary to draft convincing and well supported disputes for their clients that persuade at the same time as they perfect the client's rights.

Endnotes

1 See MRPC 3.7.

2 15 U.S.C. § 1681s-2(a)(8).

3 See 15 U.S.C. § 1681s-2(c).

4 15 U.S.C. 1681s-2(b).

5 15 U.S.C. § 1681i(a)(2)(B).

6 28 U.S.C §1746.

7 15 U.S.C. § 1681g(e).

8 15 U.S.C. § 1681i(a)(6)(B)(iii).

Scalia's Compulsory Binding Arbitration Legacy—Big Business Prevails at the Expense of Consumers, Employees and Small Businesses

By Gary M. Victor and Henry J. Hastings

Introduction

This article focuses on compulsory, binding arbitration as a means of avoiding litigation and resolving disputes. Viewed through a political lens, especially after the election of President Trump, it can be argued that arbitration is but a microcosm of the current political environment. In that broader world, one view, usually labeled as "conservative," emphasizes the importance of free markets and the necessity that business be protected from overregulation and frivolous litigation. The other view, labeled "progressive" or "liberal," recognizes the importance of free markets but believes that without significant safeguards the interests of consumers, employees and even small businesses may be put in jeopardy.

Consumers and employees generally would prefer their cases be decided by courts rather than arbitrators. Traditionally, arbitration has been more favorable to business than consumers or employees. These latter groups seek the benefits of court procedures not available in arbitration. Namely, and possibly the most important, court decisions can be reviewed, which is not normally the case in arbitration. Additionally, the potential for consumers and employees to obtain equitable settlements is greater in court proceedings. Given the conservative majority on the United States Supreme Court with its pro-business view, there has been a marked expansion in arbitration in recent years evidenced in particular by three decisions written by late Justice Scalia.[1] This article will discuss those three Scalia decisions and the current expansive arbitration environment they have created.

A short history of arbitration

Arbitration is a widely accepted alternative to court litigation as a means of settling legal disputes. It has become the procedure of choice employed by business to avoid litigation. It is most commonly used in commercial, consumer, and employment contracts. At its best, arbitration can efficiently resolve even the most contentious disputes; at its worst, it can deprive consumers, employees, and even small businesses of any reasonable opportunity to redress their grievances.

The Federal Arbitration Act (FAA)[2] was passed in 1925. Prior to its passage, federal courts were not inclined to enforce arbitration agreements. For the most part, judges considered this non-judicial process an unwelcomed intrusion into matters that were otherwise within their exclusive purview. The FAA created a new judicial preference in favor of arbitration. Under the FAA, any written contract containing an arbitration provision is valid, irrevocable, and enforceable, except on grounds that exist for the revocation of any contract.[3] Further, the FAA allows federal district courts to stay proceedings where an arbitration clause is at issue, and to compel arbitration where one party fails to comply with an otherwise valid arbitration agreement. Federal courts now uniformly recognize a liberal policy in favor of arbitration agreements.

In the long march of Supreme Court opinions interpreting the reach of the FAA, the arc is clearly in the direction of an expansive view in favor of arbitration. The three decisions discussed here claim that expansive approach will promote arbitration's prime objective of achieving streamlined proceedings and expeditious results. The Court's minority, on the other hand, questions whether this expanded application of arbitration will provide an opportunity for consumers and employees to obtain a fair resolution of their grievances.

Consumers, employees and small businesses versus arbitration

Typically, consumers have little or no real bargaining power to negotiate an arbitration agreement and often may not even be aware that they have entered into one. This type of agreement, where the stronger party writes the contract and the weaker party has little or no power to negotiate or modify terms, is called an adhesion contract. Most such agreements limit the consumer's remedy to an individual one, and through provisions known as class waivers, prohibit arbitration in an aggregate form ordinarily used in class action litigation. When an aggrieved consumer seeks his or her individual remedy, the amount of damages is often too small to economically pursue. Most importantly, without this ability to use an aggregate resolution format, any business that has acquired substantial ill-gotten gains through small individual deceptions cannot be forced to part with them. This, then, unjustly enriches these businesses at the expense of innocent consumers.

Employees too would prefer the benefits of court litigation rather than be forced into arbitration. Like consumers, they fare better in that arena. Similarly, small businesses who, whether or not they require arbitration for their own customers, are often forced into unfavorable arbitration agreements with large business entities. The three Scalia drafted opinions discussed here: *Rent-A-Center, West v. Jackson* (2010);[4] *AT&T Mobility, Inc. v. Concepcion* (2011);[5] and, *American Express Co. v. Italian Colors Restaurant* (2013)[6] present issues related to all these groups. Whether the plaintiff in these cases was a consumer, employee, or small business, the law created is applicable to all groups and has become part of the current arbitration environment.

Each of these cases represents an example of the ongoing conflict between the conservative view and the progressive view. Justice Scalia, on behalf of the majority in all three cases, argued forcefully in favor of compulsory binding arbitration as necessary for the protection of business. The minority opinions, although written by three different justices, lament the law created which they argue will leave aggrieved consumers, employees, and small businesses without sufficient safeguards to ensure they can adequately redress their grievances. We can now turn to a discussion of each of these cases.

The Three Cases

Rent-A-Center, West, Inc. vs. Jackson

The primary question in Rent-A-Center (RAC) was who would decide whether a case should go to arbitration—the court or the arbitrator. Generally, this question depends on whether the focus of the challenge is to the arbitration provision or the entire contract. Ordinarily, if a challenge is made to the validity of an arbitration provision contained in a contract, the court would decide that issue. On the other hand, if the challenge is made to the entire contract, the arbitrator would make the decision. Issues related to the validity of the arbitration provision are referred to as "gateway" issues since a negative decision would close the gate to arbitration while a positive one would open that gate.

As expected, consumers and employees challenging arbitration provisions prefer that courts make those gateway decisions; businesses would rather have these decisions made by an arbitrator. Because of this preference, businesses have started to include clauses in their arbitration provisions that delegate gateway determinations to an arbitrator. As a result, the consumer is deprived of an opportunity to challenge these decisions in a court procedure. At the heart of RAC is one of these delegation clauses.

Jackson, the plaintiff in *RAC*, was a former employee of Rent-A-Center, Inc. He sued RAC in federal district court alleging employment discrimination and retaliation. As a condition of employment, he signed both an employment contract and a separate arbitration agreement. This arbitration agreement included a delegation clause providing that "gateway" challenges would be decided by an arbitrator, not a court. Jackson challenged the validity of arbitration agreement on grounds of unconscionability. RAC moved to dismiss the suit and compel arbitration pursuant to the arbitration agreement's delegation clause.

Generally, in cases challenging an agreement to arbitrate there is a presumption in favor of arbitration. However, when the case concerns a delegation clause that takes the gateway

decisions out of the hands of the court, the presumption is reversed. To force gateway issues into arbitration, the business must meet the test of showing "clearly and unmistakably" that the parties agreed to submit these gateway issues to arbitration. Proof of that test is nearly impossible when the claim is that the arbitration agreement is unconscionable. An unconscionability challenge basically alleges that the party with superior bargaining power forced the weaker party to agree to a provision particularly unfavorable to that party. One generally does not "clearly and unmistakably" agree to terms heavily stacked against his own interest.

Justice Scalia found a way around this conundrum avoiding the "clearly and unmistakably" test altogether. As discussed above, there is a dual standard whereby challenges to the contract as a whole are decided by the arbitrator but challenges to the arbitration provision are decided by the court. Justice Scalia reasoned that the separate arbitration agreement was in itself a complete contract rather than part of the employment contract. Under that proposition, he concluded that the case should go to arbitration because the plaintiff had not specifically challenged the validity of the one-sentence delegation provision.

> Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid . . .leaving any challenge to the validity of the Agreement as a whole for the arbitrator.[7]

In a vigorous dissent, Justice Stevens drew a sharp distinction between a challenge to an arbitration clause within a contract and this case's standalone arbitration agreement. In his view, where the challenge is to a standalone arbitration agreement, a challenge to the arbitration agreement is necessarily a challenge to the delegation provision contained therein, as they are one and the same.

> Before today, however, if respondent instead raised a challenge specific to "the validity of the agreement to arbitrate"—for example, that the agreement to arbitrate was void under state law—the challenge would have gone to the court. But the Court now declares that . . .[a] party must lodge a challenge with even greater specificity than what would have satisfied (prior decisions). A claim that an *entire* arbitration agreement is invalid will not go to the court unless the party challenges the *particular sentences* that delegate such claims to the arbitrator, on some contract ground that is particular and unique to those sentences.[8]

RAC sets the tone for the other cases to follow. This expansion of the use of delegation clauses to take gateway issues out of the hands of the courts creates a theme of arbitration at all costs. The next case makes that observation more obvious.

AT&T Mobility LLC vs. Concepcion

The issue in *Concepcion* was whether the FAA preempts state law that prohibits the use of class waivers in adhesion contracts with consumers. The California Supreme Court in *Discover Bank v. Superior Court*[9] determined that class waivers in consumer adhesion contracts were unconscionable and against public policy. The Court reasoned as follows:

> . . .But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums

> of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another."[10]

The plaintiffs in *Concepcion* claimed that they were induced by a marketing campaign for what was represented to be a "free" cellular phone to enter into a service contract with AT&T. Upon learning that AT&T had charged them sales tax on the full retail value of the "free" phone, plaintiffs filed a class action in a California federal district court. The service contract provided for arbitration of all disputes, and specifically disallowed classwide arbitration. AT&T moved to compel individual arbitration.

Relying on the California Supreme Court decision in *Discover Bank*, the district court denied AT&T's motion and the Ninth Circuit affirmed. The question before the U. S. Supreme Court was whether the provisions of the FAA favoring arbitration preempted California's *Discover Bank* rule. Generally, in a gateway decision where a court is charged with the responsibility of determining whether the agreement is valid or not, it follows state law to make that determination. The issue here then was whether the conservative majority could find a way to avoid applying California law holding certain class waivers unconscionable in order to have the case sent to individual arbitration. As might be expected, the Scalia-led majority found a way to do so.

The majority held the *Discover Bank* rule inconsistent with the primary objectives of the FAA, and therefore, that the FAA preempted that rule. It provided several rationales for its decision. First, the Court determined that the switch from individual to class arbitration sacrifices the principal advantages of arbitration. Individual arbitration, in the Court's opinion, as opposed to class arbitration, allows the parties the benefit of private dispute resolution, including lower costs, greater efficiency, speed, and the ability to choose expert adjudicators to resolve specialized disputes. Second, since class arbitration requires procedural formality it was unlikely that Congress intended to leave the disposition of class procedural requirements to an arbitrator. Third, showing great deference to the concerns of businesses, the majority reasoned that class arbitration greatly increases risk to business because businesses can more easily calculate a cost benefit analysis between the likely errors associated with individual arbitration and the savings realized by avoiding a costly lawsuit. Fourth, the majority was concerned that the potential loss associated with tens of thousands of potential claimants in class arbitration might pressure big business defendants into settling questionable claims.

In Justice Breyer's dissent, the minority argued that California's *Discover Bank* decision was consistent with the language of the FAA and did not provide an impediment to arbitration since it only held certain class waivers, rather than all such waivers, unenforceable. The minority saw no reason to preempt a rule of state law.

> *Discover Bank* sets forth circumstances in which the California courts believe that the terms of consumer contracts can be manipulated to insulate an agreement's author from liability for its own frauds by "deliberately cheat[ing] large numbers of consumers out of individually small sums of money." Why is this kind of decision—weighing the pros and cons of all class proceedings alike—not California's to make?[11]

Addressing an obvious concern for an aggrieved consumer, Justice Breyer asked whether any rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim. The clear answer is none. Functionally, *Concepcion* leaves both individual consumers and consumers in the aggregate without a reasonable remedy.

Concepcion is the most dramatic illustration of the Court majority's pro-business/anti-consumer posture. The class action format is a fundamental method for consumers to aggregate individually small losses and force business to disgorge substantial ill-gotten gains. After *Concepcion*, any business that can bind a customer to an arbitration agreement will include a class waiver. Businesses, particularly those that engage in deceptive practices, will clearly benefit at the expense of innocent consumers. We can now turn to the third case of this troika.

American Express Co vs. Italian Colors Restaurant

Italian Colors is another individual versus class treatment case with a different twist—the plaintiff is a business. In some cases the cost of proving a violation of a federal law, especially antitrust law, is so high that it would be prohibitively expensive for an individual to pursue a remedy for such a violation. However, if individual claims can be aggregated in a class format, sufficient funds can be generated to prove a violation for the benefit of all members of that class. *Italian Colors* presents such a scenario in an arbitration context.

> Plaintiff restaurant accepted AMEX credit cards. The standard AMEX merchant agreement contained an arbitration clause requiring all disputes to be resolved by arbitration and included a class waiver. In disregard of the arbitration agreement, plaintiff brought a class action against AMEX for violation of federal antitrust law. AMEX moved to compel individual arbitration. Plaintiff argued that in order to prevail in arbitration, it necessarily would be required to engage the services of an expert witness at considerable cost, 20 times the potential maximum individual damages. Plaintiff further argued that due to the excessive cost,

the class waiver effectively denied it the right to pursue its statutory remedy under federal antitrust law. Plaintiff asked the court to invalidate the class waiver.

Citing its decision in *Concepcion* extensively, the Court dismissed plaintiff's claim. The Court reiterated its familiar litany that arbitration is a matter of contract and courts must "rigorously enforce" the terms of an arbitration agreement. Addressing plaintiff's argument that federal courts should be allowed to invalidate agreements that prevent an effective vindication of a federal statutory right, the Court created a distinction between pursuing a statutory remedy and proving that remedy. The principle that an arbitration agreement cannot eliminate a party's right to seek a remedy under federal law:

> . . .would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable. 'It may well be that the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights.' But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.[12]

In yet another strong dissent, Justice Kagan, representing the progressive or liberal view, took objection to the majority's "pursuing versus proving" distinction. The minority opinion forcefully argued that the *AMEX* arbitration agreement, if enforced, would effectively deny a claimant a remedy against an unlawful business practice:

> …The restaurateur wants to challenge the allegedly unlawful provision (imposing a tying arrangement), but the same contract's arbitration clause prevents him from doing so. That term imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool's errand. So if the arbitration clause is enforceable, AMEX has insulated itself from antitrust liability–even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse. And here is the nutshell version of today's opinion, admirably flaunted rather than camouflaged: Too darn bad.

* * *

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> In short, the agreement as applied in this case cuts off not just class arbitration, but any avenue for sharing, shifting, or shrinking necessary costs. *AMEX* has put Italian Colors to this choice: Spend way, way, way more money than your claim is worth, or relinquish your Sherman Act rights.
>
> * * *
>
> The FAA conceived of arbitration as a "method of *resolving* disputes"—a way of using tailored and streamlined procedures to facilitate redress of injuries. In the hands of today's majority, arbitration threatens to become more nearly the opposite—a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.[13]

Italian Colors is yet another example of the Court majority's willingness to elevate form over substance in order to protect big business in the arbitration arena, in this case at the expense of smaller businesses. The Court's manufactured distinction between the existence of a statutory right and the cost of pursuing that right leaves all merchants accepting AMEX credit cards with no right at all.

Conclusion

Compulsory binding arbitration is the method of choice employed by businesses to protect themselves from the costs and uncertainties of litigation. Cases defining the parameters of arbitration represent but a smaller playing field in the battle of conservative versus liberal philosophies. The vigorous majority and minority opinions examined here illustrate the tension between the conservative view of protecting big business and the liberal view of protecting consumers, employees, and even small businesses.

The three conservative majority opinions penned by Justice Scalia demonstrate an ever-expanding approach to arbitration for the benefit of business. In *Rent-A-Center West, Inc. v. Jackson*, the Court expanded the ability of businesses to design arbitration provisions that delegate to the arbitrator decisions which would ordinarily be for a court to decide. In *AT&T Mobility, Inc. v. Concepcion*, the Court sanctioned the use of class action waivers in arbitration agreements even where state law would prohibit them, thereby depriving consumers of their most important tool in redressing individually small claims that can be quite substantial in the aggregate. In *American Express v. Italian Colors Restaurant,* the Court created a distinction between *the right* to pursue a federally protected claim and *the ability* to prove that claim holding that Italian Colors could only pursue its antitrust claim in individual arbitration. Since the cost to pursuing an antitrust claim in individual arbitration was prohibitive, not only Italian Colors Restaurant but all AMEX customers were effectively denied their rights to pursue antitrust relief. Applied generally, where arbitration agreements contain class waivers and the cost of pursuing an individual remedy far exceeds any potential remedy, plaintiffs are left with no remedy at all.

In each of these cases the liberal minority did its best to stem the stampede toward an ever-expanding arbitration environment that takes cases out of the hands of courts and puts them in the hands of arbitrators. However persuasive the minority might have been, it was to no avail.

With the "substitution" of Justice Gorsuch for Justice Scalia, it seems likely that the presently configured Supreme Court will continue to bend over backward to make sure that cases will go to arbitration rather than being heard by a court. Justice Scalia's compulsory binding arbitration legacy protecting big business at the expense of consumers, employees, and even small businesses is likely to continue for the foreseeable future barring any modifications to the Federal Arbitration Act.[14]

Endnotes

1 An expansion that can be expected to be maintained with the substitution of Justice Gorsuch for Justice Scalia.

2 9 U.S.C.A. § 1, *et seq*.

3 9 U.S.C.A. § 2.

4 561 U.S. 63 (2010).

5 131 S.Ct. 1740 (2011).

6 133 S.Ct. 2304 (2013).

7 561 U.S. at 72.

8 561 U.S. at 86.

9 113 P.3d 1100 (2005).

10 *Id* at 1110.

11 131 S.Ct. at 1761.

12 133 S.Ct. at 2310-2311.

13 133 S.Ct. at 2313-2320.

14 Prior to the election of President Trump, there was some hope for positive change on the horizon as a study by the Consumer Financial Protection Bureau (CFPB) found that compulsory binding arbitration clauses are detrimental to consumers, suggesting that rules may be necessary to eliminate such clauses in financial contacts. Consumer Financial Protection Bureau, *"CFPB Study Finds That Arbitration Agreements Limit Relief for Consumers*," March 10, 2015, http://www.consumerfinance.gov/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/. Given President Trump's approach to the CFPB and governmental regulations in general, the possibility of new regulations eliminating arbitration clauses in financial contracts is much less likely.

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