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Volume 2011 | Issue 1 Article 5

3-1-2011

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Michael Q. Cannon, *Greenwood v. CompuCredit Corp.: The Ninth Circuit's Misdirected Interpretation of the Credit Repair Organizations Act*, 2011 BYU L. Rev. 67 (2011).
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Greenwood v. CompuCredit Corp.: The Ninth Circuit's Misdirected Interpretation of the Credit Repair Organizations Act

I. INTRODUCTION

In *Greenwood v. CompuCredit Corp.*[1] the United States Court of Appeals for the Ninth Circuit was asked to decide whether the Credit Repair Organizations Act ("CROA")[2] permitted the enforcement of an arbitration agreement in a credit-repair contract.[3] The Ninth Circuit glibly announced that the issue in the case was as simple as making a determination about whether the word "sue" could really mean "arbitrate" and light-heartedly suggested that "perhaps the question [was], as Alice put it: 'whether you can make words mean so many different things?'"[4] Although two other circuits had previously concluded that similar arbitration agreements did not run afoul of the CROA,[5] the Ninth Circuit nonetheless created a circuit split by holding that the plain meaning of the CROA afforded consumers the definitive right to adjudication of all CROA disputes in a judicial forum.[6] The court's decision wrongly created a circuit split because it misapplied relevant Supreme Court precedent; specifically, it adopted an interpretive methodology that was insufficiently hospitable towards arbitration agreements.

This Note begins by summarizing the relevant facts and procedural history of *Greenwood*. Next, the Note provides a brief background for the key federal statute governing agreements to arbitrate, the Federal Arbitration Act, and then discusses some of the crucial Supreme Court precedent regarding statutory challenges to arbitration agreements. The Note then presents a brief discussion of the other circuit court decisions from which the Ninth Circuit split

1. 615 F.3d 1204 (9th Cir. 2010).

2. 15 U.S.C. §§ 1679–1679j (2006).

3. *Greenwood*, 615 F.3d at 1205 (quoting LEWIS CARROLL, THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE, *in* THE ANNOTATED ALICE: THE DEFINITIVE EDITION 213 (Martin Gardner ed., Norton Publishers 2000)).

4. *Id.*

5. Picard v. Credit Solutions, Inc., 564 F.3d 1249 (11th Cir. 2009); Gay v. CreditInform, 511 F.3d 369 (3d Cir. 2007).

6. *Greenwood*, 615 F.3d at 1213.

in its interpretation of the CROA in *Greenwood*. Finally, the Note provides a detailed discussion of the Ninth Circuit's reasoning in *Greenwood* before concluding with an analysis of how the *Greenwood* decision erred by interpreting the CROA in a way that was too inhospitable to arbitration agreements.

II. FACTS AND PROCEDURAL HISTORY

CompuCredit Corporation was a business that used direct mail solicitation to market credit cards allegedly designed to help individuals repair their credit.[7] These cards had an initial credit limit of just $300. Although no deposit was required for card membership, the "subprime" cards actually carried first-year fees of $257.[8] These fees were disclosed in card promotional materials, but these disclosures were buried within small print.[9]

The promotional materials for the card also included a "Pre-Approved Acceptance Certificate" that stated, among other things, that by signing the certificate consumers represented that they had both read and accepted the "Terms of the Offer."[10] One of the provisions of the "Terms of the Offer" stated the following: "Important—The agreement you receive contains a binding arbitration provision. If a dispute is resolved by binding arbitration, you will not have the right to go to court or have the dispute heard by a jury, [or] to engage in pre-arbitration discovery . . . ."[11]

The plaintiffs in *Greenwood* were consumers of CompuCredit credit cards.[12] The plaintiffs brought suit, alleging that CompuCredit's failure to provide adequate fee disclosures had violated both the CROA and California state law.[13] CompuCredit moved to compel arbitration, seeking to enforce the arbitration agreements contained in the "Terms of the Offer."[14] The district court declined to uphold the arbitration agreement contained in the "Terms of the Offer" and held that the CROA precluded such

7. *Id*. at 1205.
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*. at 1206.
12. *Id*. at 1205.
13. *Id*.
14. *Id*. at 1206.

agreements.[15] CompuCredit appealed the district court's denial of its motion to compel arbitration.[16]

III. SIGNIFICANT LEGAL BACKGROUND

After briefly explaining the impact of the Federal Arbitration Act on arbitration jurisprudence, this section surveys the relevant Supreme Court precedent regarding statutory challenges to arbitration agreements. Finally, this section concludes by briefly examining the decisions from which *Greenwood* split by holding that the CROA precludes arbitration.

A. Federal Arbitration Act—Abandonment of Common Law Arbitration Animosity

Historically, courts disfavored arbitration. However, a departure from judicial animosity towards arbitration[17] commenced with the 1925 passage of the predecessor to the modern Federal Arbitration Act ("FAA").[18] The Supreme Court's numerous decisions interpreting the FAA[19] have now made it clear that the Court understands that the FAA manifested a clear congressional intent to overcome "the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts."[20]

B. Federal Arbitration Act—Articulation with Other Statutes

Despite its modern acknowledgement that the FAA was designed to overcome judicial hostility towards agreements to arbitrate, in the early years following the FAA's passage the Supreme Court continued to exhibit some hostility towards arbitration agreements in

15. Greenwood v. CompuCredit Corp., 617 F. Supp. 2d 980, 988 (N.D. Cal. 2009), *aff'd*, 615 F.3d 1204 (9th Cir. 2010).

16. *Greenwood*, 615 F.3d at 1206.

17. *See* Kenneth F. Dunham, Southland Corp. v. Keating *Revisited: Twenty-Five Years in Which Direction?*, 4 CHARLESTON L. REV. 331, 333–35 (2010) (tracing the historical judicial animosity toward agreements to arbitrate).

18. *See id.* at 342 (containing a discussion of the genesis of the Federal Arbitration Act).

19. *See* Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 414 (2009) (noting that the Supreme Court has promulgated over forty rulings on arbitration).

20. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

statutory claims cases.[21] The seminal 1985 case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[22] marked the turning point away from such historic hostility. The case involved a Sherman Antitrust Act claim arising out of a contract dispute between international parties whose contract had contained an arbitration agreement.[23] Though one party argued that agreements to arbitrate should be presumptively invalid in the context of statutory claims, the Court disagreed and stated that there was "no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims."[24]

Rather, the Court explained, "questions of arbitrability," even those involving statutory claims, were now to "be addressed with a healthy regard for the federal policy favoring arbitration," meaning that "any doubts concerning the scope of arbitrable issues [were to] be resolved in favor of arbitration."[25] This treatment was warranted because the Court was no longer suspicious as to the "desirability of arbitration" or the "competence of arbitral tribunals," and it also recognized that a party arbitrating a statutory claim "does not forgo the substantive rights afforded by" a statute.[26] While noting that some statutory claims were not suitable for arbitration, the Court stated that the process of statutory interpretation did not need to be "distort[ed] . . . to ferret out the inappropriate," because Congress had, through the FAA, declared a general policy favoring arbitration.[27] Rather, if Congress intended that certain claims not be arbitrable, "that intention [would] be deducible from text or legislative history."[28]

The 1987 decision of *Shearson/American Express, Inc. v. McMahon* (which involved claims under Racketeer Influenced Corrupt Organizations Act and Securities Exchange Act of 1934)

21. *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 437 (1953) (holding that the Securities Act of 1933 precluded arbitration of claims under the Securities Act and reasoning that "the protective provisions of the Securities Act require[d] the effectiveness of judicial discretion to fairly assure their effectiveness").

22. 473 U.S. 614 (1985).

23. *Id.* at 619–20.

24. *Id.* at 625.

25. *Id.* at 626 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983)).

26. *Id.* at 626–28.

27. *Id.* at 627.

28. *Id.* at 628.

expanded *Mitsubishi* by clarifying that its holding was not confined to international disputes and by placing the burden of proof on parties opposing arbitration to "show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue."[29] Though the Act specifically stated that the "district courts of the United States" would have "exclusive jurisdiction" over "violations of this title" and contained a waiver provision, the Court still construed the Act in a way that permitted arbitration.[30] Only two years later, in *Rodriguez de Quijas v. Shearson/American Express, Inc.* (which involved a Securities Act of 1933 claim), the Court reiterated its current "strong endorsement of the federal statutes" favoring arbitration.[31] Finally, the later *Gilmer v. Interstate/Johnson Lane Corp.* (which involved an Age Discrimination in Employment Act claim) instructed that there needed to be a "healthy regard for the federal policy favoring arbitration" during the entire process of statutory interpretation.[32]

C. Judicial Decisions Regarding the Arbitrability of Credit Repair Organizations Act Claims

Though the Supreme Court has never entertained a claim asserting that the CROA precludes arbitration agreements, two other circuits entertained such claims prior to the Ninth Circuit's *Greenwood* opinion.[33]

In the Third Circuit case of *Gay v. CreditInform*, a consumer brought CROA claims against the provider of credit repair services; the contract between the consumer and provider contained an arbitration agreement.[34] The court concluded that the enforceability of the arbitration agreement was not precluded by the CROA.[35] The court noted that because the case implicated the policy favoring arbitration embodied in the FAA, relevant Supreme Court precedent required the court to keep "in mind" the strong "federal policy

29. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 225–27 (1987).

30. *Id.* at 227–28.

31. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

32. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

33. Picard v. Credit Solutions, Inc., 564 F.3d 1249 (11th Cir. 2009); Gay v. CreditInform, 511 F.3d 369 (3d Cir. 2007).

34. *Gay*, 511 F.3d at 374–75.

35. *Id.* at 375.

favoring arbitration" throughout its process of examining the CROA.[36]

With the policy in favor of arbitration in mind, the court addressed the consumer's principal claim as to why the CROA precluded arbitration—that the CROA's language stating "you have a right to sue a credit repair organization" provided the right to judicial adjudication. The court concluded that this language did not actually entitle consumers to resolution of claims in a judicial forum because the statutory language did not specifically identify a forum.[37] The court signaled its willingness to accommodate the strong federal policy favoring arbitration by noting that, even if this provision of the CROA did refer to a judicial forum, the parties would still be able to contract around this forum requirement, since the CROA's anti-waiver provision was quite narrow. The narrow anti-waiver provision, according to the court, only precluded waiver of "rights premised on the imposition of statutory duties."[38]

The other circuit court opinion interpreting the CROA, *Picard v. Credit Solutions, Inc.*, involved a factual situation similar to the one in *Gay*, and the court essentially adopted the reasoning of the *Gay* court.[39] Consequently, no discussion of *Picard* is entertained here.

IV. THE COURT'S DECISION

The Ninth Circuit's 2–1 decision in *Greenwood* concluded that the CROA precludes the enforceability of arbitration agreements.[40] The court began its analysis by explaining the interpretive methodology it planned to utilize in interpreting the CROA and then used that interpretive methodology.[41] Only after reaching its conclusion that the CROA precludes agreements to arbitrate did the court address each of the contentions of CompuCredit, the party seeking arbitration.[42] Finally, more than seven pages into its opinion, the court noted that its opinion ran counter to the decisions of two

36. *Id.* at 378–79 (quoting *Gilmer*, 500 U.S. at 26).

37. *Id.* at 381–82.

38. *Id.* at 385.

39. Picard v. Credit Solutions, Inc., 564 F.3d 1249, 1255 (11th Cir. 2009) ("This Court agrees with *Gay.*").

40. Greenwood v. CompuCredit Corp., 615 F.3d 1204, 1209 (9th Cir. 2010).

41. *Id.* at 1207.

42. *Id.* at 1209.

other circuit courts; the court then attempted to distinguish these cases and the line of Supreme Court precedent they had relied upon.[43] A spirited dissent followed.

A. Interpretive Methodology Defined—Standard Statutory Interpretation Methodology Deployed

The court's opinion began by presenting the plaintiff's principal claim that the CROA precludes the enforcement of arbitration agreements.[44] The court explained that it viewed its task as a standard exercise of statutory interpretation; under this method, the plain meaning of a statute controls, and recourse to legislative history only occurs where the plain meaning is ambiguous.[45] While the court noted the federal policy favoring arbitration, the court placed equal or greater emphasis on Congress's ability to overcome this policy by contrary command; the court then stated it would keep "these principles in mind" as it interpreted the CROA.[46]

After introducing its interpretive methodology, the court began its interpretive analysis of the CROA by explaining that the CROA provides consumers with four rights.[47] The only one of these rights relevant to the court's decision was the right to sue a credit repair organization for violating the CROA.[48] The court reasoned that because consumers were provided with the right to "sue," this created the right to litigate disputes in a judicial forum.[49] The court explained that it was merely giving the word "sue" its plain meaning and cited to several linguistic resources.[50] After concluding that the word "sue" entitled consumers to adjudication in a judicial forum, the court then went on to explain that this right was absolute because the CROA also contained an anti-waiver provision in "unusually comprehensive and precise language" that provided: "Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter shall be treated as void; and may not be enforced by any federal or state court or any other

43. *Id*. at 1211.
44. *Id*. at 1205.
45. *Id*. at 1207.
46. *Id*.
47. *Id*.
48. *Id*.
49. *Id*. at 1208.
50. *Id*.

person."[51] Then, based upon only its roughly one page of reasoning, the court concluded that the CROA precludes the enforceability of arbitration agreements.[52]

B. Post-conclusion Discarding of CompuCredit's Arguments

The court only concentrated on CompuCredit's arguments after concluding that the CROA precludes arbitration.[53] The court began by addressing CompuCredit's arguments regarding the meaning of the phrase "right to sue."[54] The court first tackled CompuCredit's argument that, because the "right to sue" language was placed within the CROA's disclosures section, it did not create substantive rights.[55] The court dismissed this contention, concluding that it would have been irrational for Congress to require credit repair providers to provide consumers with the right to "sue," which the court had previously decided provided the right to a judicial forum, only to then immediately take away this same right.[56] Next, the court addressed the argument that the language "right to sue" was merely shorthand for the right to bring a claim under another section of the CROA that did not preclude arbitration.[57] The also court dismissed this argument, concluding that it would render superfluous a part of the statute.[58] Finally, the court addressed the argument that the "right to sue" language was merely simplified language meant to prevent consumer confusion, stating that this argument was nonsensical because it would actually create confusion if the word "sue" did not provide the right to judicial adjudication.[59]

After addressing CompuCredit's arguments regarding the meaning of the CROA's "right to sue" language, the court then went on to address CompuCredit's argument regarding the impact of the CROA's waiver provision.[60] CompuCredit argued that, because the waiver provision said that it could "not be enforced by

51. *Id.* (numbering omitted) (quoting 15 U.S.C. § 1679f(a) (2010)).
52. *Id.* at 1209.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 1209–10.
60. *Id.* at 1210.

any Federal or State court or any other person," the reference to "any other person" meant that Congress had anticipated that CROA claims would be arbitrated.[61] The court, however, concluded that the statutory language did not lead to "such a clear and unilateral conclusion" because the language might actually refer to other types of arbitration proceedings, such as collection proceedings.[62] The Court further noted that the CROA repeatedly referred to courts as an enforcement mechanism.[63] The Court also sought to bolster the strength of its reasoning by noting that its decision was in harmony with "other courts," but it then cited only a single court decision from the Northern District of Texas.[64]

C. Circuit Split Without Fanfare Late in the Game

The *Greenwood* court was more than seven pages into its opinion before it first noted that its holding was contrary to the holdings of the Third Circuit in *Gay v. CreditInform* and the Eleventh Circuit in *Picard v. Credit Solutions, Inc.*[65] The court justified its departure from its sister circuits by stating that they had given "surprisingly little regard to the 'right to sue' language" and had wrongly "rel[ied] upon reasoning in Supreme Court cases . . . distinguishable from the situation here."[66] The court criticized the Third Circuit's *Gay* opinion for "ignor[ing] the plain meaning of the word 'sue'" and for concluding that, even if the "right to sue" provided the right to a judicial adjudication, this right could still be waived.[67] Next, the *Greenwood* court noted that it found the *Gay* court's reliance "upon analogies to several Supreme Court arbitration cases . . . unavailing"; it then factually distinguished a number of the core Supreme Court precedents regarding the arbitrability of statutory claims that the *Gay* court had relied upon, including *McMahon*, *Mitsubishi*, and *Gilmer*.[68]

61. *Id.*
62. *Id.*
63. *Id.* at 1211.
64. *Id.*
65. *See id.*
66. *Id.*
67. *Id.*
68. *Id.* at 1212; *see also* Gay v. CreditInform, 511 F.3d 369, 378–79 (3d Cir. 2007).

D. Dissent—Alternate Methodology of Statutory Interpretation

A spirited dissent followed the majority opinion. Unlike the majority opinion, the dissent began by noting the importance of the "liberal federal policy favoring arbitration."[69] Only after addressing the strong policy favoring arbitration did the dissent proceed to address the "right to sue" language of the CROA, concluding that this language was not "intended to preclude a waiver of judicial remedies."[70] The dissent noted that each of the rights provided in the disclosure section of the statute was actually provided for elsewhere; therefore, the dissent concluded, the disclosure section was not intended to create any "substantive rights."[71] The dissent further noted that the "right to sue" did not, in and of itself, "mandate a judicial forum," and that the broad waiver provision relied on by the majority actually contemplated adjudications in other fora because it stated that waivers of statutory rights could "not be enforced by any Federal or State court *or any other person*."[72] The dissent went on to further suggest that mere references to courts in the CROA were insufficient to "overcome the 'liberal federal policy favoring arbitration agreements.'"[73] Finally, the dissent noted that because the Ninth Circuit has a strong policy against creating circuit splits, the court should not have "lightly create[d] a circuit split on an issue of national application on the basis of . . . flimsy evidence."[74]

V. ANALYSIS

In concluding that the statutory language of the CROA clearly precludes the enforceability of arbitration agreements, the Ninth Circuit failed to properly apply the strong federal policy favoring the enforceability of arbitration agreements and wrongly created a circuit split. By pretending that federal arbitration jurisprudence required it to adopt a hostile approach toward arbitration agreements, the Ninth Circuit misapplied Supreme Court arbitration agreement precedent,

69. *Greenwood*, 615 F.3d at 1214 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

70. *Id.*

71. *Id.* at 1215.

72. *Id.* (quoting 15 U.S.C. § 1679f(a) (2010)).

73. *Id.* at 1216 (quoting *Moses H. Cone*, 460 U.S. at 24).

74. *Id.*

which clearly establishes that arbitration agreements should be welcomed as presumptively valid.[75] The court's decision will generate confusion for Ninth Circuit courts.

This section commences by examining the differences in interpretive methodologies that produced the inconsistent outcomes in the *Greenwood* and *Gay/Picard* opinions. Next, it examines the likely substantive impact of the deployment of these distinct interpretive methodologies upon the enforceability of arbitration agreements. Then, it explains why the interpretive methodology employed by the *Greenwood* court is out of sync with relevant Supreme Court precedent. Finally, it concludes by predicting the likely future ramifications of the Ninth Circuit's recent *Greenwood* opinion.

A. Interpretive Methodologies Examined

Though the *Greenwood* majority opinion and the *Gay* and *Picard* opinions each faced the same task of interpreting the CROA, the *Greenwood* decision reached a fundamentally different conclusion than the *Gay* and *Picard* opinions.[76] What produced these disparate conclusions? The answer is that they approached the task of interpreting the CROA using fundamentally different interpretive methodologies. Underlying these methodologies were distinct conceptualizations of the proper interplay between the strong federal policy in favor of arbitration and statutory language encapsulated in a wide variety of federal statutes.

The *Greenwood* majority viewed its task as a standard exercise of statutory interpretation.[77] The court stated that it would apply its "usual methodology in statutory construction" and, following this methodology, quickly concluded that the "plain meaning" of the CROA should control through a simple, two-step deductive process.[78] While the Ninth Circuit noted the existence of the federal

75. *See supra* text accompanying notes 21–32.

76. *See supra* text accompanying notes 38–39, 48.

77. *Greenwood*, 615 F.3d at 1207.

78. *See id.* First, the court examined the language in the statute stating that consumers have a right to "sue" and used various linguistic resources, such as dictionaries, to show that "sue" cannot mean arbitrate. *Id.* Second, the court examined the waiver provision of the CROA and determined that this provision is very broad and, therefore, covers the right to sue. *Id.* Then, applying these two subsidiary conclusions in concert, the court concluded that, because the statute provides the right to sue (which the court construed to mean in a judicial forum), and also provides, through a broad waiver provision, that this right cannot be waived,

policy favoring arbitration, the court immediately noted that this policy could be overridden and placed strong emphasis on this fact.[79] Based upon its recognition that the policy could be overridden, and before applying the federal policy favoring the enforcement of arbitration agreements, the court, as a threshold matter, scoured the CROA for clues suggesting that Congress had attempted to statutorily override the general policy favoring arbitration.[80]

Therefore, the first step under the Ninth Circuit's interpretive methodology involves a probing exercise in statutory interpretation to look for clues suggesting that Congress has chosen to override the general policy favoring arbitration in relation to a specific statutory regime. At this initial stage of inquiry, the strong policy favoring arbitration plays no functional role in a court's analysis. Only when clues suggesting that Congress has given a more specific command do not appear within a statute does the general policy in favor of arbitration then enter into play as a presumptive, gap-filling default rule. Thus, under the Ninth Circuit's interpretive methodology, though arbitration is the presumptive default rule, the rule's practical effect is circumscribed; the rule is only rendered functionally operative where, after threshold-level judicial scrutiny of the specific statute at issue, a court can find no evidence suggesting that Congress preempted the presumptive default rule with a more specific, contrary mandate.

On the other hand, the courts in *Gay* and *Picard* viewed their tasks in a way that gave broader importance to the federal policy favoring the enforceability of arbitration agreements.[81] While, like the *Greenwood* court, the *Gay* court noted that Congress was free to override the policy in favor of enforcing arbitration agreements by contrary command, early on in its opinion the *Gay* court clearly emphasized that the case "implicate[d] the Federal Arbitration Act" and further noted that the FAA was designed to overcome "longstanding judicial hostility to arbitration agreements."[82] More significantly, the court noted critical language from the *Gilmer* opinion suggesting that the policy in favor of arbitration should play

Congress must have intended to preclude the arbitrability of CROA disputes. *Id*.

79. *See id*.

80. *See id*.

81. *See* Picard v. Credit Solutions, Inc., 564 F.3d 1249, 1253 (11th Cir. 2009); Gay v. CreditInform, 511 F.3d 369, 378 (3d Cir. 2007).

82. *See Gay*, 511 F.3d at 378.

a role throughout a court's process of interpretive analysis.[83] Therefore, under the *Gay/Picard* interpretive methodology, because the general rule favoring the enforcement of arbitration agreements operates as a background principle from the earliest stages of statutory interpretation, it functionally operates as a canonical rule that resolves any statutory ambiguity in favor of the enforcement of agreements to arbitrate.

B. Substantive Ramifications of Distinct Interpretive Methodologies

The distinct functional roles of the presumption favoring the enforceability of agreements to arbitrate under the two interpretive methodologies highlighted in the previous subsection are likely to create important, substantive differences in interpretive outcomes. First and foremost, under the *Greenwood* methodology, it is clear that agreements to arbitrate will be upheld less frequently than under the *Gay/Picard* methodology. This is because, under *Greenwood*'s methodology, before the presumption favoring arbitration comes into play the court must use general statutory interpretive techniques to interpret the statute, probing carefully for some sort of specific statutory intention that overrides the general presumption. On the other hand, under the *Gay/Picard* methodology, unless a statutory scheme is very clear in stating that arbitration is not permitted, close questions will be resolved in favor of arbitration at the interpretive stage. Thus, under the *Gay/Picard* methodology the policy favoring arbitration plays a role earlier in the process of statutory inquiry and is more hospitable to arbitration.

An additional difference between the two methodologies is that, under the *Greenwood* methodology, courts that do not favor arbitration will more easily be able to find ways to avoid enforcing agreements to arbitrate at the interpretive stage when the presumption in favor of arbitration is inoperable. Conversely, under the *Gay/Picard* interpretive method, even judges that disfavor agreements to arbitrate will have a difficult time invalidating such agreements, because this methodology requires that ambiguities in specific statutes be resolved in favor of arbitration. Consequently,

83. *See id*. at 379 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)) ("Throughout such an inquiry, it should be kept in mind that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.").

based upon the aforementioned substantive differences, it is clear that under *Greenwood*'s methodology, arbitration agreements are relatively disfavored as compared to under the *Gay/Picard* interpretive methodology.

C. Greenwood*—Infidelity to Supreme Court Precedent*

The *Greenwood* case's interpretive methodology, which is relatively inhospitable to arbitration agreements, is out of sync with relevant Supreme Court precedent because this precedent suggests that the federal policy favoring arbitration should play a role throughout the process of statutory interpretation[84]—and, similarly, that the policy should resolve ambiguity in favor of arbitration.[85] The *Greenwood* opinion failed to even note these critical components of relevant Supreme Court precedent. The court's failure to note these critical components led the court to believe that it was justified in distinguishing relevant Supreme Court precedent based merely upon factual distinctions. The *Greenwood* majority thereby failed to recognize that embodied within the precedent it distinguished was a portable interpretive methodology that the Supreme Court has nimbly employed across a variety of statutory regimes in creating a presumptive rule that is highly hospitable to arbitration.[86] The *Greenwood* majority overlooked the fact that what relevant Supreme Court precedent now essentially requires is that, if a statute has a plausible construction that permits the enforcement of agreements to arbitrate, these agreements are to be upheld.[87] A clear, unequivocal, contrary command from Congress in a specific statutory regime is required to override this general presumption favoring arbitration.[88]

D. Greenwood*—Legacy Going Forward*

Because *Greenwood* misapplied Supreme Court precedent, its decision will create substantial confusion for courts within the Ninth Circuit. Various other statutory regimes likely contain provisions that

84. *See Gilmer*, 500 U.S. at 26.

85. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983)).

86. *See supra* text accompanying notes 21–32.

87. *See id.*

88. *See supra* notes 27–28 and accompanying text.

could be construed to provide individuals or businesses with the right to a judicial adjudication of a controversy. In light of *Greenwood*, courts will face difficulty knowing when they should enforce other agreements to arbitrate. Under *Greenwood*, agreements to arbitrate involving statutory claims are no longer presumptively valid at the statutory interpretation stage because the *Greenwood* interpretive methodology does not apply the presumption in favor of arbitrability until late in the statutory interpretive process. On the other hand, under Supreme Court precedent, these agreements to arbitrate are very clearly presumptively valid at the interpretive stage. The Supreme Court should grant certiorari to clarify the presumptive validity of such agreements.

VI. CONCLUSION

The Ninth Circuit's *Greenwood* decision misapplied Supreme Court arbitration agreement precedent by applying a statutory interpretation methodology that treated agreements to arbitrate inhospitably instead of properly regarding them as presumptively valid. The Federal Arbitration Act, in connection with relevant Supreme Court precedent interpreting it, creates a legal regime that is highly hospitable to the enforcement of arbitration agreements. In cases involving statutory challenges to arbitration agreements, this legal regime requires courts to apply the policy favoring arbitration as they interpret statutes. Where a given statute has any permissible construction that will allow for the enforcement of arbitration agreements, that construction must be adopted. Congress must speak clearly to override this strong presumption favoring the enforceability of arbitration awards. The Ninth Circuit split from its sister circuits in *Greenwood* because it did not apply the strong presumption in favor of the enforceability of arbitration agreements as it interpreted the CROA. By applying the appropriate interpretive methodology, the Ninth Circuit would have concluded that the arbitration agreement was valid, thereby avoiding the creation of a circuit split.

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