

# Client Alert

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## 11th Circuit: Make Sure You Hold onto That Agreement to Arbitrate

A recent Eleventh Circuit opinion emphasizes the need for good recordkeeping when it comes to seeking to enforce your arbitration agreement.

In *Bazemore v. Jefferson Capital Systems, LLC*, the plaintiff applied online for a credit card issued by First Bank of Delaware, the defendant's predecessor-in-interest. Bazemore ran up charges on the card, failed to pay the debt in full, and filed for bankruptcy. Bazemore subsequently filed a putative class action alleging a violation of the Fair Debt Collection Practices Act. The defendant financial institution moved to compel arbitration based on an arbitration clause contained in the cardholder agreement.

In affirming the district court's denial of the motion to compel arbitration, the Eleventh Circuit found that the defendant "failed to establish the existence of any agreement between Ms. Bazemore and [First Bank] beyond the agreement to pay whatever charges Ms. Bazemore incurred by using the credit card." The defendant relied on a declaration from an individual employed by a third party, which averred "in conclusory terms" that the plaintiff "accepted the terms governing her account and opened the account."

The court concluded that the employee failed to assert that he had personal knowledge as to whether the plaintiff had actually accepted any terms, nor did the defendant produce evidence to support his assertion that plaintiff accepted any terms. The court emphasized that the declaration did not assert that the Cardholder Agreement that "would have been sent" to the plaintiff was the same as the agreement attached to the declaration. In sum, the court concluded that the defendant "did not me[et] its burden under Georgia law to prove the existence and terms of the arbitration agreement it [sought] to enforce."

Despite its failure to prove the existence and terms of an arbitration agreement, the defendant argued that the appropriate course of action was for the court to remand the case for trial pursuant to Section 4 of the Federal Arbitration Agreement ("FAA"). Among other things, the FAA provides the legal framework for the enforcement of arbitration agreements in the United States. Section 4 of the FAA states that "[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4.

Agreeing with the Third and Tenth Circuits, the court concluded that a "summary judgment-like standard" is appropriate in determining whether a trial is necessary, and "a district court may conclude as a matter of law that the parties did or did not enter into an arbitration agreement."

This case serves as a reminder that including an agreement to arbitrate in one's form documents may not be sufficient. Where the existence of an agreement to arbitrate is in dispute, a party seeking to enforce the agreement must be able to provide the court with evidence of the existence of the agreement and that the parties agreed to its terms. Companies should evaluate their recordkeeping policies to ensure that customer acknowledgments of arbitration provisions are retained for as long as practicable. If direct proof that the plaintiff actually signed or acknowledged the agreement is unavailable, a party seeking to compel arbitration may need to put forth competent evidence of its policies and procedures in order to show that

the terms and conditions of their agreement with the customer contained the arbitration agreement at the time of the events in question.

Should you need any assistance concerning enforcement of your agreements to arbitrate or policies and procedures with respect to agreements to arbitration, please contact a member of Hunton & Williams LLP's litigation team.

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