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Supreme Court Upholds Use of Arbitration in CROA Lawsuits

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The U.S. Supreme Court has handed credit counseling agencies a major victory. By an 8-1 vote, on January 10, 2012, the Court ruled that lawsuits brought under the federal Credit Repair Organizations Act ("CROA") can be subject to mandatory arbitration.

This is a profoundly significant decision with far-reaching positive implications for counseling agencies and others in the consumer financial services sector that in recent years have been the target of aggressive plaintiffs' lawyers. Providers of consumer financial services can use this pro-arbitration ruling to help mitigate the threat of consumer class action lawsuits by using carefully drafted contract language. While not bullet-proof, consumer-friendly mandatory arbitration provisions with class-action waivers can reduce the risk of class-action lawsuits (or put companies in a better position to successfully defend them) by requiring consumers to pursue their claims through individual (not class) arbitration, and not through litigation (class-action or otherwise).

The Supreme Court ruling in *CompuCredit Corporation and Synovus Bank v. Greenwood* reverses a decision by the Ninth Circuit Court of Appeals that consumers had a right to sue under CROA. In addition, the Supreme Court last year, in *AT&T Mobility v. Concepcion*, overturned an appellate court decision that held that an arbitration clause in a consumer agreement containing a class-action waiver was unconscionable, and therefore unenforceable as a matter of law.

Background

CompuCredit Corp. marketed a subprime credit card under the brand name Aspire Visa to consumers with low or weak credit scores through massive direct-mail solicitations and the Internet. CompuCredit Corp. represented the card as a tool to improve a consumer's credit rating and guaranteed $300 available credit upon receipt of the card. The issuing bank, Columbus Bank and Trust (a division of Synovus Bank), would charge a series of fees totaling over $180 against the $300 credit limit—charges which CompuCredit Corp.'s promotional materials allegedly mentioned in small print.

Before receiving the card, each consumer was required to sign a Pre-Approved Acceptance Certificate referring to the enclosed "Terms of Offer" and "Summary of Credit Terms," which created binding arbitration for disputes relating to the consumer's Aspire Visa account.

Greenwood, in a class-action lawsuit, sued CompuCredit Corp. and the issuing bank alleging that the fees charged in connection with the Aspire Visa violated CROA and California's Unfair Competition Law. The defendants moved to compel arbitration pursuant to the terms of the Certificate.

The U.S. District Court of the Northern District of California denied CompuCredit Corp.'s motion to compel arbitration and ruled that CROA provides consumers with a non-waivable right to litigate their disputes in court.

Despite recognizing the strong federal policy favoring arbitration under the Federal Arbitration Act and a Third Circuit precedent in favor of compulsory arbitration, the district court held that the "right to sue" and the anti-waiver language used in CROA demonstrated Congress's intent to treat claims under CROA as non-arbitrable. The district court further denied the defendants' motion for leave to seek reconsideration or clarification based on a ruling in favor of compulsory arbitration, which was decided almost immediately after the district court's decision in this case.

The Ninth Circuit affirmed the district court's decision that CROA provided a non-waivable right to sue, creating a split from the Third and Eleventh Circuits, both of which have held that claims brought under CROA are arbitrable.

The Supreme Court granted review to determine if disputes arising under CROA are subject to valid arbitration agreements between consumers and credit repair organizations.

Supreme Court Decision

The Supreme Court ruled in *CompuCredit* that because CROA is silent on whether claims under the statute can proceed in an arbitration forum, the Federal Arbitration Act ("FAA") requires the arbitration agreement to be enforced according to its terms. Writing for the majority, Justice Antonin Scalia said, "[h]ad Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest."

With regard to the CROA disclosure statement's description of the "right to sue," the Court reasoned that it was not misleading because it did not describe precisely that a suit in court has to be preceded by an arbitration proceeding. "The disclosure provision is meant to describe the law to consumers in a manner that is concise and comprehensible to the layman—which necessarily means that it will be imprecise," the Court explained. The Court noted, "we have repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court."

The Court concluded, "[t]hat Congress would have sought to achieve the same result in the CROA through combination of the nonwaiver provision with the 'right to sue' phrase in the disclosure provision, and the references to 'action' and 'court' in the description of damages recoverable, is unlikely."

Justice Ruth Bader Ginsburg dissented. She wrote, "Congress enacted the CROA with vulnerable consumers in mind—consumers likely to read the words 'right to sue' to mean the right to litigate in court, not the obligation to submit disputes to binding arbitration."

Significance beyond Credit Repair Lawsuits

The significance of the Supreme Court's decision for consumer financial service providers is that the path is now clear for the enforceability of well-written, consumer-friendly arbitration provisions in consumer agreements, including those that arguably involve credit repair. Moreover, *CompuCredit* provides a roadmap for courts (and regulators) that consider limitations on the use of arbitration provisions that they may claim appear in other consumer protection statutes.

For additional information about *Concepcion*, see the article on our website, here. For additional information about the scope of CROA and credit counseling agencies, see the article on our website, here.

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