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LEGAL ALERT

January 12, 2012

Supreme Court Rings in New Year with Another Ruling in Favor of Arbitration

The federal policy expressed in the FAA favoring arbitration "requires courts to enforce agreements to arbitrate according to their terms . . . even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by contrary congressional command.'"

Compucredit Corp. v. Greenwood, decided January 10, 2012 is the latest in a series of U.S. Supreme Court opinions that have come down firmly on the side of the enforceability of consumer arbitration agreements. Lining up 8-1 in favor of Petitioner Compucredit, the justices rejected a determination by the U.S. Court of Appeals for the Ninth Circuit that the provisions of the Credit Repair Organization Act (the CROA or the Act), 15 U.S.C. §§ 1679 *et seq*., which require that consumers be provided with a disclosure informing them that they "have the right to sue" and prohibit the waiver of "any right of [a] consumer under" the Act, make CROA claims nonarbitrable. A copy of the opinion, authored by Justice Antonin Scalia, is available here.

Section 2 of the Federal Arbitration Act (the FAA), 9 U.S.C. §§ 1 *et seq.*, has been cited consistently by the Court in arbitration-related decisions issued over the past several years for the proposition that the FAA establishes "a liberal policy favoring arbitration agreements." This section was cited again by the Court as the basis for its holding in *Compucredit*. Justice Scalia explained that the federal policy favoring arbitration "requires courts to enforce agreements to arbitrate according to their terms . . . even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by contrary congressional command.'"

Greenwood, the plaintiff in the underlying action, argued that the CROA's disclosure and nonwaiver provisions constitute just such a congressional command. The disclosure provision—Section 1679c(a)—sets forth a disclosure statement that a credit repair organization is required to provide to a consumer before a contract for credit repair services is signed, which includes a sentence that reads, "You have a right to sue a credit repair organization that violates the [CROA]." The Act's nonwaiver provision—Section 1679f(a)—states that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under [the CROA]—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person." Greenwood argued that Section 1679f(a) and the disclosure statement together create a nonwaivable right to sue in court.

The majority rejected Greenwood's argument, finding that the only consumer right created by the CROA's disclosure provision was the right to receive the disclosure. The Court explained that the "right to sue" language contained in the CROA disclosure is merely "a colloquial method of communicating to consumers that they have the legal right, enforceable in court, to recover damages from credit repair organizations that violate the CROA," and that "[w]hen [Congress] has restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds" that language.

In a concurring opinion, Justices Sonia Sotomayor and Elena Kagan expressed their belief that, if Respondent's argument had been supported by the legislative history or purpose of the CROA, it would have been more persuasive. "[T]he Act's text is not dispositive, and respondents identify nothing in the legislative history or purpose of the Act that would tip the balance of the scale in favor of their interpretation," Sotomayor wrote.

Justice Ruth Bader Ginsburg authored the lone dissenting opinion. Quoting from the text of the Act, she pointed out that the CROA was enacted "to protect consumers 'who have experienced credit problems'—'particularly those of limited economic means'—against the unfair and deceptive practices of credit repair organizations." Given that fact, she expressed her misgivings regarding the majority's holding that, as she put it, "credit repair organizations can escape suit by providing in their take-it-or-leave-it contracts that arbitration will serve as the parties' sole dispute-resolution mechanism."

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