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Supreme Court Takes Up Credit Repair Case on Arbitration: Implications for Credit Counseling Agencies

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On October 11, 2011, the U.S. Supreme Court will hear the case of *CompuCredit Corp. v. Greenwood*, which asks the question whether claims arising under the Credit Repair Organizations Act ("CROA") are subject to arbitration pursuant to a valid arbitration agreement. If the Supreme Court finds in favor of the waiveability of rights under CROA and clarifies that arbitration is permitted, then it could save credit counseling agencies ("CCAs") from costly litigation.

CompuCredit Corp. v. Greenwood

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.

Effect of CompuCredit on Credit Repair Organizations

Private litigation, especially potential class-action lawsuits under CROA, can be "bet the company" litigation that most CCAs simply cannot afford. Congress enacted CROA, aiming to ensure that consumers are supplied with the information to make informed decisions when purchasing credit services, and to protect consumers from predatory business practices. CROA exempts nonprofit, tax-exempt organizations. Nonetheless, plaintiffs' lawyers have used CROA as a method to attack the work of nonprofit, tax-exempt CCA with some success.

CROA requires a disclosures to consumers that they have the "right to sue a credit repair organization that violates [CROA]" and protects this right, along with others, through an anti-waiver clause. CompuCredit argues that CROA does not expressly prohibit the Supreme Court from enforcing a valid

arbitration clause in a consumer contract. Greenwood argues that the contract's binding arbitration provision is not valid because CROA's anti-waiver provision voids the waiver of any protection that the statute provides to consumers, including the "right to sue."

Under CROA, a credit repair organization is defined as any person, including an attorney, who uses interstate commerce or the mail to sell or provide services for the express or implied purpose of improving any consumer's credit history. CROA prohibits a number of acts and practices, including: misrepresentations of services a credit repair organization can provide; and engaging in or attempting to commit a fraud or deception on any person in connection with the services of a credit repair organization, among others. Credit repair organizations may not receive payments before any promised service is fully performed.

CROA requires that credit repair services must be performed under a written contract that is accompanied with a separate disclosure statement, including the "right to sue." CROA can be enforced by the Federal Trade Commission, state Attorneys General, and by private plaintiffs in court (including as class actions). Consumers can sue to recover the greater of the amount paid or actual damages, punitive damages, costs, and attorney's fees for violations of CROA.

Bottom Line

In this regard, another recent high-profile Supreme Court case has sweeping ramifications that are important to consider. In *AT&T Mobility, LLC v. Concepcion*, the Supreme Court struck down a California rule that invalidated most class-action waivers in consumer contracts and ushered in a clear path for CCAs to follow to limit class-action lawsuits under most consumer protection statutes.

In order to take advantage of *Concepcion*, companies will need to use well-written arbitration provisions and class-action waivers. While not bullet proof, a carefully drafted arbitration provision and class-action waiver can really take enthusiasm away from class-action attorneys and be customer friendly at the same time.

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One important caveat, implementation of any dispute resolution provisions into a CCA debt management plan agreement would need to be done on a state-by-state basis to take into account differences in state debt adjusting laws that often regulate such contracts, as well as take into account specific company preferences. In addition, there are other steps that a counseling agency can take to limit its class-action risk, including a robust compliance program, carefully tailored consumer agreements, and a transparent dispute resolution program.

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

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For more information about this and related industry topics, see ***www.venable.com/ccds/publications****.*

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