Arbitration at the Supreme Court (2011 to 2012 Term)

By Sherman Kahn

The U.S. Supreme Court took time out from its momentous work deciding the fate of the health care law and Arizona's immigration enforcement statute to issue one regular opinion and two *per curiam* opinions on arbitration during its 2011 term (commencing in October 2011 and extending until June 2012). All three of these opinions are discussed below.

A. *Compucredit Corp. v. Greenwood*

The Supreme Court's sole regular opinion on arbitration this year was rendered in *Compucredit v. Greenwood*, 132 S. Ct. 665 (2012). In *Compucredit*, the Supreme Court reversed a Ninth Circuit decision finding that statutory claims brought under the Credit Repair Organizations Act ("CROA"), 15 U.S.C. § 1679, *et seq* were non-arbitrable, finding that a no-waiver clause in CROA was not sufficiently specific to demonstrate an intent by Congress to make an exception to the Federal Arbitration Act ("FAA") presumption in favor of honoring arbitration agreements.[1]

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Compucredit arose out of a class action complaint filed by individuals who had been offered a Visa branded credit card marketed by Compucredit.[2] CROA is a statute that regulates the practices of certain credit repair organizations as defined by CROA that offer services designed to improve a consumer's credit or provide advice regarding how to improve the consumer's credit.[3] The substantive provisions of CROA provide for certain requirements for contracts between covered organizations and consumers and for a consumer right to cancel.[4] CROA provides a private right of action to enforce those provisions.[5] The class action complaint alleged that Compucredit and other entities involved with issuing the relevant Visa card had violated CROA by allegedly making misleading representations that the card could be used to rebuild poor credit and by diluting the advertised credit limit through the assessment of poorly explained fees.[6]

The individual named plaintiffs in *Compucredit* had submitted credit card applications that included an arbitration clause.[7] Based on that clause, Compucredit and its co-defendants moved to compel arbitration.[8] The district court denied the motion to compel arbitration on the ground that Congress intended claims under CROA to be non-arbitrable and the Ninth Circuit affirmed.[9] The Ninth Circuit and the district court found CROA claims to be non-arbitrable based upon a disclosure provision and a non-waiver provision.[10] The disclosure provision requires that all covered organizations provide consumers with a statement specifically included by Congress as part of the act including in relevant part the following:

> You have a right to sue a credit repair organization that violates the Credit Repair Organization Act.[11]

The non-waiver provision states:

> Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person.[12]

The Ninth Circuit reasoned that because the disclosure provision provided consumers with a right to sue, which involves the right to bring an action in court and the non-waiver provision prohibits the waiver or any right of the consumer under CROA, the arbitration clause could not be enforced.[13]

The Supreme Court, in an opinion by Justice Scalia joined by Chief Justice Roberts and Justices Kennedy, Thomas, Breyer and Alito, reversed the Ninth Circuit on the ground that the premise that the CROA disclosure provision provided a consumer with a right to bring an action in court was wrong.[14] The majority opinion reasoned that the disclosure requirement did not create any substantive rights but rather required only a disclosure of other rights and that therefore the discussion of the "right to sue" did not create a non-waivable right.[15] Likewise, the Court held that CROA § 1679g, which creates a private right of action to enforce CROA, did not create a non-waivable rights.[16] The opinion recited a variety of cases in which the Supreme Court had previously held statutory rights arbitrable.[17] Although the Court acknowledged that none of those prior cases had concerned a statute having a non-waiver clause like the one in CROA, the court held that those cases demonstrate that the creation of a private right of action in a statute does not create a right to initial judicial enforcement.[18] Thus, according to the Court, there was no statutory right to litigate in court in the first instance to be waived under CROA and the non-waiver clause did not apply.[19]

The majority opinion went on to dismiss the argument that, absent an unwaivable right to litigate in court, the required CROA disclosure would effectively require credit repair organizations to mislead consumers.[20] Ac-

cording to the Court, the reference to the right to sue in the disclosure was "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."[21] As such, the Court opined that most consumers would understand it as a general right to litigate without regard to whether access to court may be preceded by an arbitration proceeding.[22]

Finally, the Supreme Court pointed out that at the time of CROA's enaction, arbitration clauses were common in consumer agreements.[23] Thus, according to the Court, had Congress intended to prohibit arbitration of claims under CROA, it would have done so more explicitly.[24]

"The Supreme Court's holding in Cocchi *that the emphatic federal policy in favor of arbitration requires courts to compel arbitration even where the result may be increased inefficiency is not, in itself, controversial, but nonetheless stands in strong contrast to the Supreme Court's statements regarding the goals of the FAA in* AT&T v. Concepcion *just one term before."*

Justice Sotomayor submitted a concurring opinion, joined by Justice Kagan, that agreed that statutory claims are generally subject to valid arbitration agreements unless Congress evinces a contrary intent.[25] Justice Sotomayor continued that she believed that the argument that Congress had intended to bar arbitration through a combination of the private right of action, disclosure and non-waiver provisions in CROA was plausible, but that the opposite conclusion was equally plausible.[26] Thus, given that the arguments for and against arbitrability were in equipoise, the issue should be resolved in favor of arbitrability because the courts resolve doubts in favor of arbitrability.[27] The concurrence added, however, that it would not be necessary for Congress to explicitly disallow arbitration to convey its intent to do so, but that rather the intent of Congress can be determined from the history and purpose of the statute in question.[28]

Justice Ginsburg dissented, stating that CROA's notice provision (15 U.S.C. § 1679c(a)), the private right of action (15 U.S.C. § 1679g) and the waiver provision (15 U.S.C. § 1679f) act together to "indicate Congress's intention to preclude mandatory, creditor-imposed, arbitration of CROA claims."[29] The dissent points to references in the private right of action section to "action," "class action" and "court" which combined with the disclosure requirement suggested to Justice Ginsburg that Congress intended to bar arbitration of claims under CROA.[30]

B. *KPMG LLP v. Cocchi*

In a *per curiam* opinion issued early in the term, *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011), the Supreme Court vacated a judgment of the Florida Court of Appeal, Fourth District, which had refused to compel arbitration after a determination that two of four claims were nonarbitrable. *Cocchi* arose from claims brought from nineteen individuals and entities who had bought interests in limited partnerships invested with Bernard Madoff.[31] The plaintiffs sued a variety of entities including KPMG, the auditing firm for the manager of the funds.[32] The Supreme Court's opinion concerned only the claims against KPMG.[33]

The plaintiffs had alleged four causes of action against KPMG: negligent misprepresentation, violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"); professional malpractice; and aiding and abetting a breach of fiduciary duty.[34] KPMG moved to compel arbitration based on the audit services agreement it had with the fund manager.[35] The Florida Circuit Court denied the motion and the appellate court affirmed.[36] The appellate court's reasoning was that as none of the plaintiffs had directly assented to the arbitration clause, the clause could only be enforced against them if their claims were derivative in that they arose from the services KPMG performed for the fund managers under the audit services agreement.[37] The Florida Court of Appeal concluded that both the negligent misrepresentation and the FDUPTA claims were direct rather than derivative and thus denied arbitration.[38]

The Supreme Court observed that the Florida Court of Appeals had not made any determination about the other two claims for professional malpractice and aiding and abetting a breach of fiduciary duty.[39] The Supreme Court vacated the ruling because the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed."[40] Thus, the Supreme Court continued, "when a complaint contains both arbitrable and nonarbitrable claims, the Act requires courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result will be the possibly inefficient maintenance of separate proceedings in different forums."[41]

The Supreme Court's holding in *Cocchi* that the emphatic federal policy in favor of arbitration requires courts to compel arbitration even where the result may be increased inefficiency is not, in itself, controversial, but nonetheless stands in strong contrast to the Supreme Court's statements regarding the goals of the FAA in *AT&T Mobility LLC v. Concepcion* just one term before. The majority opinion in *Concepcion* emphasized efficiency as the primary goal of the FAA:

> The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.[42]

In *Cocchi*, the Supreme Court opined that efficiency must step aside for the FAA. It remains to be seen how the Supreme Court will reconcile these two different lines of reasoning.[43]

"Interestingly, however, the Supreme Court in Marmet *did not completely preclude the West Virginia Court's alternative ruling that the arbitration clauses at issue were unconscionable under state law."*

C. *Marmet Healthcare Center, Inc. v. Brown*

In a second *per curiam* opinion in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), the Supreme Court vacated a decision of the Supreme Court of Appeals of West Virginia holding that as a matter of public policy in West Virginia all predispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes were invalid.[44]

The *Marmet* decision arose from three negligence and wrongful death suits against nursing homes in West Virginia in each of which a relative had signed a nursing home agreement containing an arbitration clause on behalf of the patient.[45] The West Virginia court held the arbitration clauses in the subject agreements unenforceable as a matter of public policy.[46] The West Virginia court considered whether the FAA preempted West Virginia public policy with respect to the arbitration clauses and concluded that it did not because the U.S. Supreme Court's interpretation of the FAA was "tendentious" and "created from whole cloth."[47] The West Virginia court thus independently determined that "Congress did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce, particularly where that agreement involves a service that is a practical necessity for members of the public."[48] The West Virginia court thus concluded that the FAA did not preempt West Virginia's public policy against predispute arbitration agreements that apply to wrongful death or personal injury against nursing homes.[49]

The Supreme Court disagreed, stating "[a]s this Court reaffirmed last Term 'when state law prohibits outright the arbitration of a certain type of claim, the analysis is straightforward: The Conflicting rule is displaced by the FAA.'"[50] The Court's *per curiam* opinion concludes that West Virginia's preclusion of arbitration for nursing home related negligence claims is precisely the kind of categorical rule that is preempted by the FAA.[51]

Interestingly, however, the Supreme Court in *Marmet* did not completely preclude the West Virginia Court's alternative ruling that the arbitration clauses at issue were unconscionable under state law.[52] Rather, the Supreme Court remanded that issue back to the West Virginia court for determination of the whether the arbitration clauses are unconscionable under state common law principles not specific to arbitration without influence from the state court's categorical rule.[53] On remand, the Supreme Court of Appeals of West Virginia accepted the Supreme Court's ruling and overruled the section of its prior opinion to which the Supreme Court had objected.[54] Nonetheless, with the observation that "[a]greements to arbitrate must contain 'at least a modicum of bilaterality' to avoid unconscionability," the West Virginia court remanded the three underlying actions to the trial court for further proceedings on whether the individual contracts should be held unconscionable under the circumstances.[55]

Endnotes

1. *Compucredit Corp.*, 132 S. Ct. at 672-673.
2. *Id.* at 668.
3. *Id.*
4. 132 S. Ct. at 669.
5. 132 S. Ct. at 668.
6. *Id.* The dissent provides a more complete explanation of the plaintiffs' allegations. 132 S. Ct. at 676-77.
7. 132 S. Ct. at 668.
8. *Id.*
9. *Id.*
10. 132 S. Ct. at 669.
11. *Id.* The Supreme Court's opinion includes the entire required statement as an appendix. 132 S. Ct. at 673-74.
12. 132 S. Ct. at 669, *citing* 15 U.S.C. § 1679f(a).
13. *Id.*
14. 132 S. Ct. at 669-70.
15. 132 S. Ct. at 670.
16. *Id.*
17. 132 S. Ct. at 670-71, *citing*, *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991) (enforcing arbitration agreement with respect to claim under Age Discrimination in Employment Act of 1967), *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987) (enforcing arbitration agreement with respect to claim under RICO); and *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 105 S. Ct. 3346 (1985) (enforcing arbitration agreement with respect to claim under Clayton Act).
18. 132 S. Ct. at 671.

19. *Id.*
20. *Id.*
21. 132 S. Ct. at 672.
22. *Id.*
23. *Id.*
24. 132 S. Ct. at 672-73.
25. 132 S. Ct. at 675.
26. *Id.*
27. *Id.*
28. *Id.*
29. 132 S. Ct. at 676-77.
30. *Id.*
31. 132 S. Ct. at 24.
32. *Id.*
33. *Id.*
34. *Id.*
35. 132 S. Ct. at 25.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. 132 S. Ct. at 25-26 (emphasis in the original), *quoting Dean Witter Reynolds Inc. v. Byrd,* 105 S.Ct. 1238, 1241 (1985). The Florida Court of Appeal has already acted upon the remand in *Cocchi*, directing the circuit court to compel arbitration of the two remaining claims if they remain in the case. *KPMG LLP v. Cocchi et al.*, 2012 Fla. App. LEXIS 6886 (2012). On remand the plaintiffs alleged that the issue of the two remaining claims was moot as those claims had been dismissed, but KPMG disputed whether the claims had, in fact, been completely dismissed. *Id.*
41. 132 S. Ct. at 25-26, *again quoting Dean Witter,* 105 S. Ct. at 1241.
42. *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740, 1748 (2011).
43. 132 S. Ct. at 25-26
44. 132 S. Ct. at 1202.
45. *Id.*
46. 132 S. Ct. at 1203.
47. *Id., quoting Brown v. Genesis Healthcare Corp.,* No. 35494, 724 S.E. 2d 250 (W. Va. 2011).
48. *Id.*
49. 132 S. Ct. at 1203.
50. *Id., quoting AT&T mobility LLC v. Concepcion,* 131 S.Ct. 1740, 1747 (2011).
51. 132 S. Ct. at 1204.
52. *Id.*
53. *Id.*
54. *Brown v. Genesis Healthcare Corp.,* 729 S.E.2d 217, 225 (W. Va. 2012).
55. *Brown*, 729 S.E.2d at 228.

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