Supreme Court upholds mandatory pre-dispute arbitration clause in credit card agreements

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In an 8-1 decision on January 12, 2012, the U.S. Supreme Court upheld mandatory pre-dispute arbitration clauses in consumer credit card contracts covered by the Credit Repair Organizations Act, 15 U.S.C. § 1679 et seq. In *CompuCredit Corp. v. Greenwood*, customers of CompuCredit Corporation brought a class action lawsuit in federal court alleging that CompuCredit unlawfully marketed a credit card to consumers with marginal credit histories by, among other things, allegedly failing to make required disclosures.

The credit card at issue in this case – the so-called "fee harvester card," was largely outlawed by Section 105 of the CARD Act of 2009. Such cards, which typically come with a low credit limit and high upfront fees, prompted a 2008 FDIC enforcement action against CompuCredit alleging violations of the Federal Trade Commission Act (FTC Act). In this case, CompuCredit advertised the card as a means of rebuilding credit with a $300 limit, but the card had first-year fees of $257, leaving the customer with an available credit limit of only $43. Together, such features would likely push the effective interest rate on card purchases in excess of one hundred percent per year.

The credit card contracts at issue contained mandatory arbitration clauses, which, CompuCredit argued, were enforceable under the Federal Arbitration Act ("FAA") and prohibited the plaintiffs from going to court.

But the Ninth Circuit disagreed, holding that the CROA – which outlaws unfair business practices by companies designed to help consumers repair their credit – gives consumers the right to sue in court, and consumers could not waive that right. The Ninth Circuit's decision turned on the CROA's disclosure and nonwaiver provisions. The former provides in part that consumers "have a right to sue" credit repair organizations for a violation of the statute. §1679c(a). The nonwaiver provision states "Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter . . . shall be treated as void . . . ." §1679f(a). The Ninth Circuit reasoned that the conferral of the "right to sue" necessarily meant the right to bring an action in a court of law, and because the nonwaiver provision prohibits the waiver of any right "under this subchapter," the arbitration agreement – which purported to waive the right to bring an action in court – was unenforceable.

In an opinion by Justice Scalia, the Supreme Court reversed the Ninth Circuit and held that because the CROA is silent on whether claims may proceed in arbitration, the FAA requires that the agreement be enforced according to its terms. The Court rejected the Ninth Circuit's conclusion that the CROA provides customers with the right to bring a lawsuit in court, reasoning that the statute merely imposes an obligation on the credit repair organization to provide customers with a statement as set forth in the statute and creates a right to receive such statements. According to the Court, the "right to sue" could include arbitration and the FAA requires the enforcement of such agreements to arbitrate in the absence of statutory language expressly prohibiting such agreements.

In dissent, Justice Ginsburg stated that the term "right to sue" was a reasonably clear reference to suing in court rather than proceeding in arbitration.

The majority's ruling reaffirms the Supreme Court's pro-arbitration stance taken last year in the *AT&T v. Concepcion* case, in which the Court also reversed the Ninth Circuit, upholding a mandatory arbitration and class action waiver clause in wireless telephone service contracts with consumers.

The *CompuCredit* decision, however, runs counter to the recent trend in which several leading banks and other card issuers, including Bank of America, JPMorgan Chase, and Capital One Financial Corp., have moved away from requiring arbitration in their consumer agreements or have announced that they would not enforce such agreements. The National Arbitration Forum similarly pulled out of the business of adjudicating delinquent credit card debt disputes as part of a settlement of a lawsuit by the Minnesota Attorney General alleging fraud and deceptive trade practices in connection with its arbitration activities.

While it may be too early to assess the impact of these Supreme Court precedents on these recent efforts to retreat from mandatory arbitration for credit card disputes, inevitably the debate over the use of mandatory arbitration clauses in consumer credit agreements will continue given the authority Congress conferred on the Consumer Financial Protection Bureau ("CFPB" or "Bureau") to conduct a study of such agreements to determine whether they should be limited or eliminated. Specifically, Section 1028 of Dodd-Frank requires the CFPB to conduct a study of pre-dispute arbitration provisions in consumer financial services contracts, to report to Congress and, if supported by the results of the study, to prohibit or regulate such provisions. The CFPB study must find that such a prohibition or regulation "is in the public interest" and for the "protection of consumers" in order for it to act.

Notwithstanding these provisions, it is unlikely that the CFPB will make a move to restrict mandatory consumer arbitration any time soon as the Bureau has not indicated when it will begin its arbitration study, nor does it face any statutory deadline for commencing such study.

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