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The U.S. Supreme Court Reaffirms The Enforceability Of Arbitration Agreements

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In *CompuCredit Corp. v. Greenwood*, ---S.Ct.---, 2012 WL 43514 (U.S. Jan. 10, 2012), the Supreme Court has again enforced an arbitration clause and class action waiver in a consumer contract. In doing so, the Court solidified the holding of its recent landmark decision of *AT&T Mobility v. Concepcion*, 563 U.S. ___, 131 S.Ct. 1740 (2011) that under the Federal Arbitration Act (the "FAA") arbitration agreements must be enforced according to their terms. Indeed, *CompuCredit* demonstrates a growing consensus on this point. While the Court decided *Concepcion* by a 5-4 majority, 8 out of 9 justices formed the majority in *CompuCredit*, with only Justice Ginsberg dissenting. Justice Scalia wrote the majority opinions in both cases.

CompuCredit, however, does not merely repeat *Concepcion*. The Court in *Concepcion* held that the FAA preempts state law refusing to enforce arbitration terms (such as class action waivers) that some argue favor corporate defendants over consumers. The Court in *CompuCredit* expands this by holding that the FAA also trumps federal law implying a statutory right to a civil action in a court of law. Unless some other federal law expressly prohibits arbitration, the FAA requires that arbitration agreements be enforced. As for state law, the FAA preempts any implied or express statutory right to a judicial action.

The class action plaintiffs in *CompuCredit* obtained credit cards through a form application containing an arbitration provision enforceable under the FAA. The plaintiffs sued in federal court in California claiming CompuCredit violated the federal Credit Report Organization Act (the "CROA"), 15 U.S.C. § 1679 *et seq*. by allegedly misrepresenting the credit limits and by claiming that credit cards could be used to rebuild poor credit. CompuCredit moved to compel arbitration and enforce a class action waiver.

The plaintiffs opposed the motion, arguing that the CROA granted them a statutory right to a judicial action. Specifically, the plaintiffs relied on a provision of the CROA stating that consumers: "have a right to sue a credit repair organization that violates" its provisions and that this right cannot be waived. The U.S. District Court for the Northern District of California agreed with the plaintiffs and denied the motion to compel arbitration, holding that "Congress intended

claims under the CROA to be non-arbitrable." *CompuCredit*, ---S.Ct.---, 2012 WL 43514 at *2-*3. The Ninth Circuit affirmed, holding that CROA's "right to sue" provision "clearly involves the right to bring an action in a court of law." *Id*.

The U.S. Supreme Court disagreed, and reversed the decision of the Ninth Circuit. The Court began by repeating from Concepcion and other precedent that the FAA "establishes a liberal policy favoring arbitration agreements." *Id*. at *3. "It requires courts to enforce agreements to arbitrate according to their terms." *Id*.

The Court then went on to add that this "is the case even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *Id*. According to the Supreme Court, the CROA's "right to sue" provision does not override the FAA. Instead, it means only that consumers "have the legal right, enforceable in court, to recover damages from credit report organizations that violate CROA." *Id*. at *5. The parties "remain free to specify" how this legal right can be pursued, including by arbitration. *Id*. at *4. "Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms." *Id*. at *6.

This decision reaches well beyond the CROA. Prior to *Concepcion*, the plaintiffs' class action bar argued that class action waivers are unenforceable as unconscionable under state law. Deprived of that argument post-*Concepcion*, they now focus on the argument that plaintiffs have unwaivable statutory rights that trump any agreement under the FAA. In California, for example, plaintiffs argue that the Consumers Legal Remedies Act (the "CLRA") grants an unwaivable statutory right to a class action in a court of law. See *Fisher v. DCH Temecula Imports*, 187 Cal.App.4th 610 (2010); *Gentry v. Superior Court*, 42 Cal.4th 443 (2007). Similarly, plaintiffs also argue that they have an unwaivable right to a public injunction in a court of law under both the CLRA and California's Unfair Competition Law (the "UCL"). See *Cruz v. Pacific Health Systems, Inc*., 30 Cal. 4th 303, 316 (Cal. 2003); *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066, 1082 (1999).

The language of the CLRA and the UCL, however, is similar to the language of the CROA. The CLRA states that a consumer "is entitled to bring an action," including a class action, and that any waiver of this right is unenforceable. Similarly, the CLRA and the UCL state that plaintiffs have the right to seek injunctions on behalf of the public. Like the CROA, the CLRA and the UCL do not expressly preclude arbitration. Thus, according to the U.S. Supreme Court, the parties "remain free to specify" how these legal rights can be pursued. *See CompuCredit*, ---S.Ct.---, 2012 WL 43514 at *4. Because the CLRA and the UCL are silent on whether claims under them can proceed in an arbitrable forum, "the FAA requires the arbitration agreement to be enforced according to its terms." *Id*. at *6.

In any event, under *Concepcion* and other law, the FAA preempts any state-law based statutory right to a class action, a public injunction, or a judicial action. *See, e.g., Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (holding the FAA preempts any unwaivable statutory right to a class action under the CLRA).