CompuCredit: Credit the Supreme Court for Consistency on Enforcement of Pre-Dispute Arbitration Agreements.

On January 11, 2012 the Supreme Court decided *CompuCredit Corp. v. Greenwood,* No. 10-948, a closely-watched case involving pre-dispute arbitration agreements under the Credit Repair Organizations Act in the consumer arena. Specifically, the Question Presented was:

> Whether claims arising under the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.* ("CROA"), are subject to arbitration pursuant to a valid arbitration agreement.

Justice Scalia's majority opinion falls squarely in line with the Court's recent cases enforcing arbitration agreements in a variety of contexts under the Federal Arbitration Act, 9 U.S.C. § 2 ("FAA"). The CROA, although construed by the majority in perhaps a surprising manner, was not specific enough to overcome the liberal policy favoring presumptive arbitrability under the FAA. Despite the CROA's requirement of disclosure of consumer rights to sue, authorization of consumers' private right of action, and non-waiver of rights, because the Act is silent as to whether claims under the Act may be arbitrated, the Court held the arbitration agreement had to be enforced according to its terms.

The CompuCredit Case and the CROA

Respondents, who acquired credit cards through CompuCredit, successfully persuaded the District Court and the Ninth Circuit Court of Appeals that the CROA provides consumers with a non-waivable right to litigate their disputes in court. *Greenwood v. CompuCredit Corp.,* 617 F. Supp.2d 980, 988 (N.D. Cal. 2009)(denying motion to compel arbitration despite strong federal policy favoring arbitration) *aff'd* 615 F.3d 1204, 1205 (9th Cir. 2010). The Ninth Circuit's holding created a conflict with the Third and Eleventh Circuits, both favoring compulsory arbitration of CROA claims.

CompuCredit marketed a sub-prime credit card to consumers with impaired credit, advertising that the card could improve a consumer's credit rating, although the credit limit on the cards typically was a mere $300. However, the issuing bank would charge fees totaling $180 against the $300 credit limit. The pre-approved acceptance certificate enclosed "terms of the offer" and a "summary of credit terms" with a pre-dispute arbitration provision. CompuCredit principally relied on the argument that the CROA nowhere mandates judicial resolution of any "rights" or "causes of action" asserted by consumers. A "right to sue" does not mean a "right to sue in court". CompuCredit's position was supported by amicus briefs by DRI and the Consumer Data Industry Association.

Respondents filed a class action alleging violations of substantive provisions of the CROA for deceitful marketing. In 1996, Congress enacted the CROA to ensure

sufficient disclosures to permit consumers to make informed decisions when dealing with credit repair companies and prohibit predatory practices. Respondents alleged that CompuCredit omitted the necessary disclosures altogether or failed to present them with the required detail. Respondents relied on a reading of the obligation of credit firms to disclose consumers' "right to sue" and a cross reference to a separate section providing that "[a]ny waiver by any consumer of any protection ***or any right" is void. 15 U.S.C. § 1679f(a). They also argued, in reliance on language in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (2011), that class arbitration is inadequate to protect consumers' interests. Respondents, also, were supported by amicus briefs, including one by the AARP and the NSCLC.

Clues from Oral Argument?

There was no partisan duel between liberal and conservative Justices at the oral argument. While Justices Sotomayor, Kagan, and Ginsburg at times seemed very concerned with how an ordinary person would construe the phrase "right to sue", the significance of the disclosure requirement in the CROA, and the one-sided nature of non-bargained for consumer contracts, their questions disclosed concerns with Respondents' position as well in light of the court's precedent and the necessity to distinguish post dispute arbitration agreements and pre-dispute arbitration waivers. Chief Justice Roberts remarked that the term "lawsuit" does not typically refer to arbitration. Justice Kennedy queried whether the act of requesting the waiver caused a breach of the CROA. Presumably, this would fit an argument to construe the statute to avoid absurd results. Yet, the argument covered a litany of other federal statutes containing non-waiver provisions that courts frequently refer to arbitration, including antitrust, RICO, ADEA, and Truth in Lending Act claims. None of them use the same language as the CROA. Justice Scalia took interest in the argument that the "right to sue" language was not included in the substantive, versus procedural, rights in the CROA.

The Majority Opinion

Justice Scalia, joined by Justices Roberts, C.J., Kennedy, Thomas, Beyer, and Alito, initially focused on whether the CROA contained the requisite "contrary congressional command" to overcome the presumption of arbitration under the FAA. *CompuCredit,* slip. op. at 3. The Court took care to describe the principal purposes of the CROA and the substantive prohibitions and protections catalogued in the Act. *Id. citing* 15 U.S.C. §§ 1679b (prohibited practices); 1679c(a) (provision of statement to consumer before execution of credit repair contracts);1679d (requirements for consumer credit repair contracts); 1679e (right to cancel); 1679g (establishing private right of action); and 1679h (providing for concurrent federal and state administrative enforcement). Section 1679g(a), in particular, provides that consumers have the "right" to enforce a credit repair organization's "liab[ility] for "fail[ure] to comply with the [Act]."

Justice Scalia reasoned that all the Act requires is disclosure to consumers of "a specific statement set forth in the statute" of their rights, including the "right to sue." But that

language, either alone or coupled with the general non-waiver provision, does not necessarily mean a right to sue in a court of law to the exclusion of arbitration. There is no congressional command for litigation in court first or to the exclusion of arbitration. The right to sue is the right to enforce legal rights, not a specific bar to arbitration.

The majority found support in their prior decisions from other contexts teaching that statutes that spell out the elements of a cause of action do not abrogate arbitration on that basis:

> "If the mere formulation of the cause of action in this standard fashion were sufficient to establish the 'contrary congressional command' overriding the FAA, [cit. om.], valid arbitration agreements covering federal causes of action would be rare indeed."

Id. at 5-6. And the Court provided numerous examples of this reasoning. *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 25 (1991) (ADEA provision that aggrieved party "may bring a civil action in any court" did not preclude arbitration); *Shearson/American Express Inc. v. McMahon, 482 U.S.* 220, 226 (1987) (RICO provision authorizing party injured by violation of 18 U.S.C. § 1962 to "sue therefore in any appropriate United States District Court" under § 1964(c)); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628 (1985) (antitrust claims are arbitrable despite Clayton Act authorization of suit in district courts).

As a matter of statutory construction, the Court also noted that interpreting the CROA's right to sue language to "create" a right to sue in court would be "strikingly out of place" in a section describing notice of rights created in other parts of the statute. *CompuCredit*, slip. op. at 5. Moreover, when congress enacted the CROA in 1996, arbitration clauses in were commonplace in consumer contracts, especially agreements in the financial services industry. Thus, "[h]ad Congress meant to prohibit these very common provision in the CROA, it would have done so in a manner less obtuse than what respondents suggest." *Id*. at 8.

On the interplay of the non-waiver provision, the Court declined to infer a guarantee of access to courts first. It is equally plausible that the parties contemplated the right to sue in court to enforce legal liabilities, which can be established first in binding arbitration. The non-waiver provision ensures there is judicial action to compel, review or enforce arbitration decisions. *Id*. at 7. As long as the legal power to impose liability is guaranteed the parties are free to negotiate arbitration.

Justice Scalia brushed aside contentions the majority disregarded reasonable perceptions of ordinary consumers who are the object of protection under the CROA and the possibility of misleading disclosures. The "colloquial method" of communicating the right to sue means consumers have the right to recover damages for violations. *Id*. at 8. The CROA's notice and non-waiver provisions would not influence consumers to believe that they could bar arbitration prior to access to court.

The Sotomayor Concurrence

Justice Sotomayor, joined by Justice Kagan, concurred in the result but found the issues to be a "closer case" than the majority. They agree that a statute must disclose a stronger intention to override the FAA to bar enforcement of arbitration. They disagree that consumers would not be misled. "Those for whom Congress wrote the Act—lay readers of 'limited economic means and inexperienced in credit matters,' §1679(a)(2)—reasonably may interpret the phrase 'right to sue' as promising a right to sue *in court.*" *CompuCredit*, slip. op. at 1 (Sotomayor, S., concurring). However, the concurrence agreed that the disclosure provision in the CROA does not confer a cause of action and the Court's prior cases on other statutes support the majority's logic. Accordingly, the concurring justices concluded that the parties are essentially in "equipoise", which dictates the same result because the party seeking to avoid arbitration bears the burden of demonstrating Congress disallowed arbitration. All doubts are resolved in favor of arbitration.

The Ginsburg Lone Dissent

Justice Ginsburg reasoned that Congress could not have intended, in this remedial statute, to authorize disclosure of a right to sue in court when as a practical matter it does not exist. The outcome turns squarely on the meaning attached to the "right to sue a credit repair organization that violates the [CROA]" statutory language. *CompuCredit*, slip. op. at 2 (Ginsburg, R., dissenting).

Justice Ginsburg takes issue with what she characterizes as the majority's interpretation of "right to sue" as merely "vindication of legal rights, whether in court or before an arbitrator." Justice Ginsburg emphatically rejects the "sophisticated gloss" the majority finds by harmonizing the matter of suit in court and arbitration as a matter of timing as to which occurs first. "The right to sue, I would hold, means the right to litigate in court." *Id*. at 7.

Justice Ginsburg distinguishes the prior precedents the majority cites on the basis that none of them included non-waiver provisions. Coupled with her definition of what Congress plausibly meant by inclusion of the "right to sue" language and the non-waiver provision compels a different result.

Finally, Justice Ginsburg rejects the concurring opinion's equipoise/burden analysis. She points to the non-negotiable contract of adhesion provided to consumers, which specifically informed consumers of a right to sue, and cannot more clearly evince a Congressional intention to override the FAA. "No 'unmistakably clear' statement is necessary to proscribe the arbitration clause CompuCredit seeks to enforce." *Id*. at 8-9.

The Impact of CompuCredit

On the day of its issuance, the *CompuCredit* opinion sparked markedly different reactions. Consumer activists described the case as a fatal blow to consumer rights and an end to consumer class actions. Business interests hailed the decision as an important reaffirmation of the primacy of the FAA and enforcement of contractual rights. We can expect continuation of the contentious war of words between these camps on the ultimate impact of the case and the future of consumer litigation versus arbitration under the guidance of the divided Court.

The majority and the dissent exchanged salvos on congressional intent and the manner in which congress writes provisions to exclude arbitration. Here, both were right in some respects. One likely impact may be a call for Congressional action to review and modify various consumer protection statutes to clarify that arbitration is prohibited notwithstanding the FAA. The likelihood of such reforms, however, may well depend on the outcome of the 2012 elections.

The decision may have diminished effect if the Consumer Financial Protection Bureau, authorized by §1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, exercises its authority to abolish pre-dispute arbitration agreements in consumer contracts in the financial services space. Now that President O'Bama has filled its leadership positions, it may issue administrative directives addressing arbitration.

At bottom, however, the result is neither surprising nor unexpected. The majority opinion itself is short and, characteristic of Justice Scalia, clearly written and well supported. *CompuCredit* is a logical extension of the Court's unwavering support for upholding contractual rights to arbitrate under the FAA. Although dispassionately written, it serves to avoid a case by case evaluation of congressional intent in the absence of the now clear guidance on language sufficient to preclude arbitration. It is certainly notable that Justices Sotomayor and Kagan agreed with the majority on the need for clarity in this area in light of the strong federal policy favoring arbitration.

Litigation Chair
Gallop Johnson & Neuman LC
January 11, 2012