U.S. Supreme Court Provides a Blueprint to Congress on How to Ban Contractual Arbitration Provisions in Consumer Contracts in CompuCredit v. Greenwood

January 19, 2012

On January 10, 2012, the U.S. Supreme Court released its decision in CompuCredit v. Greenwood, Supreme Court No. 10-048. Justice Scalia delivered the opinion of the Court to which Chief Justice Roberts and Justices Kennedy, Thomas, Breyer, and Alito joined.

The Decision: Congress Must be Clear When Prohibiting Arbitration

At issue in the case was whether the Credit Repair Organizations Act (CROA), 15 U. S. C. §1679 et seq., precludes enforcement of an arbitration agreement in a lawsuit alleging violations of that Act.

Briefly, the case involved a putative class of individuals who applied for and received a credit card marketed by CompuCredit. In the credit applications, the class members agreed to be bound by a binding arbitration provision, which precluded class actions. The class action complaint brought in the Northern District of California alleged violations of the CROA, largely due to alleged misleading representations that the credit card could be used to rebuild poor credit and the assessment of multiple fees upon opening of the accounts, which greatly reduced the advertised credit limit.

The District Court denied CompuCredit's motion to compel arbitration of the claims and the Ninth Circuit affirmed, concluding that "Congress intended claims under the CROA to be non-arbitrable." 617 F. Supp. 2d 980, 988 (2009).

The U.S. Supreme Court disagreed, reversing the Ninth Circuit's decision, holding that "[b]ecause 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." CompuCredit v. Greenwood, Supreme Court No. 10-048, at 10.

In enforcing the arbitration provision, the Court discussed again the Federal Arbitration Act (FAA) — that the Act both establishes "a liberal federal policy favoring

arbitration agreements" and "requires courts to enforce agreements to arbitrate according to their terms." Id. at 2. Courts must enforce arbitration agreements "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" Id. at 2-3 (quoting Shearson/American Express Inc. v. McMahon, 482 U. S. 220, 226, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987)).

The rest of the decision, then, addresses whether or not the specific language of the CROA contains a "contrary congressional command" overriding the FAA. After examining the relevant CROA language, the Court held that it did not contain such a contrary command. Id. at 3-4.

For example, the CROA's requirement that credit repair organizations include a disclosure statement explaining the "right to sue" did not create a substantive right to sue in court — rather, "[t]he only consumer right it creates is the right to receive the statement." Id. at 4.

The Court held that had Congress meant in the CROA to prohibit these common arbitration provisions, it would have done so "with a clarity that far exceeds the claimed indications in the CROA." Id. at 9. The Court went on to cite several other statutes in which Congress was more direct in its command, such as in the Commodity Exchange Act (7 U. S. C. §26(n)(2)) (prohibiting pre-dispute arbitration agreements), the Automobile Dealer's Day in Court Act (15 U. S. C. §1226(a)(2)) (prohibiting arbitration unless all parties consent after the dispute arises). Id.

What Does CompuCredit Mean for Companies Seeking to Enforce Contractual Arbitration Clauses?

What does all of this mean for companies not subject to the CROA but concerned about enforcing arbitration provisions in their consumer contracts? It means this: unless specifically prohibited by statute in no uncertain terms, the FAA requires that contractual arbitration provisions — including class action waivers — be enforced according to their terms.

CompuCredit also reaffirms that Congress — and not the Court — has the final say on what kinds of disputes may be subject to arbitration. The case essentially gives Congress a blueprint on how to prohibit contractually agreed-upon arbitration where it sees fit. For example, CompuCredit mentions specifically the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U. S. C. §5518(b)), which grants the recently created Consumer Financial Protection Bureau the authority to:

> [P]rohibit or impose conditions or limitations on the use of an agreement between [a person engaged in providing a consumer financial product or service] and a consumer for a consumer financial product or service

> providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.

(12 U. S. C. §5518(b.))

In other words, if the Bureau finds that prohibiting all mandatory arbitration in all consumer financial services contracts is in the public interest, the Bureau can make it happen — regardless of the Court's recent decisions regarding the liberal federal policy toward enforcing arbitration agreements set forth in the FAA.

But just because CompuCredit affirms that Congress (and the Bureau) has the ability to implement a complete ban on certain arbitration agreements doesn't mean that it should. In fact, in many cases, consumers achieve better results in a consumer-friendly arbitration than in a class action, where a class member might end up with just a handful of buy-one-get-one-free coupons many years down the road. The arbitration provision in AT&T Mobility v. Concepcion, for example, provided that if the arbitration award was greater than AT&T's last written settlement offer, AT&T would pay a minimum recovery of $7,500 plus twice the amount of the claimant's attorney's fees. AT&T Mobility v. Concepcion, 131 S.Ct. 1740, 1744 (2011).

CompuCredit is an important reminder that Congress has the final say on whether or not contracts can require mandatory arbitration and include class action waivers. It is then up to Congress and regulators like the Consumer Financial Protection Bureau to decide whether a ban — or something more nuanced — is the truly pro-consumer path.