Law360
Thursday, January 12, 2012

Reaffirming Mandatory Arbitration of Consumer Claims

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Consumers cannot avoid arbitrating claims under the Credit Repair Organizations Act, the U.S. Supreme Court ruled on Jan. 10, because the statute's "right to sue" clause does not invalidate an arbitration agreement.

In CompuCredit Corp. v. Greenwood, the justices continued a recent streak of decisions that favored arbitration of disputes. They reversed a ruling by the Ninth Circuit Court of Appeals that held the arbitration clause was void because it conflicted with CROA.

The plaintiffs in CompuCredit alleged that defendants misrepresented that a subprime credit card marketed to consumers with low credit scores could be used to rebuild poor credit. The suit alleged multiple fees were improperly assessed upon opening an account, effectively reducing the advertised $300 credit limit.

In a proposed class action, the plaintiffs alleged violations of the CROA, a statute that regulates the practices of credit-repair organizations. Defendants sought to compel arbitration of the dispute, pointing to a provision in the "Terms of Offer" that mandates arbitration of disputes on an individual basis.

The Ninth Circuit refused to compel arbitration, citing a provision in the CROA that gives consumers the "right to sue," which the appellate court construed as "the right to bring an action in a court of law." The Ninth Circuit also relied on language in the CROA that bars the waiver by consumers of any rights conferred by the act.

Now the Supreme Court, in an 8-1 decision, has reversed the Ninth Circuit, holding that CROA cannot be read to include any bar against enforcement of arbitration agreements.

Consistent with a string of recent decisions, including its watershed decision last year in AT&T Mobility v. Concepcion, the Supreme Court stressed that the Federal Arbitration Act establishes "a liberal federal policy favoring arbitration agreements," and this policy applies "even when the claims at issue are federal statutory claims."

The "right to sue" conferred by the CROA may be vindicated in arbitration, the Supreme Court held, and is not confined to a court of law, noting that "we have repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court."

Significantly, the justices emphasized in CompuCredit that if Congress had intended to prohibit the enforcement of arbitration agreements in the CROA, it could have said so explicitly, as it has done in certain other statutes. "Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum," the court said, "the FAA requires the arbitration agreement to be enforced according to its terms."

The significance of the Supreme Court's decision in CompuCredit extends far beyond the CROA context. It casts significant doubt on the correctness of a recent ruling by the National Labor Relations Board that said a class action waiver in an employer's arbitration agreement with its employees amounted to an unfair labor practice.

The NLRB's decision in D.R. Horton Inc.[1] held that the arbitration clause conflicted with Section 7 of the National Labor Relations Act, which gives employees the right "to engage in … concerted activities for the purpose of ... mutual aid or protection."

The NLRA, like the CROA, does not contain any provision that expressly bars the use of arbitration agreements. Thus, it would appear that since the "right to sue" in the CROA did not suffice to bar arbitration, neither does the right "to engage in concerted activities" in the NLRA suffice to preclude enforcement of a class action waiver in an arbitration agreement.

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