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OCTOBER 2011

COMPUCREDIT CORP. v. GREENWOOD: THE SUPREME COURT REVISITS BINDING ARBITRATION CLAUSES IN THE CONSUMER FINANCE CONTEXT

Oral argument in *CompuCredit Corp. v. Greenwood*, No. 10-948, (argument held October 11, 2011) addressing the "Credit Repair Organizations Act," has confirmed that the Supreme Court appears ready to define the potential reach of its decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), when called upon to do so by federal statutes.

In May, Jones Day sounded a cautionary note concerning the potential reach of the Supreme Court's decision in *Concepcion*. While the *Concepcion* Court held that states cannot, as a general practice, void as unconscionable all arbitration clauses in consumer contracts that also reject class arbitration, we warned that subsequent statutory developments could drastically affect the scope of the decision. Because *Concepcion* was decided on federal preemption grounds, it does not prohibit another federal law from restricting the enforceability of class-action waivers. We noted that the Dodd-Frank Wall Street Reform and Consumer Protection Act arguably allows the newly created Consumer Financial Protection Bureau (the "Bureau") to propose (and perhaps in the absence of Congress action upon the proposal, effectively to enact) a regulatory "veto" of *Concepcion* as it applies to companies engaged in consumer finance. The Bureau may "prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties," should the Bureau find such regulation necessary to serve the public interest and protect consumers.

On October 11, 2011, the Supreme Court heard oral arguments in *CompuCredit Corp. v. Greenwood*. *CompuCredit* involves the enforceability of mandatory arbitration clauses in a consumer finance context. Specifically, the Court will decide whether claims arising under the Credit Repair Organizations Act ("CROA") can be subject to arbitration despite a provision in the statute that gives consumers the right to

"sue." In *CompuCredit*, a consumer class sued a company that marketed subprime credit cards, and the bank that issued them, alleging that the cards were marketed as a way to redeem poor credit, but that high fees were not disclosed. Prior to receiving the card, consumers were notified that by accepting, they waived the right to proceed in any dispute as a class and agreed that all disputes would be resolved through arbitration.

A split panel of the Ninth Circuit had held that the credit card contracts' arbitration and no class treatment provisions are unenforceable, finding that the CROA prohibits any waiver of the right to sue. *Greenwood v. CompuCredit Corp.*, No. 09-15906 (9th Cir. Aug. 17, 2010). This decision set up a circuit split, with the Eleventh and Third Circuits upholding arbitration clauses on the basis that the right to sue can be exercised in an arbitration context. *See generally Picard v. Credit Solutions Inc.*, 564 F.3d 1249 (11th Cir. 2009); *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007).

Throughout oral argument, the Justices questioned counsel for both sides concerning the interpretation of the CROA provision providing a "right to sue" in the statute. Questioning addressed whether the express right to sue could be carried forward in arbitration or could be enforced only in a lawsuit. While it is always difficult to interpret questioning from the Court as leading to any particular result, questions addressed to counsel for both parties focused upon the meaning of the CROA itself, and not merely a general statement of preference for arbitration arising due to the Federal Arbitration Act.

Whichever way the Court construes the CROA statute's discussion of a right to sue, the resulting opinion may shed light on the Court's approach to arbitration as an alternative to litigation and, accordingly, to the types of consumer class action waiver issues presented by *Concepcion*. As we noted in May, these developments merit continued study and vigilance. Early reports of *Concepcion* as sounding a death knell to consumer class actions of all kinds may well be premature.

Jones Day's Consumer Financial Products & Services team advises clients regarding the issues discussed in this Alert, including the ongoing development of law regarding arbitration clauses in the consumer finance context.

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