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**Exploring Consumer Arbitration Provisions after
*CompuCredit Corp. et al. v. Greenwood et al.***

**Association of Independent Consumer Credit
Counseling Agencies (AICCCA)
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Monday, January 23, 2012



Agenda

- Introduction
- How we got here...
- Credit Repair Organizations Act
- *CompuCredit v. Greenwood* and *AT&T Mobility v. Concepcion*
- Looking to the Horizon – What's next?
- Question and Answers



Howe we got here...

- **Credit Repair Organizations Act (“CROA”)** enacted in 1996.
 1. to ensure that prospective buyers of the services of credit repair organizations are provided with the information necessary to make an informed decision regarding the purchase of such services; and
 2. to protect the public from unfair or deceptive advertising and business practices by credit repair organizations.

- Lawsuits by class-action attorneys alleging CROA violations have plagued the credit counseling industry.



Credit Repair Organizations Act

The **Credit Repair Organizations Act** became effective on April 1, 1997, and is directed to the credit repair industry.

The term “**credit repair organization**”—

(A) means any person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of—

- (i) improving any consumer's credit record, credit history, or credit rating; or
- (ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i).

(B) does not include —

(i) any nonprofit organization which is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;



Credit Counseling Agencies and CROA?

- In *Plattner v. Edge Solutions, Inc.*, 422 F.Supp.2d 969, 2006 WL 763651 (N.D. Ill. March 22, 2006) the court recognized, that "[w]hether [an apparent debt settlement] company is a credit repair organization under the CROA depends on the representations made [to consumers]." *Plattner*, 2006 WL 763651 at *4.
- *In re National Credit Mgt. Group, LLC*, 21 F.Supp. 2d 424 (D.N.J. 1998), wherein that court, in a case brought by the FTC, agreed with the FTC's position that certain educational and credit monitoring programs of a type offered by the credit counseling agency were governed by the CROA.



***Zimmerman v. Puccio*, No. 09-1416 (1st Cir. 2010).**

- Held that a tax-exempt, nonprofit credit counseling agency operated as a “credit repair organization” within the meaning of CROA and that certain principals of the organization were personally liable under CROA.
- The *Zimmerman* decision adopts a sweeping interpretation of CROA that equates credit counseling agencies with credit repair organizations.
 - As the First Circuit observed, “credit counseling aimed at improving future creditworthy behavior is the quintessential credit repair service.”
- As a result, we are likely to see an increase in credit repair class action lawsuits, which can be crippling to nonprofit credit counseling agencies, especially those that offer or provide services to renegotiate, settle, reduce, or otherwise alter the terms of consumer debts.
- Some courts have adopted a two-part test for the CROA exemption for *bona fide* tax-exempt nonprofit credit counseling agencies, requiring such agencies to: (1) be recognized by the IRS as being exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code; and (2) actually operate as a *bona fide* nonprofit organization.



CROA: Requirements

- CROA requires full disclosure regarding consumer rights before any contract for credit repair services is executed. A written statement must be provided and signed by all prospective customers, and must be retained by the credit repair organization for at least two years after the statement is signed.
- Written Contract
- Notice of Cancellation Right
- Advance Fee Prohibition



CROA: Prohibitions

The statutory scheme provides further protection for consumers with a list of prohibitions. CROA prohibits any person, credit repair organizations, as well as their employees and agents, from:

- misrepresenting the organization's services
- making or enticing consumers to make untrue or misleading statements either to the credit reporting agencies or to the consumer's creditors
- advising consumers to attempt to change their credit identities
- accepting payment or other valuable consideration for their services in advance of fully performing those services



CROA: Penalties

- CROA includes civil penalties for violations and procedures for administrative enforcement by both the FTC and the states.
- CROA includes a private right of action.



CROA: Waiver of Rights

A consumer cannot waive his rights under CROA.

- Any waiver of any protection afforded by CROA is treated as void, and contracts that are not in compliance with the Act's provisions may not be enforced by any federal or state court.



CompuCredit Corp. v. Greenwood

- The Supreme Court 8-1 decision, in *CompuCredit Corp. v. Greenwood*, claims arising under the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.*, may be subject to mandatory arbitration pursuant to a valid arbitration agreement.”

- The basics of *CompuCredit*.
 - Although respondents’ credit card agreement required their claims to be resolved by binding arbitration, they filed a lawsuit against petitioner CompuCredit Corporation and a division of petitioner bank, alleging, *inter alia*, violations of CROA.

 - The Federal District Court denied the defendants’ motion to compel arbitration, concluding that Congress intended CROA claims to be nonarbitrable. The Ninth Circuit affirmed.

 - *Supreme Court Decision* - Because CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the Federal Arbitration Act (FAA) requires the arbitration agreement to be enforced according to its terms.



***CompuCredit* (cont'd)**

- Of particular significance, a required disclosure provision prescribes that the written statement to consumers' state:

“You have a right to sue a credit repair organization that violates the Credit Repair Organizations Act.”

- The “right to sue” described in Section 1679c(a) is found in CROA’s civil liability provision, which states: “Any person who fails to comply with any provision of [the CROA] with respect to any other person shall be liable to such person” in an amount determined under a framework set forth in the statute
- Resolves split between Ninth Circuit’s (AK, CA, HI, ID, MT, NV, OR) conclusion in *CompuCredit* with decisions of the Third (DE, NJ, PA) and Eleventh Circuits (AL, FL, GA)



Strong Support for Arbitration

- The Supreme Court ruled in *CompuCredit* that because CROA is silent on whether claims under the statute can proceed in an arbitration forum, the Federal Arbitration Act (“FAA”) requires the arbitration agreement to be enforced according to its terms. Writing for the majority, Justice Antonin Scalia said, “[h]ad Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest.”
- With regard to the CROA disclosure statement’s description of the “right to sue,” the Court reasoned that it was not misleading because it did not describe precisely that a suit in court has to be preceded by an arbitration proceeding. “The disclosure provision is meant to describe the law to consumers in a manner that is concise and comprehensible to the layman—which necessarily means that it will be imprecise,” the Court explained. The Court noted, “we have repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court.”
- The Court concluded, “[t]hat Congress would have sought to achieve the same result in the CROA through combination of the nonwaiver provision with the ‘right to sue’ phrase in the disclosure provision, and the references to ‘action’ and ‘court’ in the description of damages recoverable, is unlikely.”
- Justice Ruth Bader Ginsburg dissented. She wrote, “Congress enacted the CROA with vulnerable consumers in mind—consumers likely to read the words ‘right to sue’ to mean the right to litigate in court, not the obligation to submit disputes to binding arbitration.”



AT&T Mobility LLC v. Concepcion

- The 5-4 ruling, in the case of *AT&T Mobility LLC v. Concepcion*, stated that “[a]rbitration is poorly suited to the higher stakes of class litigation.” The momentous opinion recognizes that arbitration is dependent on contractual consent and that arbitration clauses should be enforced as written, even when they include certain types of class-action waivers.
- *Concepcion* offers support to organizations with customers – in California and nationwide – that seek to use contractual arbitration clauses with class-action waiver provisions in order to provide a fast, fair and efficient way to resolve disputes on a voluntary basis and avoid class actions.
- The risk of consumer class actions may be substantially reduced or possibly eliminated with the use of an appropriately drafted and implemented arbitration provision and class-action waiver.



Important Not all Arbitration Provisions and Class-Action Waivers will be Upheld

- Not all blanket mandatory arbitration clause and class-action waivers within consumer agreements will automatically result in enforcement of the arbitration provision.
 - Is it consumer-friendly?
 - Does it allow for cheap and expeditious resolution?
 - Individualized?
 - It is it written in plain English?
 - Implemented in a way that allows the consumer to understand and consider the provisions before agreement?
 - Opt-out ?
 - Otherwise fair and reasonable?



What's on the Horizon?

- Consumer groups already on the offensive; CROA could be amended (in a negative way)
- Intersection of State Laws and *CompuCredit*?
- CFPB report to Congress, ability to prohibit prospective mandatory arbitration in consumer financial services agreements.
- Review consumer facing agreements (e.g., DMP, housing, bankruptcy, etc.; website, social media, etc.)
- Carefully assess any current arbitration provisions and class-action waivers; are they consumer friendly? (don't automatically assume they will be upheld)
- Update dispute resolution provisions, if needed.



QUESTIONS AND DISCUSSION

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