



Class Action Alert

Recent developments in class action law

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Third Circuit provides support for class action waivers, rejects preemption of arbitration under Credit Repair Organizations Act

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Earlier this week, the United States Court of Appeals for the Third Circuit released an opinion deciding, in a case of initial impression nationwide, that the federal Credit Repair Organizations Act, 15 U.S.C. §§ 1679, *et seq.* (2000) (CROA), does not preclude arbitration of claims by a consumer against a company covered by the statute. *Gay v. CreditInform*, No. 06-4036, 2007 U.S. App. LEXIS 29302 (3rd Cir. Dec. 19, 2007). Perhaps even more importantly, the court also held that CROA does not preclude pre-dispute class waivers by consumers. *See id.*, 2007 U.S. App. LEXIS 29302, at *34. We represented the *amicus curiae*, the National Organization of Credit Correction Attorneys, favoring the result reached by the Third Circuit.

The plaintiff in the *Gay* case was an individual consumer who bought “credit repair services” from a company called Intersections, Inc. (Intersections). *Id.*, 2007 U.S. App. LEXIS 29302, at *1. Under the terms of a written agreement with the company, she paid it \$4.99 per month for credit monitoring and improvement. *Id.*, 2007 U.S. App. LEXIS 29302, at *2. According to her, however, Intersections failed to make certain disclosures and demanded payment from her in advance for its services. *See id.*, 2007 U.S. App. LEXIS 29302, at *4. Believing that CROA required the disclosures not made by Intersections and that CROA forbade prepayment for credit monitoring and improvement services, the plaintiff commenced a putative class action against Intersections and a co-defendant later dismissed from the case.

In response to the lawsuit, Intersections both asserted that CROA did not apply to it, *see id.*, 2007 U.S. App. LEXIS 29302, at *2 n.2, and moved to stay and to compel the plaintiff to arbitrate her claim—on an individual basis—pursuant to an arbitration clause, *id.*, 2007 U.S. App. LEXIS 29302, at *5. The clause was a broad one. It provided that: “Any claim arising out of or relating to the Product shall be settled by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association on an individual basis not consolidated with any other claim.” *Id.* Based on this clause, the trial court granted the motion to stay and ordered the plaintiff to arbitrate on an individual basis.

The plaintiff appealed. On appeal, she argued that CROA expressly forbids companies from obtaining waivers of rights provided to consumers by the statute. In particular, Subsection “F” of the statute states that:

(a) Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter (1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person. (b) Any attempt by any person to obtain a waiver from any consumer of any protection provided by or any right of the consumer under this subchapter shall be treated as a violation of this subchapter. (c) Any contract for services which does not comply with the applicable provisions of this subchapter (1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person.

Among the rights protected by this provision, the plaintiff argued, is the right to a judicial forum and class procedures. *See* 15 U.S.C. § 1679g(a)(2), (b) (referring to “class action” in describing the damages that may be awarded by a “court” under CROA) (cited in *Gay*, 2007 U.S. App. LEXIS 29302, at *7-8). In the alternative, the plaintiff claimed that the arbitration clause in her contract with Intersections was unconscionable because of the purported class waiver. *See Gay*, 2007 U.S. App. LEXIS 29302, at *3, 37.

As we have noted in earlier *Class Action Alerts*, arguments such as this in the consumer context have been received favorably in some jurisdictions, with California courts being perhaps the leaders on the issue. *See, e.g., Discover Bank v. Superior Ct.*, 113 P.3d 1100 (2005) (class action waiver unenforceable in a contract of adhesion where predictably small amounts are at issue); *accord, e.g., Shroyer v. New Cingular Wireless Servs.*, No. 06-55964, 2007 U.S. App. LEXIS 19560 (9th Cir. 2007) (applying *Discover Bank* to invalidate arbitration provision in customer service agreement prohibiting class actions); *Gentry v. Superior Ct.*, 165 P.3d 556 (Cal. 2007) (applying *Discover Bank* to labor class actions).

The Third Circuit, however, extending and reaffirming its well-known decision in *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000) (refusing to find a substantive right to class actions under the Truth In Lending Act, 15 U.S.C. §§ 1601, *et seq.* (2005)), *cert. denied*, 531 U.S. 1145 (2001), rejected the plaintiff’s version of this argument in the *Gay* case. Addressing both CROA and a similar Pennsylvania statute, the Pennsylvania Credit Services Act, 73 Pa. Cons. Stat. Ann. §§ 2181, *et seq.* (West 1993) (the CSA), which also mentions the right to sue in “court” (but does not mention class actions) and contains an anti-waiver provision (*see id.* § 2189(a)), the court held that, while those:

statutes clearly contemplate consumers’ actions being brought in a judicial forum and, in the case of the CROA, on a class action basis, and to that extent may be said to recognize a consumer’s right to proceed in court, they neither contain provisions creating such rights nor indicate that Congress or the Pennsylvania Legislature, respectively, intended to exclude claims asserted under the CROA or the CSA from arbitration agreements.

Gay, 2007 U.S. App. LEXIS 29302, at *23.

The Third Circuit similarly rejected the plaintiff’s argument that the arbitration provision in her contract with Intersections was unconscionable. Among other things, her pre-dispute agreement to arbitrate with Intersections could not, on its face, “constitute an unconscionable bargain” because she “retain[ed] the full range of rights created by the relevant statute,” and those rights “remain

available in individual arbitration proceedings.” 2007 U.S. App. LEXIS 29302, at *52 (internal citation omitted); *accord, e.g., id.* 2007 U.S. App. LEXIS 29302, at *24. This indicated that no conflict exists between individual arbitration and the purposes of CROA and the CSA. *Id.*, 2007 U.S. App. LEXIS 29302, at *24. It also indicated that the inequality in bargaining power between the plaintiff and the defendants was not “so gross as to shock the conscience.” *Id.*, 2007 U.S. App. LEXIS 29302, at *52 (internal citation omitted). Importantly, the court bolstered this conclusion elsewhere in its opinion in two ways: first, by observing that plaintiff had not “demonstrated that only Intersections supplies services of the kind for which [plaintiff] contracted with it,” *id.*, 2007 U.S. App. LEXIS 29302, at *52 n.15, and, second, by pointing out that both CROA and the CSA give state and federal regulators rights to enforce those statutes, *id.*, 2007 U.S. App. LEXIS 29302, at *25. Such “provisions for administrative enforcement supply procedures for obtaining remedies reasonably substituting for those available in a class action.” *Id.*, 2007 U.S. App. LEXIS 29302, at *26. Finally, given the explicit intent of Congress in the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2005), to favor arbitration, the Third Circuit expressly rejected two Pennsylvania Superior Court decisions, *Thibodeau v. Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006), and *Lytle v. CitiFinancial Servs., Inc.*, 810 A.2d 643 (Pa. Super. Ct. 2002), to the extent that they held that “a waiver of the right to bring judicial class actions in an arbitration agreement constitutes an unconscionable contract” *Gay*, 2007 U.S. App. LEXIS 29302, at *62.

The Third Circuit’s reasoning in *Gay* is better than the reasoning in most of the California cases on the subject, and better than the reasoning in federal cases such as *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) (severing provision of arbitration clause denying class arbitration because of supposed potential to prevent plaintiffs from vindicating their statutory rights under federal antitrust statutes), which have found a fundamental, unwaivable substantive “right” to class treatment in statutes that, on their face, do not say that class procedures are substantive rights. In the somewhat splintered landscape of decisions on arbitration and class waivers, the *Gay* opinion stands as a good example of how the analysis should be done. *See also, e.g., Ranieri v. Bell Atl. Mobile*, 759 N.Y.S.2d 448 (N.Y. App. Div. 2003) (in arbitration clause of cellular service agreement, “given the strong public policy favoring arbitration and the absence of a commensurate policy favoring class actions, we are in accord with authorities holding that a contractual proscription against class actions is neither unconscionable nor violative of public policy”).

We welcome your questions and comments. If you need assistance on any matter, please call or e-mail Christopher M. Mason (212-940-3017, cmason@nixonpeabody.com) or Paul J. Hall (415-984-8266, phall@nixonpeabody.com) as the coordinating heads of our Class Action Defense practice across our substantive litigation teams, or contact any of our partners listed below. Questions regarding the *amicus* brief in the *Gay* case may be directed to Chris Thomas (585-263-1087, cdthomas@nixonpeabody.com).

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