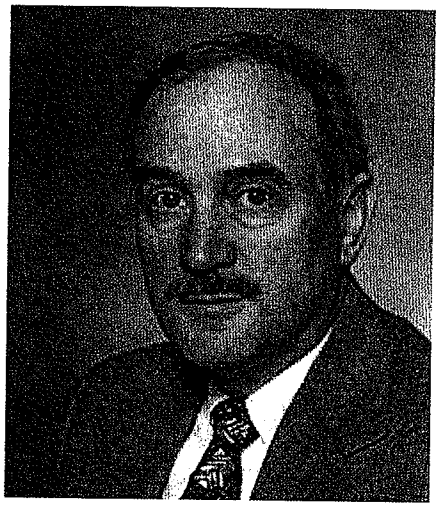
The Credit Repair Organizations Act: Recent Developments

By John L. Ropiequet and Jason B. Hirsh



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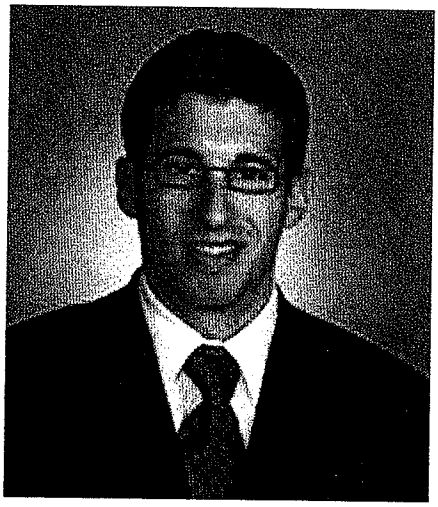

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One of your authors represented defendants in *Parker v. 1-800 Bar None*, 2002 WL 215530 (N.D. Ill. Feb. 11, 2002), and *Vance v. Nat'l Benefit Ass'n*, 1999 WL 731764 (N.D. Ill. Nov. 30, 1999), discussed in this article.

I. Introduction

Receiving notice that you have been refused a mortgage, a car loan or any other extension of credit due to a poor credit score can be a miserable and embarrassing experience. Yet, many consumers have received such notices. Consumers who seek to repair their credit, erase the stain to their reputation, and protect their opportunity to receive credit in the future may turn to a credit repair organization for help. These businesses may promise expeditious and effective methods of credit repair. However, while some credit repair organizations genuinely seek to help cure poor credit scores, others may victimize consumers by making fantastic and baseless promises that any type of bad credit can be legally repaired, for a price.

In response to such abusive credit repair practices, Congress enacted the Credit Repair Organizations Act (CROA or the Act)[1] in 1996 as an amendment to the Consumer Credit Protection Act.[2] The CROA was intended to protect consumers by requiring "credit repair organizations" which fall within the statutory definition of that term to make mandatory disclosures in written contracts with specified terms and conditions, to take no payment up front, and to be governed by an anti-fraud prohibition.[3]

Since the CROA was enacted, litigants have tested the scope of the Act. Many have argued that liability under the Act

1. 15 U.S.C. §§ 1679 *et seq.*

2. Pub. L. No. 90-321, 82 Stat. 146 (codified as amended in 15 U.S.C. §§ 1601 *et seq*).

3. *See generally* Eugene J. Kelley, Jr., John L. Ropiequet & Andrea J. Durkin, *The Credit Repair Organizations Act: The "Next Big Thing?,"* 57 Consumer Fin. L.Q. Rep. 49, 50-52 (2003) [hereinafter "*CROA 2003*"].

is not limited to credit repair organizations engaged in credit repair activities recognized as such in CROA. Addressing these claims, federal district courts across the country have struggled to apply the CROA in a manner that is consistent with its stated purposes. Some courts have adopted a broad interpretation of the CROA essentially subjecting any "person" engaged in any credit-related activity to liability under the Act even if there is no involvement by anyone who meets the statutory definition of a credit repair organization. However, other courts have strictly limited CROA liability to credit repair organizations or other persons engaged in transactions that involve such activities as defined in the statute, in accordance with their view that the legislative intent and statutory design require such a limitation. Consequently, the case decisions vary and the jurisprudence in one federal district may be irreconcilable with that elsewhere.

Courts have also struggled with the issue of whether CROA claims can be arbitrated or must instead be resolved in court. While some courts, including two United States Courts of Appeals, have concluded that the CROA does not provide a substantive right to sue in the courts and, therefore, that arbitration is permissible, other courts have refused to accept this, concluding that the CROA creates a non-waivable right to pursue claims in the courts. This article discusses these developments.

II. Basic Provisions of the CROA

A. Scope

Recent case law has focused on the interpretation of just a few provisions of the CROA.[4] The Act defines "credit repair organization," but its prohibitions are not necessarily limited to persons or entities which meet that definition. There are prohibitions that apply to credit repair organizations and others which apply more generally to any "person." The Act also has a non-waiver provision concerning its remedies. The relevant statutory provisions are set forth in full below.

B. Definition of "Credit Repair Organization"

The CROA defines a "credit repair organization" as follows:

> 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);....[5]

C. Prohibited Actions for Any "Person"

The CROA prohibits all of the following practices:

> (a) In general
>
> No person may—
>
> (1) make any statement, or counsel or advise any consumer to make any statement, which is untrue or misleading (or which, upon the exercise of reasonable care, should be known by the credit repair organization, officer, employee, agent, or other person to be untrue or misleading) with respect to any consumer's credit worthiness, credit standing, or credit capacity to—
>
> (A) any consumer reporting agency (as defined in section 1681a(f) of this title); or
>
> (B) any person—
>
> (i) who has extended credit to the consumer, or
>
> (ii) to whom the consumer has applied or is applying for an extension of credit;
>
> (2) make any statement, or counsel or advise any consumer to make any statement, the intended effect of which is to alter the consumer's identification to prevent the display of the consumer's credit record, history, or rating for the purpose of concealing adverse information that is accurate and not obsolete to—
>
> (A) any consumer reporting agency; or
>
> (B) any person—
>
> (i) who has extended credit

4. The provisions of the CROA are discussed in more detail in *CROA 2003*, *supra* note 3, at 50-53.

5. 15 U.S.C. § 1679a(3)(A).

to the consumer, or

(ii) to whom the consumer has applied or is applying for an extension of credit;

(3) make or use any untrue or misleading representation of the services of the credit repair organization; or

(4) engage, directly or indirectly, in any act, practice, or course of business that constitutes or results in the commission of, or an attempt to commit, a fraud or deception on any person in connection with the offer or sale of the services of the credit repair organization.[6]

D. Non-Waiver Provision

The remedies afforded under the CROA cannot be waived:

(a) Consumer Waivers Invalid.—Any waiver by any consumer of any protection provided by or any right of the consumer under this title—

(1) shall be treated as void; and

(2) may not be enforced by any Federal or State court or any other person.

(b) Attempt To Obtain Waiver.—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 title shall be treated as a violation of this title.

(c) Contracts Not in Compliance.—Any contract for services which does not comply with the applicable provisions of this title—

(1) shall be treated as void; and

(2) may not be enforced by any Federal or State court or any other person.[7]

III. Litigation Developments

A. Who is Subject to Liability Under the CROA?

1. Two Questions

The question of who can be held liable under the CROA has involved two intertwined questions. The first question is whether the defendant meets the statutory definition of a "credit repair organization" in section 1679a(3)(A). In some cases, the courts limit their discussion to this question in determining whether a CROA claim can be brought against the defendant.

More commonly, the cases which examine whether a CROA claim is stated have proceeded to consider a second question. They have considered whether the fact that section 1679b(a) makes any "person" liable for the listed prohibited practices is intended to create liability even if neither the defendant nor any other person involved with the transaction meets the statutory definition of a credit repair organization. One line of cases has held that section 1679b(a) creates liability for any "person" regardless of the presence or absence of a credit repair organization. Other courts have held that such an expansive view of liability is contrary to the congressional purpose of the CROA.

2. Cases Examining the Definition of "Credit Repair Organization"

Auto dealers often publish advertising indicating that consumers with poor credit can do something to reestablish good credit. This has led to CROA claims against dealers which assert that the advertising was sufficient to turn them into credit repair organizations within the meaning of the Act. One early case, *Sannes v. Jeff Wyler Chevrolet, Inc.*,[8] held that because the dealer was being paid no separate amount for assistance in securing financing after putting out "credit repair" advertising, no CROA claim could be brought against it. The court concluded that the CROA's statutory purpose was to target "fraudulent companies" which "scam consumers" out of money in connection with credit repair-type services.[9]

A similar ruling was made more recently in favor of a car dealer in *Schultz v. Burton-Moore Ford, Inc.*[10] The *Schultz* court held that because there was no evidence that the dealer "provided a service in exchange for the purpose of improving Plaintiff's credit," as opposed to merely selling her a car, there was no basis for finding any CROA violation.[11] Similar rulings were made in *Berry v. Cook Motor Cars, Ltd.*,[12] and *Henry v. Westchester Foreign Autos, Inc.*[13]

6. *Id.* § 1679b(a).

7. *Id.* § 1679f(a).

8. 1999 WL 33313134 (S.D. Ohio Nov. 30, 1999).

9. *Id.* at *2. *Accord* Wojcik v. Courtesy Auto Sales, Inc., 2002 U.S. Dist. Lexis 22731 at *25 (D. Neb. Nov. 25, 2002).

10. 2008 WL 2355588 (E.D. Mich. Jun. 5, 2008).

11. *Id.* at *7.

12. 2009 WL 1971391 at *2 (D. Md. Jun. 29, 2009).

13. 522 F. Supp.2d 610, 614 (S.D.N.Y. 2007).

At issue in *Rannis v. Fair Credit Lawyers, Inc.*[14] was whether an attorney was covered by the CROA. The defendant attorney entered into a contract with the plaintiff, agreeing to achieve "maximally accurate" credit reports for him. The attorney charged a fee for his services before the services were complete, and did not comply with the other procedural requirements that the CROA imposes on credit repair organizations. When sued, the attorney argued that he was not a credit repair organization and did not have to comply with those requirements. The court disagreed, finding that the attorney's advertising, stating that he could "improve your credit score now!," constituted representations by a credit repair organization within the meaning of the statute.[15] This advertising, along with the provisions of the contract which showed an "implied purpose of improving the consumer's credit record, credit history, or credit rating," was enough to persuade the court that the attorney met the definition of a credit repair organization and was therefore covered by the statute.[16]

Debt management companies, in contrast, offer services which are typically devoted to negotiating with creditors to try to settle debts.[17] Sometimes, however, their services have been found to constitute credit repair services, which can lead to CROA liability. For example, in *Cortese v. Edge Solutions, Inc.*,[18] the court examined the defendant's Debt Meltdown Program when one of its customers sued it under the CROA. Edge Solutions argued that it never provided services designed to improve a credit record, history or rating and noted that the contract expressly stated:

> It is understood that no representation about any aspect of your credit rating can be made. Depending upon circumstances, credit can be enhanced, damaged, or not be altered, but in any case, it is beyond the control or scope of this program.[19]

The court stated that to the extent that the Debt Meltdown Program was "strictly a debt management plan, it is outside the scope of CROA's definition of a credit repair organization" because that aspect of the program "contains no representations with respect to credit repair."[20] However, Edge Solutions' Post Closing Credit Restoration Program, which promised to "assure that your credit reports properly reflect the settlement and paid accounts that were involved in this program" was found to be a different matter because the description of the program implied that "it will improve the client's credit record, credit history or credit rating."[21]

The *Cortese* court's analysis was contrary to that in *Plattner v. Edge Solutions, Inc.*,[22] where the court reached the opposite conclusion after reviewing precisely the same Debt Meltdown Program and Post Closing Credit Restoration Program. The *Plattner* court found:

> [T]he overall purpose of Edge's services is not to improve a participant's credit score but rather to help a participant settle his debt. Even an unsophisticated debtor reviewing the program documents could not be left with the impression that Edge was offering to improve his credit except insofar as paying one's debts is likely, ultimately, to have that effect.[23]

3. "Any Person" Decisions

As noted,[24] a very expansive view was taken in some early cases concerning whether the CROA imposes liability where no one meets the statutory definition of a "credit repair organization." In *Bigalke v. Creditrust Corp.*[25] and *Parker v. 1-800 Bar None*,[26] both in the Northern District of Illinois, the court found that liability under section 1679b(a) could apply to any "person" who committed an act prohibited by that section even where the person did not meet the definition of a credit repair organization. This was based on the earlier decision in *Vance v. Nat'l Benefit Ass'n*,[27] where CROA liability was extended to "persons" who were not themselves credit repair organizations but who acted together with a defendant which admittedly was a credit repair organization.

Subsequent cases in the Northern District of Illinois have applied this expansive view of the CROA in different factual situations. In *Rodriguez v. Lynch Ford, Inc.*,[28] the court dealt with an auto dealer which advertised that it would "help consumers with bad credit repair their credit by purchasing a car."[29] While agreeing that the dealer did not fall into the definition of a "credit repair organization" under section 1679a, the court noted the decisions in *Vance*, *Bigalke* and *Parker*, which had allowed claims to proceed under section 1679b(a) against other "persons" for misrepresentations about a consumer's creditworthiness made to a credit-granting institution. In *Rodriguez*, the dealer's alleged false representation to a bank that the plaintiff was sole purchaser of the car was enough to provide an actionable basis for a CROA claim.[30]

14. 489 F. Supp.2d 1110 (C.D. Cal. 2007).

15. *Id.* at 1114. *See also* Iosello v. Lexington Law Firm, 2003 U.S. Dist. Lexis 14591 at *18 (N.D. Ill. Aug. 7, 2003) (holding that a lawyer and law firm can be "credit repair organizations" under 15 U.S.C. § 1679a(3)(A), and are not exempted under *id.* § 1679a(3)(B)).

16. *Id.*

17. *See, e.g.*, Carla Stone Witzel, *The New Uniform Debt-Management Services Act*, 60 Consumer Fin. L. Q. Rep. 650 (2006); David A. Lander, *Snapshot of an Industry in Turmoil: The Plight of Consumer Debt Counseling*, 54 Consumer Fin. L.Q. Rep. 330 (2000); David A. Lander, *One Lawyer's Look at the Debt Counseling Industry*, 53 Consumer Fin. L.Q. Rep. 191 (1999); Carl Felsenfeld, *Consumer Credit Counseling*, 26 Bus. Law. 925 (1971). *Compare* Stuart B. Wolfe, *Debt Elimination Schemes*, 59 Consumer Fin. L. Q. Rep. 357 (2005).

18. 2007 WL 2782750 (E.D.N.Y. Sept. 24, 2007).

19. *Id.* at *4.

20. *Id.* at *5 (citing Plattner v. Edge Solutions, Inc., 422 F. Supp.2d 969, 973 (N.D. Ill. 2006)).

21. *Id.* at *6.

22. 422 F. Supp.2d 969 (N.D. Ill. 2006).

23. *Id.* at 976. *See Cortese*, 2007 WL 2782750 at *7.

24. *See CROA 2003*, *supra* note 3, at 54-55.

25. 162 F. Supp. 2d 996 (N.D. Ill. 2001).

26. 2002 WL 215530 (N.D. Ill. Feb. 11, 2002).

27. 1999 WL 731764 (N.D. Ill. Nov. 30, 1999)

28. 2004 WL 2958772 (N.D. Ill. Nov. 18, 2004).

29. *Id.* at *1. (Obviously, though not dispositive in the case, this advertisement used particularly unwise terminology.)

30. *Id.* at *5-6.

CROA claims against auto dealers were also subsequently allowed to proceed in *Costa v. Mauro Chevrolet, Inc.*[31] and *Lacey v. William Chrysler Plymouth, Inc.*[32]

Similar CROA claims have been allowed to proceed in the Northern District of Illinois against mortgage brokers who allegedly submitted fraudulent credit applications on behalf of borrowers. For example, in *Martinez v. Freedom Mortgage Team, Inc.*,[33] the defendant mortgage broker falsified the information which the plaintiff gave him when he filled out the loan application, and secured an inflated appraisal for the house which the plaintiff intended to purchase. After the loan was approved, the plaintiff brought several claims, including a CROA claim. The defendant broker moved to dismiss the CROA claim, arguing that it was not a "credit repair organization" and was therefore not subject to CROA liability. The court disagreed, finding that this argument:

> runs afoul of the plain language of 15 U.S.C. [section] 1679b(a), which prohibits any "person" from engaging in the prohibited activity. By using "person" in that subsection and "credit repair organization" in other subsections (such as the prohibition in 15 U.S.C. [section] 1679b(b)), Congress clearly expressed the intention that no entity could engage in the proscribed conduct whether or not that entity qualified as a credit repair organization.[34]

The *Martinez* court accordingly refused to dismiss the CROA claim. Similar results have occurred in other cases against mortgage lenders and brokers.[35]

However, other courts have found that the expansive view of CROA liability adopted in these cases in the Northern District of Illinois[36] extends too far. For example, in *In re Wright*[37] the bankruptcy court dealt with an adversary proceeding where the plaintiff debtor asserted CROA liability arising from alleged mortgage fraud. The plaintiff alleged that several persons acted together to make misrepresentations about her creditworthiness in connection with a mortgage transaction, including executing a false warranty deed and submitting a false appraisal. The defendants moved for summary judgment, arguing that they were not credit repair organizations and therefore could not be subject to liability under the Act. The plaintiff argued that the CROA extended liability to "any person" guilty of violating section 1679b(a)(1), whether or not the person was a credit repair organization.

The *Wright* court observed that none of the defendants was alleged to be a credit repair organization and that "the allegations do not identify a person, whether as a defendant or non-party, who was involved in the operative facts and who can be remotely identified as a credit repair organization."[38] The court then conducted a comprehensive review of the prior CROA decisions from the Northern District of Illinois which had taken an expansive view of CROA liability[39] and other cases which had not.[40] It began its analysis by observing that section 1679b(a), taken out of context, could justify the plaintiff's CROA claim even if no one involved in the mortgage transaction qualified as a credit repair organization:

> Admittedly, if [section] 1679b(a)(1) was lifted from the remainder of the Act and viewed as a standalone statute and then pared down to its bare essentials, it would provide: No person may make any untrue statement about a consumer's creditworthiness to any credit reporting agency or any other person who has extended credit to such a consumer, or to whom the consumer has applied or is applying for an extension of credit. Although CROA does not specifically define "person," unquestionably the term includes natural persons....[41]

But, after considering the congressional findings and purposes stated in the Act and all of the case law, the court concluded that CROA claims should be limited to claims against credit repair organizations and to claims against other persons "who are not credit repair organizations but nonetheless are guilty of the practices prohibited by [section] 1679b(a)(1) in connection with activities of, or transactions involving a credit repair organization."[42] The court explained its reasoning as follows:

> When CROA [section] 1679b(a)(1) is taken out of the context of the remainder of the Act, its plain language appears to extend liability to any person who might be found guilty of committing one of the prohibited practices, regardless of whether the practice involved a credit repair organization. However, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and

31. 390 F. Supp. 2d 720 (N.D. Ill. 2005).

32. 2004 WL 415972 (N.D. Ill. Feb. 20, 2004).

33. 527 F. Supp. 2d 827 (N.D. Ill. 2007).

34. *Id.* at 840.

35. *See, e.g.*, Whitley v. Taylor Bean & Whitacker Mortgage Co., 607 F. Supp.2d 885 (N.D. Ill. 2009); Ware v. Indymac Bank, F.S.B., 534 F. Supp.2d 835 (N.D. Ill. 2008); Poskin v. TD Banknorth, N.A., 2009 U.S. Dist. Lexis 83100 (W.D. Pa. Sept. 11, 2009).

36. A less expansive view of CROA liability was taken in Plattner v. Edge Solutions, Inc., 422 F. Supp. 2d 969, 975 (N.D. Ill. 2006) (the court concluding that, "in light of the findings and purposes contained in § 1679, as well as the concerns expressed in the legislative history, there is no reason to believe that such a broad definition was intended by Congress"), citing Limpert v. Cambridge Credit Counseling Corp., 328 F. Supp. 2d 360, 364 (E.D.N.Y. 2004). *See also* White v. Financial Credit Corp., 2001 WL 1665386 at *5-6 (N.D. Ill. Dec. 27, 2001) (the court concluding that the "plain statutory purpose" of the CROA aims at companies which perform services for money "for the purpose of improving a party's credit history").

37. 2007 WL 1459475 (Bankr. N.D. Ala. May 16, 2007).

38. *Id.* at *2.

39. The court discussed six CROA cases from the Northern District of Illinois which took an expansive view of CROA liability. *Id.* at *3-7.

40. The court noted that in Polacsek v. Debticated Consumer Counseling, Inc., 413 F. Supp.2d 539, 546 (D. Md. 2005), it was found that other persons could be held liable under the CROA because they participated in the conduct of a credit repair organization, and that two cases from the Northern District of Illinois had questioned the expansive view of CROA liability. 2007 WL 1459475 at *8, 10.

41. *Id.* at *2.

42. *Id.* at *11.

> the broader context of the statute as a whole." [citation omitted] Section 1679b(a)(1) should be construed within the context of the entire Act, including its codified findings and purposes, not as if [section] 1679b(a)(1) were a stand-alone statute. *When it enacted CROA, the focus of Congress was on the credit repair industry, not enacting a federal cause of action creating liability for every person guilty of making defamatory statements about a consumer's creditworthiness.* Remedies for such wrongs are adequately provided for under state tort laws. This Court cannot assume Congress intended to add a federal question cause of action to the dockets of federal courts without some mention of its reasons for doing so in the codified findings and purposes or in the Act's legislative history. The congressional findings, purposes and history only discuss the credit repair industry, nothing more.[43]

Although the alleged misconduct related to misrepresentations about the debtor's creditworthiness, they did not pertain to a transaction involving the credit repair industry. Accordingly, the court granted the defendants' motions for summary judgment.[44]

In *Lopez v. ML#3, LLC*,[45] a CROA claim against an auto dealer, the court followed *Wright*. It noted that the dealer was clearly not a credit repair organization and offered no credit repair, credit history or credit rating services.[46] The court reviewed both the line of cases from the Northern District of Illinois and cases holding to the contrary, and rejected the expansive view as follows:

> The better view is that the Act applies only in the context of credit-repair organizations and services. The plaintiffs' broader reading would create a federal cause of action for any false statement in a credit application—with no requirement for an effect on commerce and no other federal jurisdictional peg. This would be a remarkable and constitutionally-suspect expansion of federal regulation that undoubtedly would surprise the members of Congress who voted for the Act; they presumably believed the Act met the requirement for a jurisdictional peg because one was included in the definition of a "credit repair organization." [citation omitted] Moreover, this expansion of federal regulation would bear no relationship to the Act's explicitly stated purposes—to ensure the provision of adequate information to "prospective buyers of the services of credit repair organizations" and "to protect the public from unfair and deceptive advertising and business practices by credit repair organizations." [citation omitted] Properly construed, the Act will not bear this reading.[47]

The court found that the prohibition against any "person" in section 1679b(a) had to be construed "not to expand the Act beyond the credit-repair context, but to ensure that a person who made a false statement *in that context* would not escape liability based on the person's relationship to the credit-repair organization or based on the person's role in the transaction at issue."[48] Only this construction would be consistent with the CROA's "explicitly stated purposes," in the court's view.[49] Since the plaintiffs' claims had "nothing to do with this kind of organization or service," no CROA claim was stated.[50] *Lopez* and *Wright* have been followed in other cases where CROA claims were made against auto dealers or mortgage lenders, but no credit repair organization was involved in the transaction.[51]

B. Can CROA Claims Be Arbitrated?

The question of whether CROA claims are susceptible to arbitration, or must be litigated in court, is another issue where there is a sharp division in the courts. Here, unlike the question of who can be sued under the CROA, there are decisions at the appellate level. The two cases at that level have taken similar positions, holding that CROA claims can be arbitrated. However, lower courts outside those circuits have held that the CROA's nonwaiver provision requires CROA claims to be litigated in a court. This leaves open the question of what courts elsewhere may do when faced with this issue.

In *Gay v. Creditinform*,[52] the Third Circuit United States Court of Appeals held that consumers may contractually agree to forgo judicial resolution of CROA claims in favor of arbitration. The plaintiff alleged that she entered into an agreement in order to improve her credit and that the defendant violated the CROA by requiring her to pay before the services were rendered and failing to make disclosures required by the CROA. The defendant moved to stay the case and compel arbitration, based on an arbitration provision providing:

> Any claim arising out of or relating to the Product shall be settled by binding arbitration in accordance with the commercial arbitration rules

43. *Id.* (emphasis supplied).

44. *Id.* at *12. *Accord* Henry v. Westchester Foreign Autos, Inc., 522 F. Supp.2d 610, 613 (S.D.N.Y. 2007) ("Congress' focus in enacting the CROA was on the credit repair industry, and specifically for regulation of credit repair organizations. Although this section uses the word 'person,' it is clear that it was not Congress' intent to have CROA apply to all persons, whether they are associated with credit repair or not"); Jackson v. Telegraph Chrysler Jeep, Inc., 2009 WL 928224 at *6 (E.D. Mich. Feb. 20, 2009) (same);

45. 607 F. Supp.2d 1310 (N.D. Fla. 2009).

46. *Id.* at 1312.

47. *Id.* at 1312-13.

48. *Id.* at 1313 (emphasis in original).

49. *Id.*

50. *Id.*

51. *See* Bentley v. Vesper Auto Group, Inc., 2009 WL 3125539 (E.D.N.C. Sept. 29, 2009) (auto sale, following *Lopez*); Berry v. Cook Motor Cars, Ltd., 2009 WL 1971391 (D. Md. Jun. 29, 2009) (auto sale, following *Lopez* and *Wright*); Moret v. Select Portfolio Servicing, Inc., 2009 WL 1288062 (S.D. Fla. May 6, 2009) (mortgage loan, following *Lopez* and *Wright*).

52. 511 F.3d 369 (3d Cir. 2007).

of the American Arbitration Association on an individual basis not consolidated with any other claim.[53]

The district court granted the motion.

On appeal, the Third Circuit found that the arbitration provision clearly covered any dispute over the defendant's services, including CROA-based claims.[54] It then turned to the question of whether the CROA's provisions would nevertheless prevent the matter from being arbitrated. The plaintiff argued that the CROA and a similar Pennsylvania statute[55] protected a consumer's right to assert her claims in a judicial forum, and to do so on a class action basis.[56] In support of this, she relied on the CROA's provisions concerning punitive damages in sections 1679g(a)(2) and 1679g(b), which make "several references to a 'court.'"[57] She also argued that the CROA's non-waiver provision, section 1679f, precluded waiving the right to proceed in a judicial forum. The plaintiff thus argued that CROA grants to consumers a non-waivable right to file suit in court.[58]

Noting the strong federal policy favoring arbitration expressed in the Federal Arbitration Act (FAA),[59] the court held that the party opposing arbitration must establish that the CROA embodies a congressional intent to preclude arbitration of claims brought under the Act.[60] Such an intention could be found in: (1) the text or legislative history of the subject statute; or (2) in an "inherent conflict between arbitration and the statute's underlying purposes."[61]

Examining the statutory text, the Third Circuit hewed closely to its earlier decision in *Johnson v. West Suburban Bank*,[62] where it held that nothing in another consumer protection statute, the Truth in Lending Act (TILA),[63] prevents TILA claims from being arbitrated.[64] As it did in *Johnson*, the court concluded that the CROA did not contain any language that might indicate a right to proceed in a judicial forum or an intent to preclude arbitration of CROA claims. Instead, the CROA merely recognizes that an aggrieved party may seek a remedy in court.[65]

Considering whether an "inherent conflict" might preclude arbitration, the Third Circuit stated that the plaintiff would retain the "full range of rights created by CROA" if the matter were arbitrated, so there would be no irreconcilable conflict if such claims were arbitrated.[66] Accordingly, the court held that the CROA does not create a substantive right to a judicial forum but merely recognizes the availability of a judicial forum to address perceived wrongs.

Addressing the CROA's non-waiver provision, the Third Circuit held that this provision was limited to the waiver of substantive rights. Comparing CROA's non-waiver provision to a similar provision contained in the Securities and Exchange Act and previous analyses of this issue by the United States Supreme Court, the Third Circuit noted that the Supreme Court had limited the scope of the non-waiver provision to "rights premised on the imposition of statutory duties" and, thus, the non-waiver provision did not preclude arbitration.[67] Moreover, procedural requirements, such as waiver of jurisdictional provisions, were waivable. Consequently, because no substantive right was at issue in *Gay*, the Third Circuit concluded that the CROA claims were in fact arbitrable.[68]

Two years later, in *Picard v. Credit Solutions, Inc.*,[69] the Eleventh Circuit United States Court of Appeals took up the same issue of whether CROA claims may be arbitrated. The plaintiff there contacted the defendant, a debt settlement company, to discuss a debt management plan. During the initial consultation, Credit Solutions told the plaintiff that it could reduce her debt load by negotiating a settlement and debt reductions with her creditors. The plaintiff then entered into a contract with Credit Solutions via the internet, which included an arbitration clause. Subsequently, the plaintiff's creditors began notifying her that she was in default on her accounts, and she filed for bankruptcy. Claiming that Credit Solutions was responsible for the defaults, her trustee sued under the CROA.

Credit Solutions moved to compel arbitration. The district court denied the motion on the ground that CROA claims were not arbitrable. It first rejected the argument that Credit Solutions was not a credit repair organization within the meaning of the CROA because it merely promised to help settle debt rather than correct or repair credit reports.[70] It then concluded that CROA's disclosure and non-waiver provisions barred arbitration of CROA claims.[71]

On appeal, the Eleventh Circuit followed *Gay*, holding that CROA claims are arbitrable. It noted that most, though not all, district courts had agreed with *Gay*.[72] The Eleventh Circuit agreed with

53. *Id.* at 375.

54. *Id.* at 376.

55. Pennsylvania Credit Services Act, Pa. Stat. Ann. tit. 73, §§ 2181 *et seq.* Most states have enacted credit services organization laws which also regulate the credit repair industry and their laws are recognized in the CROA at 15 U.S.C § 1679j. *See generally CROA 2003, supra* note 3, at 56-58.

56. 511 F.3d at 375.

57. *Id.*

58. *Id.*

59. 9 U.S.C. §§ 1 *et seq.*

60. 511 F.3d at 378-79.

61. *Id.* at 379.

62. 225 F.3d 366 (3d Cir. 2000).

63. 15 U.S.C. §§ 1601–1666j.

64. 511 F.3d at 376-81.

65. *Id.* at 381-82.

66. *Id.* at 382.

67. 511 F.3d at 385, citing Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 228 (1987).

68. *Id.*

69. 564 F.3d 1249 (11th Cir. 2009).

70. Reynolds v. Credit Solutions, Inc., 541 F. Supp.2d 1248, 1255-56 (N.D. Ala. 2008), *rev'd sub nom.* Picard v. Credit Solutions, Inc., 564 F.3d 1249 (11th Cir. 2009). The district court followed Cortese v. Edge Solutions, Inc., 2007 WL 2782750 at *7 (E.D.N.Y. Sept. 24, 2007), and Zimmerman v. Cambridge Credit Counseling Corp., 529 F. Supp. 2d 254, 275 (D. Mass. 2008). It rejected Plattner v. Edge Solutions, Inc., 422 F. Supp. 2d 969, 972-76 (N.D. Ill. 2006), and Hillis v. Equifax Consumer Services, Inc., 237 F.R.D. 491, 511-13 (N.D. Ga. 2006).

71. *Reynolds*, 541 F. Supp. 2d at 1259-60.

72. 564 F.3d at 1253. Noted as following *Gay* were Rex v. CSA-Credit Solutions of America, Inc., 507 F. Supp.2d 788 (W.D. Mich. 2007); Schreiner v. Credit Advisors, Inc., 2007 WL 2904098 (D. Neb. Oct. 2, 2007); and Vegter v. Forecast

(Continued on next page)

the *Gay* court that the text of the CROA neither mentions arbitration nor creates a right to sue in a judicial forum.[73] It therefore reversed the district court.

Just a few days before the Eleventh Circuit decision in *Picard* was handed down, in *Greenwood v. Compucredit Corp.*[74] a California district court rejected the analysis in *Gay* and held that the CROA bars arbitration. In *Greenwood*, the defendants marketed and issued a subprime credit card through direct mail and internet solicitations. The credit cards were marketed with the representation that the credit card could help "rebuild your credit," "rebuild poor credit," and "improve your credit rating."[75] The plaintiff alleged, on behalf of a class, that these representations and the fee structure for the credit cards violated the CROA.

The defendants moved to compel arbitration. Like the plaintiffs in *Gay* and *Picard*, the *Greenwood* plaintiff argued that the arbitration provision was void due to the CROA's anti-waiver provision. Finding *Gay* unpersuasive and finding the reasoning of two other district courts more persuasive,[76] the *Greenwood* court concluded that the CROA's "right to sue" and "non-waiver language" were "different in important respects from other statutory language that the Supreme Court found not to preclude waiver of judicial remedies."[77]

Defending this conclusion, the *Greenwood* court contrasted the CROA provisions with the statutory provisions considered in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[78] *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[79] and *Shearson/American Express, Inc. v. McMahon*,[80] three cases which had been considered by the *Gay* court where the United States Supreme Court found that arbitration was permissible under various federal laws.[81] The *Greenwood* court explained that the Supreme Court's finding in *Mitsubishi Motors* that antitrust claims were arbitrable was supported by the policy of the FAA favoring arbitration generally together with the strong policy of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards which favored arbitration "for disputes in international commerce."[82] Also, the court noted that the Sherman Act does not contain a non-waiver provision similar to the one in the CROA and that the CROA does not contain "an international component."[83]

The court distinguished *Rodriguez de Quijas* and *McMahon* on grounds that the non-waiver provisions in the Securities Act of 1933 and the Securities Exchange Act of 1934 are different from the CROA's non-waiver provision. It found that, unlike the provisions of these other laws, the CROA's non-waiver provision is "not limited to waiver of compliance with the Act."[84] Rather, it "voids the waiver of any of the rights of a consumer."[85] The court likewise distinguished *Gilmer v. Interstate/Johnson Lane Corp.*,[86] where the Supreme Court found that Age Discrimination in Employment Act claims were arbitrable, and *Green Tree Financial Corp.–Alabama v. Randolph*,[87] where it found that TILA claims were arbitrable, on similar grounds, because the CROA "specifically grants access to a judicial forum as a right and reveals no ... flexibility toward alternative methods of dispute resolution."[88]

IV. Conclusion

Although a relatively small number of cases was decided under the CROA in the first few years following its enactment in 1996,[89] CROA claims appear to have been filed with greater frequency more recently. This may have occurred because some cases have expanded liability under the Act beyond situations where a credit repair organization is actually involved, making the Act into a more general anti-fraud law wherever there is any fraud or misrepresentation involving a consumer's creditworthiness. Other cases have pulled back from that position, finding that such an expansive view of liability under the CROA is not consistent with the congressional intent. Instead, the latter cases have found that the statutory purpose is not met by imposing liability in cases where no defendant in the case or anyone else involved in the transaction meets the definition of a credit repair organization under the CROA.

All of the reported cases which consider the "any person" provision of section 1679b(a) of the CROA are at the district court level. There has been no appellate decision to date which has considered or ruled on the scope of CROA liability. It can be expected that district courts which consider this issue will continue to go in different directions until some guidance is provided on appeal.

The other notable development in CROA litigation is a split in the cases over whether CROA claims can be made the subject of arbitration. The non-waiver provision of the CROA

72. *(Continued from previous page)*

Financial Corp., 2007 WL 4178947 (W.D. Mich. Nov. 20, 2007). Noted as not following *Gay* was Alexander v. U.S. Credit Management, Inc., 384 F. Supp.2d 1003 (N.D. Tex. 2005).

73. 564 F.3d at 1255.

74. 617 F. Supp. 2d 980 (N.D. Cal. 2009).

75. *Id.* at 982.

76. *Id.* at 985-86, citing Alexander v. U.S. Credit Management, Inc., 384 F. Supp. 2d 1003, 1011 (N.D. Tex. 2005), and Reynolds v. Credit Solutions, Inc., 541 F. Supp.3d 1248, 1258 (N.D. Ala. 2008), *rev'd sub nom.* Picard v. Credit Solutions, Inc., 564 F.3d 1249 (11th Cir. 2009). When *Reynolds* was reversed, the defendants promptly moved to reconsider. *Greenwood*, No. C 08-4878 CW (N.D. Cal. Apr. 10, 2009). The district court just as promptly denied the motion. *Greenwood*, No. C 08-4878 CW (N.D. Cal. May 11, 2009). The matter is currently the subject of an interlocutory appeal. No. 09-15906 (9th Cir. Apr. 30, 2009).

77. 617 F. Supp.2d at 986.

78. 473 U.S. 624 (1985).

79. 490 U.S. 477 (1989).

80. 482 U.S. 220, 228 (1987).

81. *See Gay*, 511 F.3d at 384-85. The *Picard* court also discussed these decisions, 564 F.3d at 1255.

82. 617 F. Supp.2d at 986-87.

83. *Id.*

84. *Id.* at 987.

85. *Id.*

86. 500 U.S. 20 (1991).

87. 531 U.S. 79 (2000).

88. 617 F. Supp.2d at 988.

89. *See CROA 2003, supra* note 3, at 53-56.