No. 08-11104-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELIZABETH PICARD,

Plaintiff-Appellee,

v.

CREDIT SOLUTIONS, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF OF PUBLIC CITIZEN, INC., NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL CONSUMER LAW CENTER, AND U.S. PUBLIC INTEREST RESEARCH GROUP AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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July 30, 2008

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 21.1-1, I hereby certify that, to my knowledge, interested persons in this case are those listed in the Certificate of Interested Persons accompanying Appellee Elizabeth Picard's brief and the following persons and entities:

Gupta, Deepak

National Association of Consumer Advocates

National Consumer Law Center

Public Citizen, Inc.

U.S. Public Interest Research Group

Wolfman, Brian

Further, *amici curiae* Public Citizen, Inc., the National Consumer Law Center, the National Association of Consumer Advocates, and the U.S. Public Interest Research Group state that they are nonprofit corporations that have no parent corporations and have issued no publicly held stock. Hence, no publicly held company owns ten percent or more of their stock.

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Deepak Gupta

July 30, 2008

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STATEMENT OF THE ISSUES

1. The Credit Repair Organizations Act ("CROA") defines a "credit repair organization" as "any person" who provides, or represents that they will provide, "any service . . . for the express or implied purpose of improving any consumer's credit record, credit history, or credit rating." 15 U.S.C. § 1679a(3).

   Does a debt settlement company that promises to "help you restore bad credit to a positive credit rating" and to "repair[] bad credit" constitute a credit repair organization under this definition?

2. CROA bars "[a]ny waiver by any consumer of any protection provided by or any right of the consumer" under the Act. 15 U.S.C. § 1679f(a). The Act also mandates that credit repair organizations inform consumers that they have a "right to sue" those organizations for CROA violations. 15 U.S.C. § 1679c(a).

   Taken together, do these provisions prohibit pre-dispute agreements to force CROA claims into mandatory binding arbitration?

INTEREST OF *AMICI CURIAE*

Amici curiae—Public Citizen, Inc., the National Association of Consumer Advocates, the National Consumer Law Center, and U.S. Public Interest Research Group—are non-profit, public interest organizations concerned about protecting

consumers from abuses in the marketplace and ensuring that consumers have access to the courts when Congress so intends. A more detailed description of *amici* is set forth in the motion for leave to file this brief.

BACKGROUND

In December 2006, plaintiff Elizabeth Picard saw a television ad promoting defendant Credit Solutions's debt management services. (RE 1 at 3.) In response, Picard visited Credit Solutions's website to find out more. (*Id.*) On its website, Credit Solutions has touted its services as providing "no better solution to fixing your bad credit" and has promised to "get rid of your credit problems today" and "repair[] bad credit" and to allow customers to "improve[e] their credit score" and "restore bad credit to a positive credit rating." (RE 23 at 11.) Picard called Credit Solutions, and a representative indicated that Credit Solutions's services would "positively affect" her credit score and, within six months of completing the debt settlement program, make her credit "as good, if not better than it is now." (RE 23 at 10.) Faced with $104,349 in unsecured credit card debt, Picard signed up for a debt settlement plan with the company. (RE 1 at 3.)

Credit Solutions agreed to negotiate with Picard's creditors to reduce her debt to $41,249 over three years. Picard authorized Credit Solutions to make direct withdrawals from her bank account to pay creditors and to pay Credit Solutions $16,043 for its services. (*Id.*) A Credit Solutions representative instructed Picard,

who had never before missed a payment to any creditor, to stop paying her creditors and to notify them that Credit Solutions represented her. (RE 1 at 3-4.) Over the next four months, Credit Solutions withdrew $5,579 from Picard's account. (RE 1 at 4.) By the end of the first month, Picard began receiving calls and letters from her creditors advising her that she was in default and threatening immediate legal action. (RE 1 at 4.) Some creditors demanded immediate payment in full. (RE 1 at 4.) Picard repeatedly contacted Credit Solutions to determine the status of the promised debt reduction negotiations, but never learned what Credit Solutions had done for her. (RE 1 at 5.) A little over four months after contracting with Credit Solutions, Picard rescinded Credit Solutions's authority to make withdrawals from her bank account. (RE 1 at 3, 5.) With her accounts in default because she had relied on Credit Solutions's promised services, Picard had to file for Chapter 7 bankruptcy. (RE 1 at 4-5.)

Picard sued Credit Solutions for violations of CROA. Credit Solutions moved to compel arbitration, citing a mandatory binding arbitration clause in the contract between it and Picard. The district court denied the motion, holding that Credit Solutions was a "credit repair organization" bound by CROA and that CROA's provisions barring waiver of "any right" under the Act and identifying a "right to sue" voided the arbitration agreement. (RE 23 at 19, 25.)

SUMMARY OF ARGUMENT

Credit Solutions is a credit repair organization under CROA's plain language. On the phone with Picard and on its website, Credit Solutions represented that it would perform a service, in return for money, for the express purpose of "improving any consumer's credit record, credit history, or credit rating." 15 U.S.C. § 1679a(3). Limiting CROA's plain meaning to exclude companies like Credit Solutions would undercut important consumer protections.

Mandatory pre-dispute binding arbitration agreements are unenforceable under CROA. The statute contains an unusually broad anti-waiver provision that voids "any waiver" of "any protection" or "any right of the consumer" under the Act. *Id.* § 1679f(a). Among the "right[s] of the consumer" expressly identified by the statute is the "right to sue" for CROA violations. *Id.* § 1679c(a). The ordinary meaning of "sue" refers to a right to bring an action *in court*, not to present a dispute to a private arbitrator. Taken together, the anti-waiver and right-to-sue provisions bar pre-dispute agreements to waive access to a judicial forum.

ARGUMENT

I. CROA APPLIES TO CREDIT SOLUTIONS.

This Court should decide whether CROA applies in this case before determining whether it precludes arbitration. Ruling on this issue would clarify the law, both for consumers and for companies that offer to improve consumers' credit

records, histories, and ratings. Even if the court ultimately allows arbitration of CROA claims, it should not leave the question of CROA's reach to private arbitrators whose secret decisions will leave unresolved the question of companies' responsibilities under the Act.

Contrary to Credit Solutions's claim, the Court has "unlimited discretion" to choose which potentially dispositive issue to decide first, and accordingly can decide the question of CROA's applicability before determining whether CROA bars arbitration.[1] *See Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 995-96 (9th Cir. 2003). One of the few courts to address in the same case both the question of CROA's applicability to a particular defendant and CROA's preclusion of arbitration decided the applicability question first. *See Alexander v. U.S. Credit Mgmt., Inc.*, 384 F. Supp. 2d 1003 (N.D. Tex. 2005). In the few other cases presenting both issues, the courts did not reach the applicability question only because the defendants conceded for the purposes of their motions to compel arbitration that CROA applied. *See Gay v. CreditInform*, 511 F.3d 369, 375 n.2 (3d Cir. 2007); *Rex v. CSA-Credit Solutions of Am., Inc.*, 507 F. Supp. 2d 788, 798 n.3 (W.D. Mich. 2007) ("As Defendant has acknowledged that it is a

[1] Although *amicus* Association of Independent Consumer Credit Counseling Agencies (AICCA) claims that the Supreme Court never reached the question of the relevant statute's applicability in cases where a plaintiff claimed the statute precluded arbitration (*see* AICCA Br. at 13-14), the statutes' applicability to the defendants was not in question in the cases cited.

'credit repair organization' for the purposes of this motion, the Court can proceed directly to the question of whether claims under the CROA are arbitrable."). *But see Schreiner v. Credit Advisors, Inc.*, 2007 WL 2904098, *1, *9-11 (D. Neb. Oct. 2, 2007).

A. Under CROA's plain language, Credit Solutions is a credit repair organization.

Credit Solutions constitutes a "credit repair organization" under CROA's plain language. CROA defines a "credit repair organization" as:

> 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)[.]

15 U.S.C. § 1679a(3).

Credit Solutions fits this description. Credit Solutions does not dispute that it sells services for money via instrumentalities of interstate commerce. And Credit Solutions represented, on its website and in a phone conversation with Picard, that it would provide a service for the purpose of "improving [consumers'] credit record, credit history, or credit rating." Indeed, Credit Solutions explicitly promised to improve one of the very things listed in the statutory definition: Its website offered to "help you restore bad credit to a positive credit rating." (RE 23

at 11.) The website also touted its services as providing "no better solution to fixing your bad credit" and urged consumers to call to "get rid of your credit problems today." (*Id.*) The website promised to "enable[] clients to save money and to repay debts while improving their credit score," to "repair[] bad credit without a credit check," and to allow customers to "watch your credit score rise through our service." (*Id.*)

When Picard called Credit Solutions, a representative told her that "in the first year your credit can go down, but within six months of you being done with this program, it should be as good, if not better than it is now . . . ." (RE 23 at 10.) The representative further explained how credit scores are calculated and that paying off a credit card will "positively affect you immediately because of something called debt-to-income ratio." (*Id.*) Through these representations, Credit Solutions acknowledged that its services have the "purpose of improving any consumer's credit record, credit history, or credit rating."

Credit Solutions and its *amici* assert that CROA's text indicates that only companies that offer to "improve a consumer's past, historical, displayable, and tangible credit record" are credit repair organizations. Appellant's Br. at 33. Specifically, they trumpet a provision barring untrue or misleading statements to creditors and credit reporting agencies "with respect to any consumer's credit worthiness, credit standing, or credit capacity." 15 U.S.C. § 1679b(a)(1); *see*

Appellant's Br. at 31; AICCA Br. at 21-22; Consumer Data Industry Ass'n Br. at 30-31 ("CDIA Br."). Credit Solutions and its *amici* erroneously conclude that CROA's use of two distinct sets of undefined terms—"credit record, credit history, or credit rating" and "credit worthiness, credit standing, or credit capacity"—shows that the former terms refer to "existing, tangible, displayable credit information based on past credit behavior," while the latter terms refer to "a consumer's actual ability to obtain and manage credit now or in the future." AICCA Br. at 21-22; *see also* Appellant's Br. at 31-34; CDIA Br. at 30-31. Thus, they assert, companies that offer to improve consumers' credit "worthiness," "standing," or "capacity" cannot constitute credit repair organizations, which offer to improve credit "records," "histories," and "ratings." This reasoning, however, incorrectly presumes that a company could not offer a service that would improve both credit capacities *and* credit records.

Moreover, the canon of construction that Credit Solutions invokes—that when a legislature uses two different words in a statute it intends to accord those words different meanings—does not apply here. If, as Credit Solutions argues, "credit record" and "credit rating" referred only to "historical" data, then those terms would mean nothing more than "credit history," rendering them superfluous. *See, e.g.*, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004) (rejecting an interpretation that "would render part of the statute entirely

superfluous, something we are loath to do"). Credit "standing," "capacity," and "worthiness" may refer to a consumer's actual ability to handle new debt responsibly, while credit "record," "history," and "rating" refer to measurements that purport to reflect that actual ability. Credit Solutions claims that its services will improve these measurements. Indeed, its website explicitly says its services will "restore . . . a positive credit rating." (RE 23 at 11.)

The few courts that have limited the definition of "credit repair organizations" to companies offering to improve existing, tangible credit information did not consider CROA's applicability to companies offering to reduce debt and accordingly based their decisions in part on considerations irrelevant to the debt settlement context at issue here. For example, *White v. Financial Credit Corp.*, 2001 WL 1665386, *6 (N.D. Ill. Dec. 27, 2001), held that a debt collector's offer to "improve your credit history" did not render the debt collector a "credit repair organization" because the company would only improve the credit history by following the standard operating procedure of reporting payment to the credit bureau. That company was not offering to improve credit history in return for payment; it was merely informing debtors about a consequence of paying off their debt. *Id.* By contrast, Credit Solutions offers a service to improve credit ratings for a fee.

In a case involving a credit-score-improvement service, one district court

concluded that the defendant did not constitute a credit repair organization merely because it did no more than offer to educate consumers about calculation of credit scores and provide a simulator showing how different actions might affect a credit score. *Hillis v. Equifax Consumer Servs., Inc.*, 237 F.R.D. 491, 509-16 (N.D. Ga. 2006). The court acknowledged that the Act's definition was "sweeping," but limited the definition out of concern that applying CROA to that type of defendant could counterproductively "thwart the efforts of Congress and the FTC to increase consumer literacy regarding credit matters." *Id.* at 511, 515. Whatever the merits of that analysis, no such concern is applicable here because debt settlement companies do not promote consumer literacy.

By promising to "restore . . . a positive credit rating" and "improve their credit score," Credit Solutions itself acknowledges that its services have the express purpose of improving consumers' "credit record, credit history, or credit rating." (RE 23 at 11.) And it is the organization's "express or implied purpose," not the label it gives itself, that matters under CROA's definition of "credit repair organizations." In recognition of that fact, courts have applied CROA to companies, like Credit Solutions, that provide services that aim to improve consumers' credit ratings. *See Browning v. Yahoo!, Inc.*, 2004 WL 2496183, *2 (N.D. Cal. Nov. 4, 2004) (applying CROA to service that offered to give personalized tips on how to improve credit score, including information on what

factors may influence score); *Bigalke v. Creditrust Corp.*, 162 F. Supp. 2d 996, 998 (N.D. Ill. 2001) (applying CROA to debt collector offering to move debt from credit report in exchange for consumer paying debt). Courts often look to representations companies make about their services and have applied CROA to companies that, like Credit Solutions, state or imply that their services aim to improve "any consumer's credit record, credit history, or credit rating." *See Zimmerman v. Cambridge Credit Counseling Corp.*, 529 F. Supp. 2d 254, 274 (D. Mass. 2008) (debt management company constituted credit repair organization because it, like Credit Solutions, advertised that its services would "restore your credit rating" and "improve your credit"); *Baker v. Family Credit Counseling Corp.*, 440 F. Supp. 2d 392, 403-04 (E.D. Pa. 2006) (applying CROA to debt management company that advertised its debt consolidation plans would "help repair bad negatives on your credit report"); *Helms v. Consumerinfo.com*, 436 F. Supp. 2d 1220, 1232 (N.D. Ala. 2005) ("In short, Defendant [credit monitoring company] provides a service for money and represents that its services will improve a customer's credit rating. The plain language of the statute warrants only one conclusion: Defendant is a credit repair organization subject to the strictures of the CROA."); *Limpert v. Cambridge Credit Counseling Corp.*, 328 F. Supp. 2d 360, 364-65 (E.D.N.Y. 2004) (company offering debt management plan could constitute credit repair organization if it implied that it would "re-establish [its]

clients' spotty credit reports," even though debt management alone did not bring company under CROA); *Parker v. 1-800 Bar None, a Fin. Corp., Inc.*, 2002 WL 215530, *3 (N.D. Ill. Feb. 12, 2002) (car company's ads that offered to obtain car financing for anyone and, like Credit Solutions's website, promised to "restore your credit" were enough to subject that company to CROA); *In re Nat'l Credit Mgmt. Group*, 21 F. Supp. 2d 424, 457-58 (D.N.J. 1998) ("CROA, as evidenced by its plain language, explicitly covers" a company that did not repair credit histories, but did "represent that they will perform services, monitor, and provide advice to assist consumers [to] improve their credit ratings").

Where courts have found debt management services not subject to CROA, the defendants, unlike Credit Solutions, did not represent that their services would have a positive impact on consumers' credit and explicitly told consumers that altering credit ratings was beyond the scope of the program. *See Cortese v. Edge Solutions, Inc.*, 2007 WL 2782750, *5 (E.D.N.Y. Sept. 24, 2007); *Plattner v. Edge Solutions, Inc.*, 422 F. Supp. 2d 969, 974 (N.D. Ill. 2006). One of those decisions expressly distinguished the debt management company and a company that constituted a credit repair organization because it promised its services would "improve credit." *Plattner*, 422 F. Supp. 2d at 976 n.5. Here, too, Credit Solutions has offered to improve consumers' credit and accordingly constitutes a credit repair organization.

Applying CROA to Credit Solutions does not mean that the statute will apply to any company whose services happen to *result in* improvement in consumers' credit ratings. *See* Appellant's Br. at 29. Credit Solutions's services do not only purport to *result in* credit rating improvement; that is their stated *purpose*. Further, that purpose is not merely ancillary; rather, credit improvement is a core benefit promised by Credit Solutions in its advertisements. In that way, Credit Solutions's services differ from, for example, the financing services a car dealership offered and advertised as a way to improve credit ratings. *See Sannes v. Jeff Wyler Chevrolet, Inc.*, 1999 WL 33313134, *3 (S.D. Ohio Mar. 31, 1999) (car dealership that invited consumers to "[r]e-establish your credit" by financing car was not credit repair organization). Although the *Sannes* defendant may have touted the credit benefits of financing a car, those credit benefits were collateral effects of a car purchase; the defendant there did not even charge extra for its financing services. *Id.* By contrast, Credit Solutions's advertised service—negotiating with creditors to pay down debts—has, according to Credit Solutions itself, a primary purpose of improving a consumer's credit rating, and that is precisely what customers pay for. Applying CROA to Credit Solutions thus would not bring within the statute's coverage entities whose services only happen to improve credit, like banks that offer loan consolidation.

To be sure, congressional hearings on CROA focused on credit repair

companies that offered to improve consumers' existing, tangible credit information by removing negative entries or by giving consumers new credit identities. The statutory text does not, however, limit "credit repair organizations" to those companies, and it is the text that controls. When the text so dictates, statutes apply to entities that may not have been specifically contemplated by Congress. *See Sedima v. Imrex Co.*, 473 U.S. 479, 499 (1985) (civil RICO's text covers legitimate businesses, even though Congress's purpose was to fight organized crime); *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 211-12 (1998) (applying Americans with Disabilities Act to state prisons, even though Congress did not contemplate it; "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (internal citations omitted); *Polacsek v. Debticated Consumer Counseling, Inc.*, 413 F. Supp. 2d 539, 545-46 (D. Md. 2005) (credit counseling agencies can constitute credit repair organizations, even though not mentioned anywhere in CROA's legislative history).

In any event, CROA's drafting history and post-enactment proposals for amendment indicate that limiting the definition of "credit repair organizations" in the manner Credit Solutions suggests would run counter to congressional intent. An earlier, unenacted version of CROA defined "credit repair organizations" as entities that offered services for the purpose of (i) improving a consumer's "credit

record, credit history, or credit rating"; (ii) "removing adverse credit information that is accurate and not obsolete from the consumer's record, history, or rating"; (iii) "altering the consumer's identification to prevent the disclosure of the consumer's credit record, history, or rating"; or (iv) "providing advice or assistance" with regard to those services. H.R. 3596, 102nd Cong. § 403 (1991). If, as Credit Solutions and its *amici* assert, Congress intended that CROA would apply only to companies offering to remove accurate, non-obsolete adverse information from consumers' credit reports or to alter consumers' identities to obscure their credit histories, it would have limited the definition to the services described above in (ii) and (iii). Instead, Congress eliminated the redundant provisions and retained only the broader provision, which applies to all services that aim to "improv[e] any consumer's credit record, credit history, or credit rating," regardless of the means employed.

Since CROA's enactment in 1996, some members of Congress have introduced legislation to limit the kinds of entities that qualify as "credit repair organizations." *See* Credit Monitoring Clarification Act, H.R. 2885, 110th Cong. § 2 (2007); Financial Data Protection Act, H.R. 3997, 109th Cong. § 6 (2005). Notably, none of these proposals would exclude debt settlement companies like Credit Solutions from the Act's purview. Rather, they would only exempt certain credit monitoring and credit reporting companies. *Id.* Thus, even though Congress

is considering clarifying CROA's reach, and even though Congress is aware that, as written, CROA can apply to debt settlement companies, no one has proposed to exempt such companies from CROA.

B. Applying CROA to Credit Solutions will provide consumers needed protection and will not lead to disastrous results, as Credit Solutions and its *amici* claim.

Limiting the plain definition of "credit repair organizations" to exclude debt settlement companies would harm consumers. A recent Senate Report recognized the damage these companies inflict on consumers and detailed several stories of consumers like Picard who paid for supposed debt management plans that provided no services. *See* PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. AND GOV'T AFFAIRS, PROFITEERING IN A NON-PROFIT INDUSTRY: ABUSIVE PRACTICES IN CREDIT COUNSELING, S. Rep. No. 109-55 (2005) ("2005 Senate Report"). These companies charge exorbitant fees for programs that promise to reduce and pay off debts. *See* NAT'L CONSUMER LAW CTR., AN INVESTIGATION OF DEBT SETTLEMENT COMPANIES: AN UNSETTLING BUSINESS FOR CONSUMERS 7-9 (2005), *available at* http://www.consumerlaw.org/issues/credit_counseling/content/DebtSettleFINALREPORT.pdf. They hold consumers' money until the company believes creditors will agree to allow the consumer to pay off only a portion of the debt. *Id.* at 2. The companies advise consumers to stop making monthly payments, which can subject consumers to legal action and

other debt collection efforts. *Id.* at 5-6. Consumers can be misled into thinking money tendered will go to creditors, when the debt management companies are actually keeping the money for themselves. *See* 2005 Senate Report, at 15, 28-29. Because these consumers expect the companies will pay their creditors as promised, they, like Picard, stop making payments, their accounts fall into default, and they are forced into bankruptcy. *See id.* at 15-16, 28-29. The Senate Report discussed the hurdles to preventing these practices by ostensible non-profits—which, unlike their for-profit counterparts, are currently exempt from laws like CROA—and suggested that for-profit debt management companies are covered by CROA. *See id.* at 5.

CROA protects consumers from these companies' abuses. For instance, CROA guarantees consumers a right to cancel contracts with credit repair organizations within three days of signing and prohibits organizations from collecting payment until they fully perform the promised services. 15 U.S.C. §§ 1679e(a), 1679b(b). Consumers can recover actual and punitive damages and reasonable attorney's fees. *Id.* § 1679g(a).

Applying CROA to Credit Solutions will not, as Credit Solutions and its *amici* argue, threaten the existence of legitimate companies providing valuable services to consumers. CROA's substantive requirements—which include requirements to provide customers with a prescribed written disclosure and a

written contract, to allow customers to cancel the contract within three days, and to avoid making untrue or misleading statements, *id.* §§ 1679b-1679e—do not threaten financial ruin for legitimate companies that offer to improve consumers' credit records, histories, and ratings. Only the provision barring collecting payment before services are rendered in full could potentially affect companies that provide long-term services, like credit monitoring. For three independent reasons, this provision does not support distorting the Act's plain text to limit the definition of "credit repair organizations" only to entities that modify existing, historical credit records.

First, the bar on advance payment will not run legitimate companies out of business. Just like other businesses subject to CROA's no-advance-payment provision, companies like Credit Solutions may, if necessary, adjust their price structure to account for delay in payment. Many providers, such as physicians, plumbers, and CPAs, provide services without advance payment. If the service is legitimate and the consumer receives what she was led to expect, the consumer will pay the bill. CROA's ban on advance payment disadvantages only companies that provide sham services—services for which the consumer will decline to pay once their nature becomes clear.

Second, companies will only constitute "credit repair organizations" if they represent that they will improve credit ratings, histories, and records. Legitimate

credit monitoring providers, for example, do not need to make such representations to sell their services, which promise to maintain credit ratings by alerting consumers to inaccurate reporting and identity theft. Third, Congress was aware that this provision could apply to debt management service providers, but chose to enact it anyway. *See H.R. 1015; The Consumer Reporting Reform Act of 1993: Hearing Before the Subcomm. on Consumer Credit and Insurance of the H. Comm. on Banking, Finance and Urban Affairs*, 103rd Cong. 44 (1993) ("1993 Hearing") (statement of Chuck Rosseel, President, National Credit Group) (testifying that provision prohibiting advance payment could drive company providing debt management and credit repair services out of business because services sometimes take 8-12 months to perform).

II. CROA BARS PRE-DISPUTE MANDATORY BINDING ARBITRATION OF CLAIMS UNDER THE STATUTE.

Although the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, establishes a federal policy in favor of arbitration, Congress can insulate classes of claims from mandatory arbitration agreements. *See Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Courts can deduce a congressional intent to limit or bar arbitration of particular claims from a statute's "text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes." *Id.* at 227 (internal citations omitted). The court, not the arbitrator, must decide if the claim is arbitrable. *See Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432

F.3d 1327, 1333 (11th Cir. 2005) (questions of the "validity of the arbitration clause itself" are "by default an issue for the court, not the arbitrator"); *see generally Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (court decided whether statute voided arbitration agreement); *Rodriquez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477 (1989) (same). As we now show, CROA bars pre-dispute mandatory arbitration agreements as to claims under the Act.

A. CROA's unusually broad provision barring waiver of "any right of the consumer" under the Act voids pre-dispute waivers of the right to sue.

CROA provides:

> 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.

15 U.S.C. § 1679f(a). The Act further provides that "[a]ny 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." 15 U.S.C. § 1679f(b). Congress did not simply adopt anti-waiver language used in other statutes, but rather drafted this new and unusually broad language, which comprehensively bars "*any* waiver" of "*any* protection provided by or *any* right of the consumer under [the Act]." *Id.* § 1679f(a) (emphasis added).

The repeated use of the word "any" shows that Congress intended CROA's anti-waiver provision to have expansive reach. *See U.S. v. Clintwood Elkhorn Mining Co.*, 128 S. Ct. 1511, 1516 (2008) ("Five 'any's' in one sentence and it begins to seem that Congress meant the statute to have expansive reach."); *U.S. v. Gonzales*, 520 U.S. 1, 5 (1997) ("[T]he word 'any' has an expansive meaning . . . ."); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-89 (1980) (use of "any" constituted "expansive language [that] offers no indication whatever that Congress intended" to limit statute's reach).

Earlier versions of the bill contained a provision that would have voided "any waiver by a consumer of the protections of this title." H.R. 458, 100th Cong. § 408 (1987); H.R. 4213, 101st Cong. § 408 (1990); S. 2764, 101st Cong. § 408 (1990). Notably, Congress added the language barring waiver of "any right of the consumer under [CROA]" at the same time it added language informing consumers of their "right to sue" credit repair organizations to the required disclosure. *See* H.R. 3596, 102nd Cong. §§ 405, 408 (1991); S. 709, 104th Cong. §§ 405, 408 (1995). Because identical words in a statute are generally given identical meaning, this simultaneous addition of the "right" to sue and the bar on waiving any "rights" indicates that Congress intended to bar waiver of the right to sue. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2417 (2007) (principle that "identical words and phrases within the same statute should normally be given the

same meaning" is "doubly appropriate" where relevant phrases were inserted at same time).

Indeed, CROA expressly identifies only four "rights"—the rights to dispute inaccurate information on a credit report, to obtain a copy of one's credit report, to sue a credit repair organization, and to cancel a contract with a credit repair organization within three days of signing it. 15 U.S.C. § 1679c(a). And only two of these rights—the right to sue credit repair organizations and the right to cancel contracts within three days—do not exist independently of CROA and are accordingly "rights under [the Act]" within the meaning of the anti-waiver provision. To give effect to the word "right" in the anti-waiver provision, this Court should find that "right" refers to those things that CROA refers to as "rights," including the "right to sue."

Unlike anti-waiver provisions that the Supreme Court has found not to preclude waiver of procedural rights to sue, this provision explicitly bars waiver of "*any* protection" or "*any* right," not only waiver of "compliance" with the statute's consumer protections. *Compare* 15 U.S.C. § 1679f(a) (emphasis added), *with Rodriguez de Quijas*, 490 U.S. at 482 (Securities Act's bar on waiving "compliance with any provision" does not apply to procedural provisions), *and McMahon*, 482 U.S. at 228 (Securities Exchange Act's provision voiding agreements "to waive compliance with" Act did not bar agreement to waive access

to judicial forum). The anti-waiver provision's heading—"Noncompliance with this subchapter"—does not limit the provision to bar only waivers of compliance with substantive protections. *See* 15 U.S.C. § 1679f. In general, "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528-29 (1947); *see ASX Inv. Corp. v. Newton*, 183 F.3d 1265, 1268 (11th Cir. 1999). And, here, Congress has specifically provided that "[c]aptions and catchlines are intended solely as aids to convenient reference, and no inference as to the legislative intent with respect to any provision enacted by the [Consumer Credit Protection] Act may be drawn from them." *See* Pub. L. No. 90-321, § 502, 82 Stat. 146, 147 (May 29, 1968) (15 U.S.C. § 1601, note). Because CROA is part of the Consumer Credit Protection Act, its captions may not limit its plain meaning. *See Brady v. Credit Recovery Co.*, 160 F.3d 64, 66 (1st Cir. 1998) (citing this note in refusing to rely on caption in interpreting Consumer Credit Protection Act provision that, like CROA, was enacted after 1968).

CROA also differs from statutes that the Supreme Court and this Court have found not to preclude arbitration because it explicitly grants consumers a "right to sue." 15 U.S.C. §§ 1679c(a). By contrast, statutes that the Supreme Court has found not to bar arbitration only confer jurisdiction on federal courts or relax procedural requirements. *See Gilmer*, 500 U.S. at 29 (arbitration did not conflict

with statute's grant of concurrent jurisdiction to state and federal courts); *Rodriguez de Quijas*, 490 U.S. at 482 (statute's broad venue and service of process provisions did not establish right to sue); *McMahon*, 482 U.S. at 227 (statute providing that "[t]he district courts of the United States . . . shall have exclusive jurisdiction of violations of this title" did not preclude arbitration). Similarly, the Magnuson-Moss Warranty Act (MMWA), which this Court found not to preclude arbitration, neither expressly grants a "right to sue" nor bars "waivers" of "rights." *See* 15 U.S.C. § 2301; *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268, 1274 (11th Cir. 2002) (holding that provisions providing a private right of action and granting concurrent jurisdiction in state and federal courts did not evidence congressional intent to preclude arbitration).

Finally, CROA's bar on the enforcement of waivers "by any Federal or State court *or any other person*" does not, as Credit Solutions's *amici* suggest, indicate that Congress contemplated arbitration of CROA claims. 15 U.S.C. § 1679f(a) (emphasis added); *see* AICCA Br. at 18; CDIA Br. at 11-14. To the contrary, the reference to "any other person" was useful, if not absolutely necessary, to demonstrate Congress's intent to prohibit credit repair organizations themselves from enforcing such waivers. Moreover, where the statute describes how punitive damages should be assessed, it only says what "courts" should consider, not what "any other person" (such as arbitrators) resolving the dispute should consider. *See*

15 U.S.C. § 1679g(b).

CROA's anti-waiver provision protects consumers from adhesion contracts that would force them—often unknowingly—to waive their rights before purchasing a service. This provision precludes mandatory pre-dispute binding arbitration agreements.[2] Pre-dispute arbitration agreements are particularly troubling because the resulting arbitrations often disadvantage consumers. When disputes arise, consumers face biased decision-makers and unfair procedures in arbitration. A recent Public Citizen report analyzed data on arbitrations in California recently made available under a new state law. *See* PUBLIC CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS (2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf. This report showed that businesses prevailed over individual consumers in 94 percent of cases arbitrated before the National Arbitration Forum. *Id.* at 2. This is not surprising given that arbitrators have a strong financial incentive to rule in favor of the repeat-player companies that will choose whether or not to continue using their services in the future. Arbitration companies track how individual arbitrators rule and do not send cases to arbitrators who rule against corporate clients. *Id.*

[2] The question whether CROA's anti-waiver provision would bar post-dispute agreements to arbitrate or settle claims is not before the Court. Post-dispute waivers of the right to sue do not pose as great a threat to consumers because they are neither buried in legalistic fine print nor offered as part of a take-it-or-leave-it package, and because consumers generally enter them with the advice of counsel.

(describing how one arbitrator, a Harvard Law School professor, was blackballed after she awarded consumer $48,000 in case filed by credit card company).

On top of the bias caused by arbitrators' financial incentives, arbitration lacks procedural safeguards that guarantee fair adjudication. Arbitrators often make decisions solely on the basis of documents produced by the company, sometimes even without the consumer's knowledge. *Id.* at 4. Hearings are not open to the public or recorded, and consumers have very limited right to discovery. *Id.* Arbitrators rarely issue written decisions, and the few written decisions they do provide are kept secret. *Id.* Appeal is nearly impossible. *Id.* CROA protects vulnerable consumers from being forced into this process by invalidating pre-dispute agreements that would waive consumers' right to sue.

B. CROA protects consumers from mandatory pre-dispute binding arbitration agreements by guaranteeing their right to sue.

CROA requires credit repair organizations to provide customers with a written disclosure informing them, among other things, that, "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act." 15 U.S.C. § 1679c(a). In common usage, to "sue" means to bring a claim in court, not in an alternative private forum. According to Black's Law Dictionary, "sue" means to "institute a lawsuit," and a "lawsuit" is "any proceeding by a party or parties against another *in a court of law*." BLACK'S LAW DICTIONARY 905, 1473, 1475 (8th ed. 2004) (defining "lawsuit," "sue," and "suit") (emphasis added).

The Third Circuit's conclusion in *Gay v. CreditInform* that the "right to sue" can mean a right to bring suit in a judicial *or arbitral* forum strains the plain meaning of the word "sue." *See Gay*, 511 F.3d at 377 n.4. Credit Solutions and its *amici* have pointed to no case other than *Gay* that distorts the plain meaning of "sue" in this way. By contrast, numerous court opinions recognize that "suing" or "bringing suit" is distinct from submitting a claim to arbitration. *See, e.g., Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 294 (1995) ("[Section] 4 holds the defendants to their promise to submit to arbitration rather than making the other party sue them."); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 (1974) ("[S]ome employees may elect to bypass arbitration and institute a lawsuit."); *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228, 231 (1972) ("[I]t would seem that the worker would have a choice to sue under the statute *or* to proceed to arbitration on his contractual claim arising out of the same dispute.") (emphasis added); *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1317 (11th Cir. 2002) ("Because Braun and AA had no agreement to arbitrate, the only way for Braun to recover from AA was to sue."); *E.C. Ernst, Inc. v. City of Tallahassee*, 527 F. Supp. 1141, 1142 (N.D. Fla. 1981) ("The plaintiff in that case elected to sue rather than arbitrate as the contract allowed."). These cases indicate that, in common parlance, to "sue" means to invoke a judicial forum.[3]

[3] The common understanding of "sue" is particularly significant here because

By requiring credit repair organizations to inform consumers of their "right to sue" for violations of the Act, CROA grants consumers the right to bring CROA claims in court. The fact that this "right to sue" language is in the prescribed disclosure language, rather than in some other statutory provision, does not matter; it would be absurd to conclude that Congress required credit repair organizations to inform consumers they had a "right" they do not actually have.

Few courts have addressed whether CROA confers a right to sue. Two courts have recognized that the plain meaning of "sue" refers exclusively to a judicial forum, while three courts (including one judge in Michigan who issued two decisions) have concluded that CROA's reference to a "right to sue" does not establish a right to sue in court. *Compare* (RE 23 at 25) (recognizing that "sue" refers to a judicial forum), *and Alexander*, 384 F. Supp. 2d at 1011 (same), *with Gay*, 511 F.3d at 376-77 (finding that "right to sue" does not mean a right to sue in court), *Vegter v. Forecast Fin. Corp.*, 2007 WL 4178947, *5 (W.D. Mich. Nov. 20, 2007) (same), *Schreiner*, 2007 WL 2904098, at *11 (same), *and Rex*, 507 F. Supp. 2d at 798-99 (same). Of the courts finding no right to a judicial forum, only the

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Congress intentionally chose that language because it would be understandable to consumers. *See Credit Repair Organizations Act: Hearing on H.R. 458 Before the Subcomm. on Consumer Affairs and Coinage of the Comm. on Banking, Fin. and Urban Affairs*, 100th Cong. 174-75 (1988) (letter from Federal Trade Commission Chairman Daniel Oliver to Rep. Frank Annunzio) (encouraging drafters to include in the disclosure easy-to-understand language informing consumers of their right to sue).

Western District of Michigan thoroughly analyzed the issue. *See Rex*, 507 F. Supp. 2d at 798-99; *see also Vegter*, 2007 WL 4178947, at *5 (following *Rex*). That court incorrectly concluded that the disclosure's mention of the "right to sue" did not *confer* any right, but merely *recognized* a right implicit in CROA's provision establishing civil liability, which does not specify a forum for CROA claims. *Id.* The court accordingly failed to give effect to the plain meaning of "sue" and absurdly suggested that Congress required companies to give consumers notice of a right they do not actually have.

The other two courts barely addressed whether the disclosure's "right to sue" language established a right to sue in court. For example, the Third Circuit in *Gay* only addressed the "right to sue" disclosure language in a brief footnote, and spent the bulk of its analysis explaining why multiple references to the word "court" in the Act's section on punitive damages do not establish the right to a judicial forum. *See Gay*, 511 F.3d at 376-77. The court did not provide any basis for holding that "sue" can mean "arbitrate." *Id.* at 377 n.4. The other court simply adopted the *Rex* analysis wholesale, even though the plaintiff before it did not argue that CROA precluded arbitration and did not brief the issue. *See Schreiner*, 2007 WL 2904098, at *11.

Congress provided in CROA that consumers have a "right to sue" for violations of the Act and prohibited "any waiver" of "any right" under the Act.

CROA thus bars consumers from waiving their right to sue and renders Credit Solutions's arbitration agreement invalid.

CONCLUSION

The Court should affirm the district court's decision denying Credit Solutions's motion to compel arbitration on the grounds that CROA applies to Credit Solutions and precludes arbitration of claims under the Act.

Respectfully submitted,

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July 30, 2008

[*] Counsel acknowledge the valuable assistance of Kristin Bateman, a third-year student at Harvard Law School, in the preparation of this brief.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 6,980 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

July 30, 2008 _____

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CERTIFICATE OF SERVICE

I hereby certify that on this date I have filed and served the foregoing brief by causing an original and six copies to be sent by first-class mail, postage pre-paid to the Clerk of the Court, and causing one copy to be sent in the same manner to each of the following counsel:

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