



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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May 1, 2019

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Re: *Commonwealth of Virginia, ex. Rel. Mark R. Herring, Attorney General v.
Net Credit Financial Solutions of Utah, LLC*, Case No. CL-2018-6258

Dear Counsel:

This matter is before the Court on Net Credit Financial Solutions of Utah's ("Net Credit") Motion to Dismiss or to Compel Arbitration. Net Credit contends that certain portions of this litigation should be dismissed or stayed since the individual borrowers signed arbitration agreements with Net Credit, which would preclude the Commonwealth of Virginia's ("Commonwealth") ability to obtain relief in this matter. The Court is called upon to decide one central issue:

Whether the Commonwealth may pursue litigation against Net Credit on behalf of individuals to enforce the Virginia Consumer Protection Act, Virginia Code §§ 59.1-196 et seq., notwithstanding that the individual borrowers signed binding arbitration agreements with Net Credit?

OPINION LETTER

After considering the pleadings and oral arguments presented by Counsel, the Court finds that the existence of arbitration agreements between Net Credit and individual borrowers does not preclude the Commonwealth from filing this action. Although the borrowers made agreements to pursue their claims with Net Credit through arbitration, the Commonwealth is not a party to those agreements, and has statutory authority to proceed with this action.

I. BACKGROUND

The present Motion to Dismiss stems from loan agreements entered into between Net Credit and private borrowers. The Commonwealth's Complaint alleges several claims, including an allegation that Net Credit violated the Virginia Consumer Protection Act ("VCPA") by misrepresenting the legality of charging more than twelve percent annual interest, among other misrepresentations. *See* Compl. ¶76 (a)-(g). Net Credit is a Chicago-based internet lender that has allegedly provided closed-end installment loans to over 47,000 Virginia consumers at annual interest rates ranging from 35% to 155% between 2012 and 2018. *Id.* Net Credit's contracts with those consumers included mandatory arbitration provisions. In its Complaint, the Commonwealth is seeking restitution, civil penalties, attorneys' fees, and injunctive relief. This Court is called upon to decide whether the Commonwealth may pursue litigation against Net Credit to enforce the VCPA, Virginia Code §§ 59.1-196 et seq., although the borrowers signed binding arbitration agreements with Net Credit.

II. STANDARD OF REVIEW

This Court has jurisdiction to determine whether parties are bound to arbitration. "[I]t is the province of the courts to determine the threshold question of arbitrability, given the terms of the contract between the parties. This is so because the extent of the duty to arbitrate, just as the initial duty to arbitrate at all, arises from contractual undertakings. *Doyle & Russell, Inc. v. Roanoke Hospital Assoc.*, 213 Va. 489, 494 (1973). However, a "party cannot be compelled to submit to arbitration unless he has first agreed to arbitrate." *Id.* Whether there has been an agreement to arbitrate on a given issue is a matter of contract interpretation subject to the determination of the courts. *Id.*

III. ARGUMENTS

A. Defendant's Argument

Net Credit contends that the Commonwealth is bound by the arbitration agreements made by the individual borrowers, and thus should be compelled to arbitrate the issues raised in its Complaint. Each loan agreement in question contains an arbitration provision requiring that any disputes between Net Credit and the individual borrowers be resolved by binding arbitration. The Commonwealth cannot assert these claims on behalf of the individual borrowers and then ignore the arbitration agreement between Net Credit and the individual borrowers. Net Credit argues that the relevant case law contradicts the Commonwealth's position. In *Olde Discount Corp. v. Tupman*, the Third Circuit addressed whether the securities commissioner could pursue remedies

on behalf of individuals who had contractually agreed that such claims would be subject to mandatory arbitration. 1 F.3d 202 (3d Cir. 1993). Since the matter would be subject to arbitration if brought by the individuals themselves, the commissioner could not be granted the ability to circumvent arbitration. *Id.* at 210. That court decided that to allow the commissioner to pursue litigation would be to render the arbitration agreement a nullity. *Id.* This logic has been subsequently relied upon in the Federal District Court in Delaware. *Ropp v. 1717 Capital Mgmt. Co.*, 2004 WL 93945, at *2 (D. Del. Jan. 14, 2004).

Net Credit argues that *EEOC v. Waffle House*, 534 U.S. 279 (2002) is not dispositive of the matter at hand. *Waffle House* held that the EEOC could not be bound by arbitration provisions between employers and employees, but its value does not extend beyond the area of employment disputes. The VCPA places individuals in control of their own cases, expressly providing for a private right of action by individuals. Va. Code § 59.1-204. Unlike in EEOC actions, both individuals and the Commonwealth may bring separate actions under the VCPA, and it contains no statutory mechanism to prevent duplicative litigation.

B. The Commonwealth's Response

The Commonwealth argues that it is not subject to the arbitration requirement because it was not a party to the arbitration agreements. "It goes without saying that a contract cannot bind a non-party." *EEOC v. Waffle House, Inc.* 534 U.S. 279, 294 (2002). Although *Waffle House* involved a dispute with the EEOC, the VCPA bears many resemblances to the EEOC-enforced Title VII. The Attorney General bears the primary burden of litigation for VCPA claims, like the EEOC does for employment-related claims. Just like in the EEOC process, when a government agency files a suit under the VCPA, the statute of limitations applicable to private actions is tolled, permitting consumers to defer pursuing individual claims. Va. Code § 59.1-204.1(B). The Commonwealth is not merely a proxy for individuals' claims, and it maintains control over its own cases. The contradictory cases cited by Net Credit are either not binding or precede the Supreme Court's *Waffle House* decision.

IV. ANALYSIS

A. The Commonwealth Possesses Statutory Authority to Pursue Litigation

The General Assembly has set forth plain language supporting the Commonwealth's position. The foundation for the support begins with the "intent" of the VCPA:

It is the intent of the General Assembly that this chapter shall be applied as remedial legislation to promote fair and ethical standards of dealings between suppliers and the consuming public.

Va. Code § 59.1-197.

When the General Assembly provides language in “clear and unmistakable terms,” it must be followed. *Halifax Corp. v. Wachovia Bank*, 268 Va. 641, 657, 604 S.E.2d 403, 410 (2004). “When a statute’s language is plain and unambiguous, we are bound by the plain meaning of that language.” *Mozley v. Prestwould Bd. of Directors*, 264 Va. 549, 554, 570 S.E.2d 817, 820 (2002) (citing *Indus. Dev. Auth. v. Bd. of Supervisors*, 263 Va. 349, 353, 559 S.E.2d 621, 623 (2002); *Earley v. Landsidle*, 257 Va. 365, 370, 514 S.E.2d 153, 155 (1999)). “Therefore, when the General Assembly has used words of a plain and definite import, courts cannot assign to them a construction that would be tantamount to holding that the General Assembly intended something other than that which it actually expressed.” *Id.* (citing *Vaughn, Inc. v. Beck*, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001); see *Advanced Marine Enters., Inc. v. PRC Inc.*, 256 Va. 106, 125, 501 S.E.2d 148, 159 (1998)). Here, the plain language of Va. Code § 59.1-197 illustrates the General Assembly’s intent that the statute be applied to remedy unfair and unethical dealings between suppliers and consumers.

The Commonwealth has statutory authority to pursue the claims through litigation. Virginia Code § 59.1-205 permits a circuit court in a VCPA case to:

Make additional orders or decrees as may be necessary to restore to any identifiable person any money or property, real, personal, or mixed, tangible or intangible, which may have been acquired from such person by means of any act or practice declared to be unlawful in §59.1-200 or 59.1-200.1, provided, that such person shall be identified by order of the court within 180 days from the date of the order permanently enjoining the unlawful act or practice.

Thus, Va. Code § 59.1-205 gives this Court the authority to issue injunctions as individual remedies. Va. Code § 59.1-203 provides that only the Commonwealth or an agent of the Commonwealth may bring an action for an injunction in the framework of the VCPA. The fact that only the Commonwealth may obtain injunctive relief and that the Court is authorized to grant it for individuals insinuates that the Commonwealth may pursue such relief on the part of individual borrowers. If the Commonwealth is authorized to seek injunctive relief under the VCPA on behalf of citizens, then it follows that it may pursue other remedies on behalf of individual borrowers as well.

Finally, the only statute in the VCPA that references arbitration, Va. Code § 59.1-202, prohibits any requirement that the Attorney General submit to arbitration to resolve disputes over its settlements. “Nothing in this chapter shall be construed to authorize or require the Commonwealth, the Attorney General, an attorney for the Commonwealth or the attorney for any county, city or town to participate in arbitration of violations under this section.” §59.1-202.

Net Credit’s arguments that the Commonwealth is seeking to obtain damages for individuals and might subject it to “double litigation” are incorrect. Instead, the Commonwealth is seeking the following relief as a result of a violation of the VCPA:

- “A. That the Court permanently enjoin Defendant and its officers, directors, members, managers, employees, agents, successors and assigns from violating {section} 59.1-200 of the VCPA pursuant to Virginia Code §59.1-203;
- B. That the Court grant judgment against the Defendant and award to the Commonwealth all sums necessary to restore to any consumers the money or property which may have been acquired from them by Defendant in connection with its violation of §59.1-200 of the VCPA pursuant to Virginia Code §59.1-205;
- C. That the Court enter any additional orders or decrees as may be necessary to restore to any consumers the money or property which may have been acquired from them in connection with its violation of § 59.1-200 of the VCPA pursuant to Virginia Code § 59.1-205;
- D. That the Court grant judgment against the Defendant and award to the Commonwealth civil penalties of up to \$2,500.00 per violation for each willful violation of § 59.1-200 of the VCPA pursuant to Virginia Code § 59.1-206(A), the exact number of violations to be proven at trial;
- E. That the Court grant judgment against the Defendant and award to the Commonwealth its costs, reasonable expenses incurred in investigating and preparing the case up to \$1,000.00 per violation of § 59.1-200 of the VCPA, and attorney’s fees pursuant to Virginia Code § 59.1-206 (C); and
- F. Grant such other and further relief as this Court deems equitable and proper.”

(See Compl., at 13).

Net Credit’s concern regarding duplicitous recovery is also rebutted by the Court’s ability to prevent such an outcome. “Courts can and should preclude double recovery.” *Waffle House*, 534 U.S. at 297. Should Net Credit become aware of both the individual borrowers and the Commonwealth seeking the same recovery, it may then petition the Court for relief. Since such duplicitous recovery has not yet occurred or been threatened, the issue is not ripe for the Court to consider at this time. Although the VCPA does not statutorily prohibit consumers from pursuing individual claims while the Commonwealth’s lawsuit is pending, Net Credit could obtain the same result through other means. It could follow the actions of the litigants in *In re: Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 2013 U.S. Dist. LEXIS 96449, who successfully moved the court to preclude double recovery.

B. The Binding Case Law Supports the Commonwealth’s Ability to Pursue Litigation

The United States Supreme Court has provided guidance on the ability of a government entity to pursue litigation to enforce its laws, even when affected individuals agreed to arbitrate the same disputes. In *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002), the Court allowed the EEOC to pursue employment discrimination claims through litigation, even though the individual employees had agreed to arbitration. In making this decision, the Court did not focus specifically on the structure of the EEOC, but rather on the fact that the Commission was not privy to the agreements that had been made: “[i]t goes without saying that a contract cannot bind a non-party.” *Id.* at 294. Here, the Commonwealth was not a party to any of the arbitration

agreements made between individual borrowers and Net Credit. Pursuant to the Court's rationale and holding in *Waffle House*, the Commonwealth may not be bound by provisions in contracts it did not agree to. Thus, the Commonwealth is free to pursue these claims through litigation.

V. CONCLUSION

For the foregoing reasons, the Court denies Net Credit's Motion to Dismiss or to Compel Arbitration.

Sincerely,



Daniel E. Ortiz
Circuit Court Judge