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PRODUCT LIABILITY—ARBITRATION

# Are Claims Under the Magnuson-Moss Warranty Act Exempt from Arbitration?



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As the U.S. Supreme Court recently pronounced, it is ''beyond dispute'' that the Federal Arbitration Act ''was designed to promote arbitration.'' *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749, 79 U.S.L.W. 4279 (U.S. 2011). Arbitration benefits consumers and businesses alike because it is faster, cheaper, more accessible, and less adversarial than litigation. These advantages make arbitration a particularly appropriate means for resolving product-warranty disputes. In the absence of enforceable arbitration agreements, the Supreme Court has explained, ''the typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set)'' would be left ''without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery.'' *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

For these reasons, many businesses have entered into agreements with their customers to resolve warranty disputes through arbitration, including disputes arising under the federal Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq*. But despite the Supreme Court's repeated endorsements of arbitration, lower courts are divided over whether MMWA claims may be arbitrated. Although most courts have concluded that MMWA claims are subject to arbitration, a growing minority—most recently joined by the Ninth Circuit—has concluded otherwise. In light of the deepening conflict over this important issue, the Supreme Court should, and likely will, resolve the question when presented with an appropriate case. As we discuss in this article, the Su-

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preme Court should conclude that MMWA claims can be arbitrated.

## The Growing Conflict Over Arbitration of MMWA Claims

Most appellate courts that have addressed the issue—including the U.S. Courts of Appeal for the Fifth and Eleventh Circuits, as well as the state supreme courts in Illinois, Texas, Michigan, and Alabama—have held that MMWA claims are arbitrable. *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 479 (5th Cir. 2002); *Davis v. Southern Energy Homes Inc.*, 305 F.3d 1268, 1275 (11th Cir. 2002); *Southern Energy Homes Inc. v. Ard*, 772 So. 2d 1131, 1135 (Ala. 2000) (per curiam); *Borowiec v. Gateway 2000 Inc.*, 808 N.E.2d 957, 965-66 (Ill. 2004); *Abela v. General Motors Corp.*, 677 N.W.2d 325, 327-28 (Mich. 2004); *In re American Homestar of Lancaster Inc.*, 50 S.W.3d 480, 483-93 (Tex. 2001).

But some courts—including the Mississippi Supreme Court and Maryland's highest court—have refused to enforce these agreements. *Koons Ford of Baltimore Inc. v. Lobach*, 919 A.2d 722 (Md. 2007); *Parkerson v. Smith*, 817 So. 2d 529 (Miss. 2002) (en banc); *see also, e.g., Rickard v. Teynor's Homes Inc.*, 279 F. Supp. 2d 910, 921 (N.D. Ohio 2003); *Browne v. Kline Tysons Import Inc.*, 190 F. Supp. 2d 827, 831 (E.D. Va. 2002).

Most recently, a divided panel of the Ninth Circuit joined the minority position in *Kolev v. Euromotors West/The Auto Gallery*, 658 F.3d 1024, 80 U.S.L.W. 377 (9th Cir. 2011), *pet. for reh'g en banc filed*, No. 09-55963 (9th Cir. Oct. 4, 2011). In an opinion authored by Judge Stephen Reinhardt, the majority held that claims under the MMWA cannot be arbitrated. *Id.* at 1025-31. The court relied heavily on Federal Trade Commission regulations that had reached such a conclusion.

Judge N. Randy Smith dissented, concluding that the text, history, and purpose of the MMWA do not reveal any congressional intent to restrict arbitration and that the FTC regulations are unworthy of judicial deference. *Kolev*, 658 F.3d at 1031-38.

The conflict over whether MMWA claims may be arbitrated turns on two key questions. The first question is whether the MMWA meets the test the Supreme Court has adopted for determining whether Congress intended to exempt a particular federal statutory claim from arbitration. The second question is whether the FTC regulations interpreting the MMWA to forbid arbitration are entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

## Did Congress Intend to Exempt Warranty Claims From the Requirement That Arbitration Agreements Be Enforced?

*Kolev*—and other decisions adopting the minority view—cannot be reconciled with the Supreme Court's decisions confirming that Congress must speak clearly if it intends to declare a statutory claim to be non-arbitrable. As the Supreme Court recently reiterated, all federal statutory claims are presumed to be fully arbitrable ''unless the FAA's mandate has been 'overridden by a contrary congressional command.' '' *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669, 80 U.S.L.W. 4034 (U.S. 2012) (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)); *see also, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 628-29 (1985) (antitrust claims are arbitrable in ''the absence of any explicit support for such an exception'' in the Sherman Act). Moreover, ''[t]he burden is on the party opposing arbitration . . . to show that Congress *intended* to preclude a waiver of judicial remedies for the statutory rights at issue.'' *McMahon*, 482 U.S. at 227 (emphasis added). That intent must be ''discernible from the text, history, or purposes of the statute.'' *Id.*

Applying this test, the Supreme Court has not found any federal statutory claim to be non-arbitrable in nearly six decades. To the contrary, the court has consistently rejected such arguments, allowing arbitration to go forward for claims arising under a wide variety of federal statutes. *See CompuCredit*, *supra* (Credit Repair Organizations Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (Age Discrimination in Employment Act of 1967); *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989) (Securities Act of 1933); *McMahon*, *supra* (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors*, *supra* (Sherman Act); *see also Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000) (noting parties' agreement that the Truth in Lending Act does not ''evince[] an intention to preclude a waiver of judicial remedies''). In fact, the sole decision in which the Supreme Court held that a federal statute—the Securities Act of 1933—precluded the arbitration of claims was later overruled by the Supreme Court. *See Rodriguez de Quijas*, 490 U.S. at 479-85 (overruling *Wilko v. Swan*, 346 U.S. 427 (1953)).

**Lower courts are divided over whether Magnuson-Moss Warranty Act claims may be arbitrated. In light of the deepening conflict over this important issue, the U.S. Supreme Court should, and likely will, resolve the question when presented with an appropriate case.**

The Ninth Circuit's decision in *Kolev*, like other decisions refusing to allow binding arbitration of MMWA claims, is inconsistent with this line of Supreme Court precedent—including the Supreme Court's intervening decision in *CompuCredit*.

**Lack of Express Congressional Intent.** At the outset, the Ninth Circuit correctly recognized that the MMWA does not itself directly speak to whether warranty claims may be subject to pre-dispute arbitration agreements. *Kolev*, 658 F.3d at 1026. But it drew the wrong conclusion from that fact: As the Fifth Circuit has explained, congressional silence alone should end the case. Under the *McMahon* test, when ''the text, legislative history, and purpose of the MMWA do not evince a congressional intent to bar arbitration'' of warranty claims, the FAA's ''clear congressional intent in favor of

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enforcing valid arbitration agreements controls.'' *Walton*, 298 F.3d at 478. Indeed, the Supreme Court just this year reiterated in *CompuCredit* that when a statute is ''silent'' on whether claims may be committed to arbitration, ''the FAA requires the arbitration agreement to be enforced according to its terms.'' 132 S. Ct. at 673.

The Ninth Circuit, however, took a narrower view of *McMahon*. *See Kolev*, 658 F.3d at 1029-30. In the *Kolev* majority's view, *McMahon* held ''only'' that ''the FAA established a rebuttable presumption in favor of arbitration'' that may be overcome by a federal agency's reasonable construction of the statute. *Id.* at 1029. The majority observed that the FTC previously concluded—once in 1975 and again in 1999—that binding arbitration is incompatible with the MMWA. *Id.* at 1026-27 (citing 40 Fed. Reg. 60,168, 60,210-11 (Dec. 31, 1975); 64 Fed. Reg. 19,700, 19,708-09 (Apr. 22, 1999)). Accepting this interpretation as controlling, the Ninth Circuit viewed the case as presenting an ''apparent conflict'' between two statutes—the FAA and the MMWA—and held that the FTC's interpretation of the MMWA trumped the FAA. *Id.* at 1029-30.

**The Ninth Circuit's Approach gives short shrift to the Federal Arbitration Act.**

That approach gives short shrift to the FAA. Although a statute such as the FAA may be overridden by a subsequent federal statute, it is ''*Congress itself*'' that must ''evince[] an intention'' to do so. *Mitsubishi Motors*, 473 U.S. at 628 (emphasis added). And *CompuCredit* emphasizes that, when a statute is ''silent'' with respect to arbitration, such silence does not override the FAA's requirement that arbitration agreements be enforced. 132 S. Ct. at 673. Nor does an agency interpretation constitute the ''contrary *congressional* command'' required by *McMahon*. 482 U.S. at 226 (emphasis added); *see also Walton*, 298 F.3d at 479.

Moreover, the Ninth Circuit's decision cannot be defended on the ground that Congress supposedly ''delegated rulemaking authority under the statute to'' the FTC. *Kolev*, 658 F.3d at 1025. The MMWA encourages warrantors to establish non-binding ''informal dispute settlement mechanisms'' (IDSMs) as a prerequisite to litigation, 15 U.S.C. § 2310(a)(1), and vests the FTC with explicit statutory authority to ''prescribe rules setting forth minimum requirements for any'' IDSM, *id.* § 2310(a)(2). But—as the dissenting judge in *Kolev* recognized—nothing in the MMWA gives the FTC power to regulate *other* non-judicial remedies, such as binding arbitration. *See Kolev*, 658 F.3d at 1032, 1034 (Smith, J., dissenting). Binding arbitration ''generally is understood to be a *substitute* for filing a lawsuit, not a prerequisite,'' and therefore ''fall[s] outside the bounds of the MMWA and of the FTC's power to prescribe regulations.'' *Walton*, 298 F.3d at 475, 476; *see also Kolev*, 658 F.3d at 1033 (Smith, J., dissenting) (''[A]rbitration [is] a binding *alternative* to litigation that operates completely outside the optional IDSM procedures available under the MMWA.'').

Further, nothing in the MMWA delegates the FTC power to override the FAA—an entirely separate statute. Had Congress instead meant to grant the FTC an expansive power to prohibit arbitration, ''it would have done so in a manner less obtuse'' than the narrow IDSM provision, which never so much as *mentions* arbitration. *CompuCredit*, 132 S. Ct. at 672. In *CompuCredit*, the Supreme Court pointed to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), explaining that, when Congress decided to delegate the power to regulate or prohibit arbitration in certain financial services contracts to the Consumer Financial Protection Bureau, it did so in express and unmistakable language. *See* 132 S. Ct. at 672 (citing 12 U.S.C. § 5518(b) (2006 Supp. IV)). The MMWA, by contrast, lacks any comparable language—or, for that matter, any discussion of arbitration at all. The MMWA's narrow grant of authority to the FTC to regulate non-binding IDSMs does not evince a congressional intent to allow the FTC to decide the different—and far broader—issue of whether warranty claims may be committed to binding arbitration.

**No Statutory Reference to Arbitration.** Some other courts that have taken the minority view have paid greater attention to *McMahon* and the FAA. But they have nonetheless reached the mistaken conclusion that the MMWA *does* demonstrate a congressional intent to preclude arbitration because they have misread the MMWA's text, history, and purpose. The Maryland Court of Appeals' decision in *Koons Ford* represents the most comprehensive articulation of this position.

According to the *Koons Ford* court, the MMWA by its own terms regards arbitration merely as one of the ''informal dispute settlement mechanisms'' that, under the statute, may be offered as a prerequisite to, but may not substitute for, litigation. 919 A.2d at 736. Yet that argument ignores the plain text of the statute, which does not contain a single reference to ''arbitration,'' much less declare it to be an ''informal dispute settlement mechanism.'' Indeed, the Supreme Court rejected similar arguments in *Gilmer*, concluding that binding arbitration is entirely ''consistent with'' a provision of the Age Discrimination in Employment Act that directed the EEOC ''to pursue 'informal methods of conciliation, conference, and persuasion' '' to resolve statutory claims. 500 U.S. at 29 (quoting 29 U.S.C. § 626(b)). Thus, the fact that a statute authorizes informal, non-binding methods of dispute resolution does not, by negative implication, preclude binding arbitration agreements.

**Because the FTC has no authority to regulate on this issue, its interpretations are not entitled to any judicial deference.**

Nor does the legislative history of the MMWA support the minority viewpoint. The legislative history, like the statute's text, simply indicates that Congress intended ''informal dispute settlement procedures'' to be a prerequisite, not a bar, to further pursuit of legal remedies under the statute. It does *not* indicate that Congress intended to preclude binding arbitration. *E.g.*, *Walton*, 298 F.3d at 476-77; *Davis*, 305 F.3d at 1275-76. In fact, the most apt evidence in the legislative history

can be found in a Senate report that describes an earlier version of the bill that became the MMWA. That report states that Congress intended for '' 'warrantors of consumer products . . . to establish informal dispute settlement mechanisms that take care of consumer grievances *without aid of litigation or formal arbitration*.' '' *In re American Homestar*, 50 S.W.3d at 488 (quoting S. Rep. No. 91-876, at 22-23 (1970)) (emphasis by the court). As the Texas Supreme Court explains, ''[t]his passage arguably demonstrates that Congress contemplated a consumer's resort to courts *or* binding arbitration if the informal dispute settlement mechanism did not resolve the dispute. Or, at a minimum, it shows [that] the legislative history is ambiguous.'' *Id.* at 488-89. In light of this legislative history, *Koons Ford* and similar decisions are mistaken in concluding that Congress ''intended to preclude a waiver of judicial remedies,'' *McMahon*, 482 U.S. at 227.

Finally, the *Koons Ford* court suggested that the arbitrability of MMWA claims should be judged against the FAA as it was interpreted at the time of the MMWA's enactment in 1975, rather than against the FAA as it is understood today. 919 A.2d at 735-37. In the court's view, Congress would have thought arbitration inapplicable to federal statutory claims before the 1980s, when the Supreme Court began to take a more expansive view of the FAA. *Id.* at 729-30, 736-37. Even if that premise were correct, however, this logic already has been rejected implicitly by numerous Supreme Court opinions, including *Gilmer* (permitting arbitration of claims under a federal statute enacted in 1967) and *McMahon* (claims under federal statutes enacted in 1934 and 1970).

In short, none of the courts taking the minority view—whether under the *Kolev* approach or the *Koons Ford* approach—has offered any compelling reason to conclude that Congress intended to make MMWA claims non-arbitrable. Absent any such congressional command overriding the FAA, the *McMahon* rule requires that binding arbitration agreements be enforced for MMWA claims just as they are for other federal statutory claims.

## Are FTC Regulations Concluding That MMWA Claims Are Unsuitable for Arbitration Entitled to *Chevron* Deference?

Just as the Ninth Circuit relied on FTC regulations to reach its holding, *Koons Ford* invoked the FTC's interpretation as additional support for its conclusion. *See* 919 A.2d at 732, 735, 737. Both courts were wrong to rely on the FTC's interpretation of the MMWA.

We have already explained why, under the *McMahon* rule, courts cannot rely on an *agency interpretation* of one statute to override an earlier congressional enactment such as the FAA. But even if it *were* sometimes permissible for an agency interpretation to override the FAA, it still would not be appropriate here, because the FTC's interpretation of the MMWA to prohibit binding arbitration does not qualify for *Chevron* deference for three reasons.

*First*, as we have explained, the FTC's statutory authority to promulgate regulations under the MMWA is limited to prescribing rules governing IDSMs. Congress has not authorized the FTC to regulate *other* nonjudicial remedies, such as binding arbitration, or to interpret any other provision of the MMWA. And Congress certainly has not authorized the FTC or any other agency to issue official interpretations of the FAA. Because the FTC has no authority to regulate on this issue, its interpretations are not entitled to any judicial deference. *See United States v. Mead Corp.*, 533 U.S. 218, 229-32 (2001); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990); *see also Kolev*, 658 F.3d at 1035 (Smith, J., dissenting).

*Second*, the FTC's interpretation is impermissible because Congress already ''has directly spoken to the precise question at issue.'' *Chevron*, 467 U.S. at 842. The Ninth Circuit, finding no specific discussion of arbitration in the MMWA itself, concluded that Congress has left a gap for an agency to fill. *Kolev*, 658 F.3d at 1025-26. But that decision, by focusing solely on the MMWA itself, overlooked the Supreme Court's repeated admonitions that Congress *has* spoken to this issue through the FAA: The FAA provides that federal statutory claims are subject to arbitration absent a contrary congressional command. *See CompuCredit*, 132 S. Ct. at 669; *McMahon*, 482 U.S. at 226. Thus, the Supreme Court recently explained that claims under the Credit Repair Organizations Act were arbitrable despite language in the statute requiring the disclosure of a ''right to sue'' (and the ''repeated use of the terms 'action,' 'class action,' and 'court' ''). *CompuCredit*, 132 S. Ct. at 670. As the court put it, ''When [Congress] has restricted the use of arbitration in other contexts,'' it has done so ''with a clarity that far exceeds'' anything to be found in the CROA. *Id.* at 672. The same can be said of the MMWA: Because the MMWA makes no mention of arbitration at all, *CompuCredit* makes clear that there is no ''contrary congressional command'' (*id.* at 669) that contradicts the FAA's unambiguous requirement that federal statutory claims arising under valid arbitration agreements be resolved through arbitration. Since Congress has spoken directly to this issue in the FAA, the FTC's contrary construction of the MMWA's silence regarding arbitration cannot be granted judicial deference.

*Third*, the FTC's interpretation is not a permissible construction of the MMWA because it relies wholly on unsupported assumptions that are forbidden by the FAA. The FAA justified its anti-arbitration rule in 1975 simply by stating that it was ''not now convinced that any guidelines which it set out [for a binding dispute resolution process] could ensure sufficient protection for consumers.'' 40 Fed. Reg. at 60,210. The FTC's interpretation ultimately relied on nothing more than this pure assumption—unsupported by evidence or reason—that arbitration is not and cannot be adequate to protect consumers.

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**In short, none of the courts taking the minority view—whether under the *Kolev* approach or the *Koons Ford* approach—has offered any compelling reason to conclude that Congress intended to make MMWA claims non-arbitrable.**

That reasoning is directly in conflict with the FAA's goal of eliminating hostility to arbitration and with ''the Supreme Court's acknowledgement and continual enforcement of the strong federal policy toward arbitration.'' *Davis*, 305 F.3d at 1280. As the Supreme Court noted in *Gilmer*, ''mistrust of the arbitral process . . . has been undermined by our recent arbitration decisions.'' 500 U.S. at 34 n.5 (internal quotation marks omitted). Accordingly, the Supreme Court consistently has ''rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.' '' *Randolph*, 531 U.S. at 89-90 (quoting *Rodriguez de Quijas*, 490 U.S. at 481). To the contrary, ''even claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute serves its functions.'' *Id.* at 90 (internal quotation marks omitted). As the dissent in *Koons Ford* properly recognized, the FTC's ''anti-arbitration bias . . . is completely out-of-step with both Congress' and the U.S. Supreme Court's views regarding arbitration not being inherently hostile to consumers' interests.'' 919 A.2d at 738 (Harrell, J., dissenting).

Rather than revisit this determination in 1999, the FTC instead simply reiterated its earlier conclusion without further analysis. 64 Fed. Reg. at 19,708. Whatever one may think of the FTC's original determination in 1975, the agency's more recent reaffirmation of that view cannot be squared with the Federal Arbitration Act or the Supreme Court's decisions—both before and after 1999. In light of these precedents, the FTC's interpretation of the MMWA—and its interplay with the FAA—cannot be deemed to be a reasonable or permissible construction of the MMWA. As the dissent in *Kolev* explained at length, ''such a view would be unreasonable in light of the presumption of arbitrability created by the Federal Arbitration Act.'' 658 F.3d at 1036 (Smith, J., dissenting).

## Conclusion

Although the courts that have held that MMWA claims are exempt from arbitration remain in the minority, the Ninth Circuit's recent decision in *Kolev* has deepened the conflict among the appellate courts on this critically important issue. Arbitration is both a vital tool for businesses that seek to resolve product warranty disputes in a fair and efficient manner and a cost-effective means for consumers to obtain redress. The Supreme Court should step in to resolve this conflict in an appropriate case and should conclude that Congress did not intend to exempt warranty claims under the MMWA from the range of federal statutory claims that can be arbitrated.