Read the Fine Print - Alabama Supreme Court Rules That Binding Arbitration Provisions in Written Warranties Are Okay - Southern Energy Homes, Inc. v. Ard

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I. INTRODUCTION

When a consumer purchases an item that includes a warranty, they generally do not read the warranty, and a consumer expects that they will have a right to a judicial forum should the warranty come into play. However, courts have recently faced the issue of whether or not binding arbitration provisions in written warranties preclude the consumer from appearing in a courtroom. The Supreme Court of Alabama, in *Southern Energy Homes, Inc. v. Ard*, held that inclusion of binding arbitration provisions in written warranties is acceptable, despite the intent of the Magnuson-Moss Act.²

II. FACTS AND HOLDING

Michael and Marsha Ard ("Ards") purchased a home manufactured by Southern Energy Homes, Inc. ("Southern Energy") through retailer Southland Quality Homes, Inc. ("Southland Quality").³ The furnace caused the home to catch on fire and the Ards then filed a civil action against both Southern Energy and Southland Quality alleging various claims of manufacturing defects and breach of warranty.⁴ Both Southland Quality and Southern Energy moved the trial court to stay litigation and compel arbitration.⁵ The trial court granted Southland Quality’s motion to compel arbitration but denied Southern Energy’s motion.⁶ Southern Energy then appealed to the Supreme Court of Alabama, which decided whether the Ards actually entered

1. 772 So. 2d 1131 (Ala. 2000).
In response to the widespread misuse by merchants of express warranties and disclaimers, Congress enacted the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975. (citations omitted). This Act, which represents the first federal entry to the law governing express and implied warranties and disclaimers, has had a substantial impact upon the warranty provisions of the Uniform Commercial Code. In general, it mandates certain guidelines in connection with written warranties and where written warranties are given, it invalidates attempts to disclaim implied warranties.
3. *Southern*, 772 So. 2d at 1132-33.
4. *Id.* at 1132.
5. *Id.*
6. *Id.* at 1133.
into a binding agreement to arbitrate with Southern Energy due to an arbitration clause in the home warranty and, if so, whether the Magnuson-Moss Act invalidates the arbitration clause found in the written warranty.

The Ards offered two arguments concerning why they should not be forced into arbitration. First, the Ards argued that Southern Energy’s motion to compel arbitration would be a violation of the Magnuson-Moss Act. Second, the Ards argued that they never made any express agreement to arbitrate with Southern Energy. The Ards claimed they never signed or accepted any arbitration clauses and that the arbitration clause in question was inconspicuous because neither the table of contents nor the caption where the clause was found contained the word “arbitration.”

Southern Energy responded by submitting two documents to the court. The first document was entitled “Southern Energy Warranty-Limited One Year/Five Year Warranty” which contained the arbitration clause found in the Home Owner’s Manual. The second document was an affidavit stating that Michael Ard requested and received warranty service from Southern Energy. Southern Energy then argued that these documents created a prima facie case for the existence of an agreement to arbitrate.

The trial court ruled in favor of the Ards stating that there was never any specific agreement to arbitrate with Southern Energy. The trial court reasoned that the situation was very similar to another Alabama case, in which Southern Energy

7. The specific clause in question was found in Southern Energy’s Home Owner’s Manual and contained the following language:

   IF THE PROBLEM IS STILL NOT RESOLVED:

   If your problems are not satisfactorily remedied through the steps set out above, you are entitled to have the dispute settled through binding arbitration as set out below:

   In the event of any dispute or claim, arising out of or in connection with the design, construction, warranty or repair of any product or component supplied by the Manufacturer, the condition of the product, the conformity of the product, the merchantability of the product, whether such product is or is not ‘new,’ any representations, promises, undertakings or covenants made or allegedly made by the Manufacturer in connection with or arising out of any transaction or undertaking between the Manufacturer and any purchaser, or subsequent purchaser, the Manufacturer and the purchaser of this product agree to submit such dispute or claim to binding arbitration, pursuant to the provisions of 9 USC 1, et. seq. and according to the Commercial Rules of Arbitration of the American Arbitration Association then existing.

   Id.

9. Southern, 772 So. 2d at 1133-34.
10. Id. at 1133.
11. Id. at 1134.
12. Id. at 1135.
13. Id. at 1132.
14. Id. The affidavit from Don McNutt stated:
   According to the books and records of Southern Energy Homes, Inc., the Ards requested and received warranty service from Southern Energy pursuant to the terms of the warranty issued by Southern Energy. At the time of service, Michael Ard signed a work order certifying that the parts and work described on the order have been furnished and the repairs had been made to his satisfaction.

   Id.

15. Id.
16. Id. at 1134.
was a defendant, that held an arbitration clause to be non-binding as between the parties.\textsuperscript{17} The Supreme Court of Alabama reversed the trial court’s decision.\textsuperscript{18} The court stated that the Ards did accept the warranty provisions of the Home Owner’s Manual by receiving warranty service and in doing so they accepted the arbitration clause.\textsuperscript{19} The court reasoned that the Ards cannot accept some conditions of the contract with Southern Energy and refuse to accept others explicitly listed.\textsuperscript{20} The court held that when an arbitration provision is located in a written warranty clause, the Magnuson-Moss Act does not invalidate the arbitration provision.\textsuperscript{21}

### III. Legal Background

In passing the Federal Arbitration Act ("FAA"), Congress intended to give arbitration agreements the same standing as other contracts.\textsuperscript{22} The fundamental purpose of the FAA is to make sure "that private arbitration agreements to arbitrate are enforced according to their terms . . . ."\textsuperscript{23} The FAA enforces arbitration agreements as to "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce . . . ."\textsuperscript{24}

The Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("Magnuson-Moss Act")\textsuperscript{25} was subsequently passed by Congress "[i]n order to

\textsuperscript{17} Id. (citing Ex parte Isbell, 708 So. 2d 571 (Ala. 1997)). In Ex parte Isbell, the Supreme Court of Alabama held in part that a manufacturer, which was not a signatory to an installment contract, could not rely on an arbitration clause found in the warranty contract. Id. at 581.

\textsuperscript{18} Southern, 772 So. 2d at 1134.

\textsuperscript{19} Id.

\textsuperscript{20} Id.

\textsuperscript{21} Id. at 1135.

\textsuperscript{22} See Rhode v. E & T Invs., Inc., 6 F. Supp. 2d 1322, 1326 (M.D. Ala. 1998) ("The [FAA’s] purpose ‘was to reverse the longstanding judicial hostility to arbitration agreements that . . . . had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts’.” (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991))).

\textsuperscript{23} Volt Info. Sciences, Inc. v. Board of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 469 (1989)

\textsuperscript{24} 9 U.S.C. § 2 (1994):

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section three of the FAA states:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

improve the adequacy of information available to consumers, [and] prevent
deception." The Act further states that "a consumer who is damaged by the failure
of a supplier, warrantor, or service contractor to comply with an obligation under this
title or under a written warranty, implied warranty, or service contract, may bring
suit for damages and other legal and equitable relief . . ." The Magnuson-Moss
Act also provides for the establishment of "informal dispute settlement
mechanisms[.]" and states that "[o]ne or more warrantors may establish an informal
dispute settlement procedure . . ." This procedure must comply with certain
"minimum requirements" to be promulgated by the Federal Trade Commission.
The Magnuson-Moss Act further provides that

if a warrantor "establishes such a procedure," and if the procedure meets the
Commission's rules, and if the warrantor "incorporates in a written warranty a
requirement that the consumer resort to such procedure before pursuing any
legal remedy, then . . . the consumer may not commence a civil action . . . unless
he initially resorts to such procedure."

The conflicting nature of these statutes has caused courts interpretation
difficulties regarding whether the Magnuson-Moss Act prohibits the inclusion of
arbitration clauses in written warranties and therefore supersedes the FAA. This
issue has been the topic in several recent cases decided by the federal courts in
Alabama and the Supreme Court of Alabama. In Southern Energy Homes, Inc. v.
Ard, the Alabama Supreme Court overturned one of its recent decisions and held that
the Magnuson-Moss Act does not supersedes the FAA, and therefore, binding
arbitration agreements in written warranties are enforceable.

In the early cases in Alabama dealing with this statutory conflict, the state court
held that the Magnuson-Moss Act does indeed supersed the FAA. The court turned
to the legislative history of the Magnuson-Moss Act to override the FAA and hold
binding arbitration clauses in warranties invalid. The court pointed to the remarks
made by Congressman Moss, one of the bill's sponsors:

regarding disclosures, duties, and remedies associated with warranties on consumer products. Southern,
772 So. 2d at 1139. It covers "tangible personal property which is distributed in commerce and which
is normally used for personal, family or household purposes." Id. (quoting Wilson v. Waverlee Homes,
Inc., 954 F. Supp. 1530, 1537 (M.D. Ala. 1997)).
28. Id. § 2310(a)(1).
29. Id. § 2310(a)(2).
30. See id. § 2310(a)(2).
32. See Boyd v. Homes of Legend, Inc., 981 F. Supp. 1423 (M.D. Ala. 1997). In this case, the court
stated that the Magnuson-Moss Act "is exclusively in the context of written warranties, and then solely
with respect to informal mechanisms of dispute resolution prescribed in § 2310(a) of the Act, that
Congress sought to limit recourse to binding arbitration." Id. at 1438.
33. See, e.g., Wilson, 954 F. Supp. 1530; Boyd, 981 F. Supp. 1423; Southern, 772 So. 2d 1131;
Southern Energy Homes, Inc. v. Lee, 732 So. 2d 994 (Ala. 1999); Ex parte Isbell, 708 So. 2d 571.
34. See generally Southern, 772 So. 2d 1131 (overturning Southern v. Lee, 732 So. 2d 994).
First, the bill provides the consumer with an economically feasible private right of action so that when a warrantor breaches his warranty or service contract obligations, the consumer can have effective redress. Reasonable attorney's fees and expenses are provided for the successful consumer litigant, and the bill is further refined so as to place a minimum extra burden on the courts by requiring as a prerequisite to suit that the purchaser give the [warrantor] reasonable opportunity to settle the dispute out of court, including the use of a fair and formal dispute settlement mechanism.  

The court also referred to a House report that stated that "[a]n adverse decision in any informal dispute settlement proceeding would not be a bar to a civil action on the warranty involved in the proceeding..." In addition, the court looked to the remarks made by the Federal Trade Commission to reach its decision that the Magnuson-Moss Act supersedes the FAA.  

Recently, the Alabama Supreme Court overturned its 1999 ruling that the Magnuson-Moss Act superseded the FAA and used a three-part approach set out in Shearson/American Express, Inc. v. McMahon for determining congressional intent to prohibit arbitration. Using this three-part approach, the party opposing compelled arbitration under the FAA can use a statute's text, legislative history, or an inherent conflict between arbitration and the statute's underlying purpose to demonstrate that a court should not compel arbitration under the FAA. If the party opposing arbitration could prove to the court that Congress intended the Magnuson-Moss Act to override the FAA by using this approach, then that party would prevail.  

In looking at text, legislative history, and whether or not there is a conflict between federal statutory purposes, the Supreme Court has "abandoned the view that arbitration is an adequate forum and has consistently upheld the application of the FAA to claims arising under federal statutes." Thus, the Supreme Court has held

35. Wilson, 954 F. Supp. at 1538 (quoting 119 Cong. Rec. 972 (Jan. 12, 1973)).  
37. Id.  
Several industry representatives contended that warrantors should be allowed to require consumers to resort to mechanisms whose decisions would be legally binding (e.g., binding arbitration). The Rule does not allow for this for two reasons. First, ... Congressional intent was that Section 110 Mechanisms not be legally binding. Second, even if binding Mechanisms were contemplated by Section 110 of the Act, the Commission is not prepared, at this point in time, to develop guidelines for a system in which consumers would commit themselves, at the time of product purchase, to resolve any difficulties in a binding, but non-judicial, proceeding. The Commission is not now convinced that any guidelines which it set out could ensure sufficient protection for consumers against warrantors, even if the Congressional report had not made clear, as it did, that it wished for such mechanisms to not be binding.  

40. Id. at 227 ("The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.").  
41. Southern v. Lee, 732 So. 2d at 1006 (See, J., dissenting).
that arbitration clauses are enforceable under the Securities Exchange Act of 1934,\textsuperscript{42} the Racketeer Influenced and Corrupt Organizations Act,\textsuperscript{43} and the Age Discrimination in Employment Act,\textsuperscript{44} using the three-part approach. In each case, the Supreme Court noted that nowhere in the statutes' text or in the legislative histories was arbitration expressly precluded.\textsuperscript{45} The Supreme Court then looked to see if it could find a conflict between the underlying purpose of the statutes and the FAA.\textsuperscript{46} The Supreme Court could not find any irreconcilable conflicts between the statutes and the FAA.\textsuperscript{47} Because the opposing party in each of these cases could not establish that Congress intended for a judicial forum to override arbitration clauses, the statutes did not preclude binding arbitration.

IV. INSTANT DECISION

In \textit{Southern Energy v. Ard}, the Supreme Court of Alabama faced the question of whether an arbitration agreement in a manufacturer's express warranty clause is enforceable under the Magnuson-Moss Act.\textsuperscript{48} The court rejected the trial court's decision that the arbitration agreement was unenforceable due to the Magnuson-Moss Act and in doing so overruled its recent decision that the Magnuson-Moss Act supersedes the FAA.\textsuperscript{49}

In determining that the arbitration agreement in the express warranty was enforceable against the Ards, the court used the \textit{Shearson/American Express} three-part approach\textsuperscript{50} to determine that the Magnuson-Moss Act does not preclude binding arbitration under the FAA.\textsuperscript{51} The court noted that nowhere in the text of the Magnuson-Moss Act does it expressly preclude arbitration.\textsuperscript{52} The court did not find that the provision in the Magnuson-Moss Act for the use of a non-binding dispute resolution procedure as a prerequisite for pursuing a written warranty claim in court implies a statutory prohibition of binding arbitration of those claims.\textsuperscript{53} The court then noted that the legislative history of the Magnuson-Moss Act does not express a clear intent to preclude enforcement of the FAA.\textsuperscript{54} The court again compared the

\textsuperscript{42} \textit{See Shearson/American Express}, 482 U.S. at 238 (declining to read \textsection 29(a) of the Securities Exchange Act of 1934 to prohibit enforcement of predispute agreements to arbitrate).

\textsuperscript{43} \textit{Id.} ("[T]here is nothing in the text of the RICO statute that even arguably evinces congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act.").

\textsuperscript{44} \textit{See Gilmer}, 500 U.S. at 26-27 (disagreeing that compulsory arbitration of ADEA claims pursuant to arbitration agreements would be inconsistent with the statutory framework and purposes of the ADEA).

\textsuperscript{45} \textit{Southern v. Lee}, 732 So. 2d at 1007-08 (See, J., dissenting).

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textit{Southern}, 772 So. 2d at 1132.

\textsuperscript{49} \textit{Id.} at 1134.

\textsuperscript{50} \textit{See supra} text accompanying note 38.

\textsuperscript{51} \textit{Southern}, 772 So. 2d at 1134-35.

\textsuperscript{52} \textit{Southern v. Lee}, 732 So. 2d at 1008 (Justice See's dissent is the basis for the ruling in \textit{Southern v. Ard}).

\textsuperscript{53} \textit{Id.} (pointing out that the ADEA has a similar provision and the Supreme Court has held that claims under the ADEA are subject to arbitration). \textit{See generally Gilmer,} 500 U.S. 20.

\textsuperscript{54} \textit{Southern v. Lee}, 732 So. 2d at 1008.
Southern Energy v. Ard case to a Supreme Court case \(^{55}\) that held that the legislative history of the Securities Exchange Act of 1934 does not preclude binding arbitration agreements under the FAA. \(^{56}\) The court stated that the "legislative history of the Magnuson-Moss Act does not demonstrate an intent 'to limit or prohibit waiver of a judicial forum.'" \(^{57}\) The court also noted that there is no irreconcilable conflict between arbitration and the purposes of the Magnuson-Moss Act. \(^{58}\) The court pointed to the purposes of the Magnuson-Moss Act \(^{59}\) and again compared the instant case to the Supreme Court case involving the Securities Exchange Act of 1934 as proof of no irreconcilable conflicts. \(^{60}\) The court also discussed the Federal Trade Commission's comments on the Magnuson-Moss Act and arbitration agreements but found the comments unpersuasive because the Supreme Court ruled, after the comments were made, that arbitration agreements under certain federal statutes are binding. \(^{61}\)

The Alabama Supreme Court further noted that the Ards were contractually bound to the arbitration agreement because they accepted the benefits of the warranty containing the arbitration agreement as shown by the affidavit Southern Energy submitted. \(^{62}\) The court made the proposition that a party cannot simultaneously claim the benefits of a contract and repudiate its burdens and conditions. \(^{63}\)

The dissent argued that the court should not overrule its previous decision in Southern Energy Homes, Inc. v. Lee. \(^{64}\) The dissent based its argument on the legislative history of the Magnuson-Moss Act, the wording of the Magnuson-Moss

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55. Shearson/American Express, 482 U.S. 220.
56. Southern v. Lee, 732 So. 2d at 1009 (See, J., dissenting).
   Despite the express language indicating a congressional approval of Wilko's holding against arbitration, the Supreme Court held that Congress did not intend to bar enforcement of all predispute arbitration agreements. Given the Supreme Court's pro-arbitration interpretation of the Conference Report to the Securities Exchange Act, which expressly deals with arbitration, I cannot accept the district court's anti-arbitration interpretation of the House Report to the Magnuson-Moss Act, which does not expressly deal with arbitration.
57. Id. (quoting Shearson/American Express, 482 U.S. at 227).
58. Id.
59. See supra text accompanying note 35.
60. Southern v. Lee, 732 So. 2d at 1010 (See, J., dissenting).
   Further, in McMahon . . . , the Supreme Court expressly rejected the 'inequality of bargaining power' argument as a means of creating an irreconcilable conflict between the Securities Exchange Act and the FAA, holding that assertions of unequal bargaining power should be addressed in the context of the particular facts of each individual case. Thus, there is no irreconcilable conflict between binding arbitration and the purposes of the Magnuson-Moss Act.
61. Id. at 1010 ("Although reasonable deference is due an interpretation of a statute by an agency charged with administering that statute, no such deference is due when the Supreme Court has expressly rejected the rationale on which the agency interpretation is based.").
62. Southern, 772 So. 2d at 1132.
64. Southern, 772 So. 2d at 1135 (Johnstone, J., dissenting).
Act,\textsuperscript{65} and the comments provided by the Federal Trade Commission that "it was Congress's intent that any non-judicial dispute resolution procedures would be non-binding, and consumers would always retain the right of final access to court."\textsuperscript{66}

V. COMMENT

In \textit{Southern Energy v. Ard}, the Alabama Supreme Court overturned its previous decision, just over a year old,\textsuperscript{67} and accepted the argument that the Magnuson-Moss Act does not forbid the use of binding arbitration clauses in written warranties and therefore does not overrule the Federal Arbitration Act.\textsuperscript{68} In overturning its own precedent, the court followed the precedent of the Supreme Court in upholding the application of the FAA to claims arising under federal statutes.\textsuperscript{69}

The court faced the competing policies of whether to allow binding arbitration or to allow consumers a judicial forum. The court chose to follow the Supreme Court rulings on other federal statutes and gave them more weight than the seemingly anti-binding arbitration, legislative history of the Magnuson-Moss Act, the Federal Trade Commission's comments, and the court's own precedent. In following the Supreme Court rulings on other federal statutes, the court used the three-prong test set out in \textit{Shearson/American Express}\textsuperscript{70} and gave the Magnuson-Moss Act a very narrow interpretation.

Under the textual prong of the \textit{Shearson/American Express} test, it is true that the Magnuson-Moss Act never expressly precludes arbitration.\textsuperscript{71} However, it is also true that the Magnuson-Moss Act gave the Federal Trade Commission the power to interpret the Act and that the Federal Trade Commission has explicitly stated that the Act does not allow for binding arbitration.\textsuperscript{72} Faced with these competing ideas, why did the court in this case choose not to follow the agency that was charged with interpreting the Act? One possible reason could be that the state court did not want

\begin{itemize}
  \item \textsuperscript{65} 16 C.F.R. § 703.5(3)(g)(1) ("The Mechanism shall inform the consumer, at the time of disclosure required in paragraph (d) of this section that: (1) If he or she is dissatisfied with its decision or warrantor's intended actions ... legal remedies, including use of small claims court, may be pursued.").
  \item \textsuperscript{66} \textit{Southern}, 772 So. 2d at 1139 (quoting Justice Johnstone's dissent).
  \item \textsuperscript{67} Several industry representatives contended that warrantors should be allowed to require consumers to resort to mechanisms whose decisions would be legally binding (e.g., binding arbitration). The Rule does not allow for this for two reasons. First, ... Congressional intent was that Section 110 Mechanisms not be legally binding. Second, even if binding Mechanisms were contemplated by Section 110 of the Act, the Commission is not prepared, at this point in time, to develop guidelines for a system in which consumers would commit themselves, at the time of product purchase, to resolve any difficulties in a binding, but nonjudicial, proceeding. The Commission is not now convinced that any guidelines which it set out could ensure sufficient protection for consumers against warrantors, even if the Congressional report had not made clear, as it did, that it wished for such mechanisms to not be binding.
  \item 40 Fed. Reg. 60168, 60210.
  \item \textsuperscript{68} \textit{See Southern} v. \textit{Lee}, 732 So. 2d 994.
  \item \textsuperscript{69} \textit{See supra} text accompanying notes 42-44.
  \item \textsuperscript{70} \textit{See supra} text accompanying note 38.
  \item \textsuperscript{71} \textit{See supra} text accompanying note 45.
  \item \textsuperscript{72} \textit{See supra} text accompanying note 66.
\end{itemize}
to shun the federal court's policy favoring arbitration as evidenced by the line of Supreme Court cases dealing with federal statutes. However, this reasoning provides little support for the court's ruling. There is one crucial difference between the federal statutes that the Supreme Court has ruled on and the Magnuson-Moss Act: the Magnuson-Moss Act has a provision dealing specifically with alternative dispute resolution that permits such procedures if they are non-binding. The actual text of the Magnuson-Moss Act does not expressly repudiate binding arbitration, but the Federal Trade Commission's interpretation of the Act, along with the specific provisions of the Act dealing with arbitration, leads one to believe that the court should have placed more faith in its own precedent.

Under the legislative history prong, the court in *Southern Energy v. Ard* felt that the Magnuson-Moss Act did not express a clear intent to preclude enforcement of the FAA. The court turned to a prior Supreme Court case ruling on another federal statute to back its holding. Once again, the court seemed to bypass the legislative history of the Magnuson-Moss Act and tried to compare the history of the Securities Exchange Act of 1934, and a Supreme Court ruling on that Act, to the case at hand. By doing so, the court ignored all of its own precedent that dealt with the same specific facts and looked instead to extrinsic cases that dealt with different statutes and different facts. Other courts facing these same issues have all looked to the legislative history of the Magnuson-Moss Act, comments made by the sponsors of the bill, and the comments made by the Federal Trade Commission and have all reached the same conclusion that the Magnuson-Moss Act does not allow for binding arbitration. Why then does the court feel that it should ignore all of these findings and overturn its own ruling? Again, the court feels that it is following the favorable federal policy towards arbitration by allowing for binding arbitration in written warranties. The court might have also felt that if Congress had wanted to correct this problem it could have amended the Magnuson-Moss Act to expressly repudiate binding arbitration agreements. However, guidance from the agency charged with interpreting the Magnuson-Moss Act, the Federal Trade Commission, makes this reasoning appear weak and flawed, especially in light of the agency's recent reaffirmation of its interpretation of the Magnuson-Moss Act.

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73. *See supra* text accompanying notes 42-44.
75. *See supra* text accompanying note 54.
76. *See supra* text accompanying note 55.
77. *Southern v. Lee*, 732 So. 2d at 1009 (See, J., dissenting).
79. Final Action Concerning Review of Interpretations of the Magnuson-Moss Warranty Act, 64 Fed. Reg. 19700, 19708-09 (Apr. 22, 1999): [In 1975] the Commission determined that "reference within the written warranty to any binding, non-judicial remedy is prohibited by the Rule and the Act." The Commission believes that this interpretation continues to be correct. Therefore, the Commission has determined not to amend [its Rule] to allow for binding arbitration. [The Rule] will continue to prohibit warrantors from including binding arbitration clauses in their contracts with consumers that would require consumers to submit warranty disputes to binding arbitration.

*Id.*
Under the irreconcilable conflicts prong of the test, the court again used a reference to the Supreme Court case dealing with arbitration under the Securities Act of 1934 to conclude that there are no irreconcilable differences between arbitration and the purposes of the Magnuson-Moss Act. 80 The court once more bypassed all legislative history dealing directly with the Magnuson-Moss Act and instead relied on holdings issued by the Supreme Court dealing with unrelated federal statutes. In its ruling, the court stated that "[t]he FTC’s statements against arbitrating Magnuson-Moss Act claims predate Mitsubishi Motors . . ., McMahon . . ., and Gilmer." 81 This implies that the Supreme Court would more than likely rule in favor of binding arbitration clauses in written warranties. However, this statement no longer holds weight due to the recent comments made by the Federal Trade Commission. 82 The Southern Energy v. Ard court should have taken notice of the recent comments made by the Federal Trade Commission because they were made after the decision in Southern Energy Homes, Inc. v. Lee. The court should have also taken heed of the fact that the Magnuson-Moss Act provides for consumer recovery of attorneys’ fees and reasonable costs in the context of a court proceeding, but not in the context of arbitration. 83 Allowing for binding arbitration provisions, in effect, takes the incentive away from the consumer who cannot afford to bring a meritorious claim because they will not be allowed to recover any expenses. 84 This in turn gives the warrantor added incentive to put in a binding arbitration provision knowing that the chances of a consumer bringing a claim are less likely. The court’s ruling—allowing binding arbitration, and therefore not allowing for recovery of expenses—presents an irreconcilable conflict between arbitration and the provisions allowing for recovery of expenses in the Magnuson-Moss Act.

Consumers generally do not have equal bargaining power in relation to warrantors. When consumers purchase products, they do not generally bargain for such things as arbitration provisions, or for that matter, warranty provisions. Consumers usually buy things off the shelf or off the lot without fully looking through the user’s manual or warranty contract that comes along with the purchased good. Therefore, warrantors can put in binding arbitration provisions without the consumer even bargaining for it. This puts the warrantor into a superior position should the warranty and arbitration provision come into play; it forces the consumer out of court and likely lowers the expected payout by the warrantor 85 or lowers the

80. Southern v. Lee, 732 So. 2d at 1009 (See, J., dissenting).
81. Id. at 1012 (See, J., dissenting) (discussing the Supreme Court cases dealing with other federal statutes).
82. Southern v. Lee, 732 So. 2d at 1009 (See, J., dissenting).
84. See Mace E. Gunter, Can Warrantors Make an End Run? The Magnuson-Moss Act and Mandatory Arbitration in Written Warranties, 34 GA. L. REV. 1483, 1511 (2000) ("The American Arbitration Association, responding to criticism of binding arbitration agreements in the consumer context, established an advisory committee in 1997 which acknowledged the problems of forced arbitration in the consumer context, including the cost barriers and the lack of remedies provided in arbitration—including attorneys’ fees.").
85. See David S. Schwartz, Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 WIS. L. REV. 33, 65 (noting that one study found median verdict from jury is $264,700 and mean verdict from jury is $703,600, while arbitration gamers median award of $49,400 and mean award of $124,500).
probability that a claim will be brought at all if a consumer is forced to pay large expenses in order to be able to arbitrate. 86 This goes against public policy that consumers should have an accessible judicial forum in which to dispute their claims. The text of the Magnuson-Moss Act, the legislative history of the Act, the statements of the Federal Trade Commission, and the comments made by the sponsors of the bill all point in the direction that the Magnuson-Moss Act intended that any non-judicial dispute resolution procedures would be nonbinding and that consumers would always retain the right of final access to court. This has been the view accepted by most other courts facing the same problem. 87 The court’s narrow interpretation of the Magnuson-Moss Act would force all consumers who purchase goods in interstate commerce, with binding arbitration provisions included somewhere in the warranty, to forego any judicial forum and only allow binding arbitration, even if the parties did not expressly agree to the arbitration provision. The court’s strict interpretation goes against the policy of allowing consumers access to court and will not allow the consumer to recover the expenses of attorneys’ fees and costs, which the text of the Magnuson-Moss Act expressly allows. 88

VI. CONCLUSION

The holding of the Alabama Supreme Court has not had much effect on subsequent rulings about whether the Magnuson-Moss Act supersedes the FAA. Other courts dealing with the same issue have held that binding arbitration provisions located in written warranties are unenforceable and conflict with the Magnuson-Moss Act. 89 It will be interesting to see how the Alabama Supreme Court will rule on this issue in future cases knowing that other jurisdictions have consistently held the opposite of Southern Energy v. Ard. It will also be interesting to see if the United States Supreme Court will grant certiorari for one of these cases to settle the dispute once and for all. As it stands, the rule set forth by the Alabama Supreme Court goes against the majority view, both federal and state. The court should have followed its own precedent, supported by legislative history, and held

86. See Jean R. Stemlight, Gateway Widens Door to Imposing Unfair Binding Arbitration on Consumers, 71 FlA. B.J. 8, 12 n.2 (1997) (noting that administrative fees of $2,000 are charged if arbitration services of International Chamber of Commerce are used). In light of the administrative fees, a consumer will probably not bring a $500 claim to arbitration.
87. See Raesly v. Grand Housing, Inc., 105 F. Supp. 2d 562 (S.D. Miss. 2000) ("The court, in light of the cited authorities, will deny at this time defendant's motion to compel arbitration as it relates to their claim for breach of an express written warranty."). See also In re Van Blarcum, 19 S.W.3d 484 (Tex. Ct. App. 2000), on appeal to Texas Supreme Court ("Because the Agreement compels arbitration of the Van Barcums' written warranty claims in violation of the Act, we hold the Agreement is invalid and unenforceable in its entirety . . . .").
89. See cases cited supra note 78.
that binding arbitration provisions in written warranties are unenforceable due to the Magnuson-Moss Act.  

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90. The court's overturning of its recent decision might have been the result of the different makeup of the Alabama Supreme Court. From the time the Southern Energy Homes, Inc. v. Lee case was handed down, to the time the Southern Energy Homes, Inc. v. Ard case was handed down, three different supreme court justices were ruling on the latter case. In both cases, five judges concurred and four dissented.