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## FAA versus the Magnuson - Moss Warranty Act: Which Warrants Precedence, The

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# The FAA versus the Magnuson–Moss Warranty Act: Which Warrants Precedence?

*Kolev v. Euromotors West/The Auto Gallery*<sup>1</sup>

## I. INTRODUCTION

Arbitration has been an integral part of American jurisprudence since the Federal Arbitration Act (FAA) was enacted in 1925.<sup>2</sup> Often described as “a speedy, economical, and effective means of dispute resolution,” arbitration has become a common alternative to litigation.<sup>3</sup> While the FAA and arbitration have continued to gain favor, some scholars have argued that adhering to arbitration agreements may occasionally produce negative policy, especially when such adherence conflicts with congressional statutes.<sup>4</sup> A specific instance of this controversy is whether such adherence conflicts with the Magnuson-Moss Warranty Act (MMWA), a federal statute which addresses how consumers may pursue breach of warranty claims. In facing these issues, courts are in the unenviable position of determining whether the statutes are reconcilable, and if not, which statute warrants precedence.

These questions have proven to be a formidable foe for the judiciary. Moreover, courts and commentators have been divided as to what answer will produce the best policy. In 2002, the discussion seemed to be headed toward conclusion after the Fifth and Eleventh Circuits found that the FAA should trump the MMWA in the event of statutory conflict. However, with the Ninth Circuit’s decision in *Kolev v. Euromotors West/The Auto Gallery*, this polarizing issue has once again become a focus in American jurisprudence. While the Ninth Circuit has recently withdrawn *Kolev sua sponte*,<sup>5</sup> it is doubtful that the Ninth Circuit is abandoning the issue as it has delayed subsequent submissions of *Kolev* until the California Supreme Court delivers its decision in *Sanchez v. Valencia Holding Co., LLC*.<sup>6</sup> Thus, an understanding of *Kolev* is vital to grasping both the current and future landscape of MMWA arbitrability. This paper asserts that not only is

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1. *Kolev v. Euromotors West/The Auto Gallery*, 658 F.3d 1024 (9th Cir. 2011).

2. 9 U.S.C. §§ 1-16 (2006).

3. Joyce J. George, *The Advantages of Administered Arbitration When Going It Alone Just Won’t Do*, 57 DISP. RESOL. J. 66, 68 (2002) (noting the cost and time savings arbitration provides as well as the ability for parties to structure the process governing their disputes).

4. Daniel G. Lloyd, *The Magnuson Moss Warranty Act v. The Federal Arbitration Act: The Quintessential Chevron Case*, 16 LOY. CONSUMER L. REV. 1 (2003); Katherine R. Guerin, *Clash of the Federal Titans: The Federal Arbitration Act v. The Magnuson Moss Warranty Act Will The Consumer Win or Lose?*, 13 LOY. CONSUMER L. REV. 4, 33 (2001).

5. *Kolev v. Euromotors West/The Auto Gallery*, 676 F.3d 867 (9th Cir. 2012).

6. *Id.*; *Sanchez v. Valencia Holding Co.*, 135 Cal. Rptr. 3d 19, *petition for review granted*, 272 P.3d 976 (Cal. 2012).

*Kolev's* legal reasoning inaccurate, but its policy manifestations would have been flawed as well.

## II. FACTS AND HOLDING

Plaintiff Diana Kolev filed suit in the District Court for the Central District of California against Euromotors West/The Auto Gallery, Motorcars West LLC, HM Gray Family II Inc., Gray Family II LLC, Bennett Automotive I Inc., Bennett Automotive II Inc. (the Dealership) and Porsche Cars North America, Inc. (Porsche) (collectively, the Defendants).<sup>7</sup> Upon purchasing the vehicle from the Dealership, Kolev signed a formal sales contract with the Dealership, agreeing to arbitrate certain disputes arising from the transaction.<sup>8</sup> In her complaint, Kolev alleged breach of implied and express warranties under the Magnuson-Moss Warranty Act (MMWA)<sup>9</sup> and breach of contract and unconscionability under California's Consumer Warranty Act<sup>10</sup> and California's Consumers Legal Remedies Act.<sup>11</sup> Kolev argued that both the Dealership and the manufacturer, Porsche, sold her a "certified" used car that was not eligible to be certified; she experienced various problems that should have been covered under the original factory warranty; and both Porsche and the dealer refused to repair them.<sup>12</sup> Additionally, Kolev argued the contract was substantively unconscionable because arbitration fees of at least \$15,000 exceeded the cost of litigation and she could not afford to pay those fees.<sup>13</sup> Kolev also alleged several other substantive defects in the sales contract, including: 1) an impermissible class action waiver, 2) a clause imposing all costs of arbitration on Kolev should she lose, 3) a one-sided appeal provision favoring the Defendants, 4) no provision providing Kolev with a waiver of fees, and 5) a provision allowing the dealership to litigate claims it was most likely to bring while compelling Kolev to pursue claims she was most likely to bring in arbitration.<sup>14</sup>

Responding to Kolev's complaint, the Defendants filed a petition to compel arbitration in accordance with the terms of the original sales contract, and also filed a motion to stay the action against Porsche.<sup>15</sup> Kolev opposed the motion to compel, arguing that the sales contract was procedurally unconscionable because it was one of adhesion between two parties of unequal bargaining power and because the arbitration agreement was light in print and hidden.<sup>16</sup> Kolev objected to

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7. *Kolev*, 658 F.3d at 1025.

8. Appellant's Opening Brief at 4, *Kolev*, 658 F.3d 1024 (No. 09-55963).

9. 15 U.S.C. § 2301 (2006).

10. CAL. CIV. CODE § 1794 (2011).

11. *Id.* § 1750.

12. Appellant's Opening Brief, *supra* note 8, at 4-5.

13. *Id.* at 5; Appellee's Response Brief at 11, *Kolev*, 658 F.3d 1024 (No. 09-55963). Defendants argued that: 1) Kolev's actual filing fees would be only a couple hundred dollars and both the American Arbitration Association (AAA) and the National Arbitration Forum (NAF) require the Defendants in this action to pay all fees incurred beyond the initial filing fee; and 2) both the AAA and California law allowed Kolev to exercise a waiver of fees as well as prevent an arbitrator from awarding costs to a defendant should the complainant lose. *Id.*; see also CAL. CIV. PROC. CODE § 1284.3(a), (b) (2011).

14. Appellant's Opening Brief, *supra* note 8, at 5.

15. *Id.*

16. *Id.*; see also Appellees' Response Brief, *supra* note 13, at 4-16. Defendants argued that: 1) the sales contract at issue was not an adhesion contract but a form contract whose provisions were nego-

the Defendants' motion to compel arbitration, arguing that her claims for injunctive relief and other claims alleged under the MMWA were not arbitrable as a matter of law.<sup>17</sup> Finally, Kolev argued that the motion to compel should be denied because the Defendants had failed to show that she ever agreed to arbitrate any dispute.<sup>18</sup>

The district court granted Kolev's claim for injunctive relief and stayed the litigation against Porsche, but denied Kolev's other objections and granted Defendants' motion to compel arbitration on all other claims.<sup>19</sup> An arbitrator awarded Kolev some substantive relief<sup>20</sup> but resolved all other claims in favor of the Defendants.<sup>21</sup>

Kolev appealed the court order confirming the arbitration award to the Ninth Circuit, alleging the aforementioned flaws in the district court's grant of the Defendant's motion to compel arbitration, as well as novel allegations of flaws in the arbitrator's decision-making.<sup>22</sup> In evaluating the case, the Ninth Circuit focused almost exclusively on Kolev's assertion that the MMWA barred arbitration of her complaint and held that written warranty provisions that mandate pre-dispute binding arbitration of consumer claims are invalid under the MMWA.<sup>23</sup> The court cited Federal Trade Commission (FTC) regulation 703,<sup>24</sup> which the court interpreted as barring arbitration of MMWA claims.<sup>25</sup> Specifically, the Ninth Circuit noted that because Congress had not specifically addressed the issue before the court and the FTC regulation was reasonable, the court should show deference to the FTC.<sup>26</sup> Consequently, the Ninth Circuit reversed and remanded the case to the district court.<sup>27</sup>

### III. LEGISLATIVE HISTORY

#### A. *The Magnuson-Moss Warranty Act*

In 1975, Congress enacted the Magnuson-Moss Warranty Act (MMWA) to address widespread exploitation of express warranties and disclaimers by mer-

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tible, and 2) the arbitration provisions contained in the contract were not hidden but were in bold, easy to find, and accessible to Kolev at the time of purchase. *Id.* at 7-8.

17. Appellant's Opening Brief, *supra* note 8, at 6.

18. *Id.*

19. *Kolev v. Euromotors West/The Auto Gallery*, 658 F.3d 1024, 1025 (9th Cir. 2011).

20. Appellant's Opening Brief, *supra* note 8, at 6-7. The arbitrator ordered the Defendants to change the springs on the vehicle back to factory springs. *Id.*

21. *Id.* at 6.

22. *Id.* at 7-8. Kolev argued that the arbitrator improperly found Defendants had not violated California's Consumer Warranty Act because the arbitrator improperly found that intent was necessary for culpability under the Act. *Id.* at 7.

23. *Kolev*, 658 F.3d at 1031 ("[W]e need not address Kolev's additional contentions that the arbitration clause was unconscionable under California law and that the district court abused its discretion by admitting and relying on the sales contract authenticated by a principal of the Dealership and by compelling arbitration of her claims against the Dealership while staying the action against Porsche.")

24. FTC Informal Dispute Settlement Procedures, 16 C.F.R. § 703.1 (2009).

25. *Kolev*, 658 F.3d at 1026.

26. *Id.* at 1026-31.

27. *Id.* at 1031.

chants.<sup>28</sup> The Act requires sellers using written express warranties as advertising and merchandising devices to meet federal standards that guarantee certain remedies be provided to aggrieved consumers.<sup>29</sup> To prevail in an action brought under the MMWA, the consumer bears the burden of establishing that the damages resulted from the supplier, warrantor, or service contractor's failure to adhere to provisions of the written warranty, implied warranty, or service contract.<sup>30</sup> The MMWA encourages warrantors to establish procedures for consumers' disputes so that they may be fairly and expeditiously settled through "informal dispute settlement mechanisms."<sup>31</sup> In establishing the MMWA, Congress expressly delegated rulemaking authority under the statute to the Federal Trade Commission (FTC).<sup>32</sup>

In finding that the MMWA did not specifically address the validity of pre-dispute binding arbitration, the *Kolev* court looked to the landmark Supreme Court case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>33</sup> to discern whether requiring such arbitration was permissible.<sup>34</sup>

### B. Agency Deference

In *Chevron*, the U.S. Supreme Court faced the Clean Air Act Amendments of 1977, which imposed national air quality standards, vis-à-vis the Environmental Protection Agency (EPA), on states that had not yet enacted air quality regulations.<sup>35</sup> The legislation required such states to establish a permit program regulating "new or modified major stationary sources" of air pollution.<sup>36</sup> The EPA later amended the Clean Air Act to allow an existing plant to get permits for new equipment that did not meet standards, as long as the total emissions from the plant itself did not increase.<sup>37</sup> In response, the plaintiff, the Natural Resources Defense Council, filed suit against the EPA claiming its Clean Air Act was contrary to other EPA legislation, and therefore impermissible.<sup>38</sup> The issue before the Court became whether to grant deference to a government agency's (in this instance, the EPA's) construction of a statute which it administers.<sup>39</sup>

The Court began by noting that the amended Clean Air Act originally did not expressly define "stationary source," nor was there any legislative history to shed light on the phrase.<sup>40</sup> Therefore, uncertainty existed as to which entities the permit program should apply.<sup>41</sup> To decide the issue, the Court created a two prong test.<sup>42</sup> First, the Court looked to "whether Congress [had] directly spoken to the precise

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28. 59 A.L.R. FED. 461, § 2(a) (1982).

29. *Id.*

30. *Id.*

31. 15 U.S.C. § 2310(a)(1) (2006).

32. *See id.* § 2310(a)(2).

33. 467 U.S. 837 (1984).

34. *Kolev v. Euromotors West/The Auto Gallery*, 658 F.3d 1024, 1025 (9th Cir. 2011).

35. *Chevron*, 467 U.S. at 2778-79.

36. *See* 42 U.S.C. § 7502 (2006).

37. *Chevron*, 467 U.S. at 2780.

38. *Id.*

39. *Id.* at 2781, 2786.

40. *Id.*

41. *Id.*

42. *Id.*

question at issue.”<sup>43</sup> If Congress had done so, then the analysis would end and effect must be given to the clearly expressed intent of Congress.<sup>44</sup> However, if Congress had not addressed the question at issue, and an administrative interpretation did address the issue, the Court would then ask whether the administrative agency’s answer is based on a permissible construction of the statute.<sup>45</sup>

Applying this test, the Supreme Court ultimately denied the plaintiff’s complaint, finding that the statute did not expressly define “stationary source,” that the EPA’s interpretation of such was permissible, and, therefore, that deference should be given to the EPA’s statutory construction.<sup>46</sup> After nearly three decades, the two-step process developed in *Chevron* is still the applicable test for evaluating administrative interpretations and the case is widely considered the harbinger for the Supreme Court’s approach to deference.<sup>47</sup>

While *Chevron* resolved the issue of how courts should approach administrative regulations, it did so in a vacuum; that is, its holding is dispositive only when the administrative regulation is the sole issue before the court.<sup>48</sup>

### C. When the MMWA and FAA Conflict

A more complex issue for courts has arisen when the proper exercise of administrative deference or adherence to the principles of the Federal Arbitration Act (FAA) would yield conflicting holdings.<sup>49</sup> The Fifth Circuit addressed such a conflict in *Walton v. Rose Mobile Homes LLC*.<sup>50</sup> In *Walton*, the plaintiffs, the Waltons, purchased a mobile home manufactured by the defendant, Southern Energy Homes, Inc. from the seller-defendant, Rose Mobile Homes.<sup>51</sup> Southern Energy issued the Waltons a one-year manufacturer’s warranty against defects in materials and workmanship.<sup>52</sup> The warranty contained an arbitration provision requiring the Waltons to submit any claims under the warranty to binding arbitration.<sup>53</sup> After finding several defects in their newly purchased home, the Waltons demanded that the defects be fixed.<sup>54</sup> However, the repairs were never completed to the Waltons’ satisfaction.<sup>55</sup> The Waltons’ dissatisfaction led them to file suit in the Circuit Court of Kemper County, Mississippi, alleging infringement of the

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43. *Id.*

44. *Id.*

45. *Id.* at 2782.

46. *Id.* at 2793.

47. See generally Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 971 (1992).

48. See *Chevron*, 467 U.S. at 2778-82.

49. Gary B. Born & Adam Raviv, *Arbitration Agreement Versus Agency Deference*, Kluwer Law International, <http://kluwer.practicesource.com/blog/2012/arbitration-agreements-versus-agency-deference/> (last visited Feb. 11, 2012) (“If a federal agency reads an ambiguous statute as allowing it to prohibit arbitration, should that interpretation be granted the normal deference afforded agencies under *Chevron*?”).

50. 298 F.3d 470 (5th Cir. 2002).

51. *Id.* at 471.

52. *Id.*

53. *Id.* at 472.

54. *Id.*

55. *Id.*

Magnuson-Moss Warranty Act, among other violations.<sup>56</sup> In response to the suit, the defendants filed a motion to compel arbitration of the Waltons' claims.<sup>57</sup> The district court denied the defendants' motion, finding that the MMWA precluded the defendants from requiring the Waltons to submit their written warranty claims to binding arbitration.<sup>58</sup> The defendants timely appealed the circuit court's order.<sup>59</sup>

On appeal, the United States Court of Appeals for the Fifth Circuit stated that as a result of a "liberal federal policy favoring arbitration," the Supreme Court has interpreted the FAA as establishing a "presumption in favor of the enforceability of contractual arbitration agreements."<sup>60</sup> The court stated that the party seeking to avoid arbitration must exhibit Congress' intent to proscribe a "waiver of judicial remedies for the statutory rights at issue" in order to circumvent arbitration and litigate their claims.<sup>61</sup> In determining whether Congress intended such preclusion, the Fifth Circuit employed the *McMahon* test,<sup>62</sup> which relies on three factors to determine Congress' intent in enacting a statute: 1) the statute's text; 2) its legislative history; and 3) whether there is an inherent conflict between arbitration and the statute's underlying purposes.<sup>63</sup>

The court then turned to the issue of whether the Waltons had met their burden.<sup>64</sup> Evaluating the text of the statute, the Fifth Circuit found that the MMWA "permits warrantors to establish 'informal dispute settlement procedures' for breach of written warranty claims and to require consumers to resort to such procedures before bringing a civil action."<sup>65</sup> Noting that the term "informal dispute settlement procedure" was not defined anywhere in the text of the Act, the court noted that the FTC is instructed to "prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty."<sup>66</sup> Reviewing the FTC regulation, the court noted that informal dispute settlement procedures under the MMWA are not legally binding, and therefore, written warranties cannot confine consumer redress to binding arbitration.<sup>67</sup>

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56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 473.

60. *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

61. *Id.*

62. *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (holding that the Arbitration Act establishes a federal policy favoring arbitration, requiring that the courts rigorously enforce arbitration agreements). The Court stated, in relevant part:

This duty . . . is not diminished when a party bound by an agreement raises a claim founded on statutory rights . . . . [T]he . . . Act's mandate may be overridden by a contrary congressional command . . . [but] the 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 . . . . [S]uch intent may be discernible from the statute's text, history, or purposes.

*Id.* at 226-27.

63. *Id.* at 227; *Walton*, 298 F.3d at 474.

64. *Walton*, 298 F.3d at 474.

65. *Id.*; 15 U.S.C. § 2310(a) (2006).

66. *Walton*, 298 F.3d at 474-75; 15 U.S.C. § 2310(a)(2).

67. *Walton*, 298 F.3d at 474-75 ("[T]here is nothing in the Rule which precludes the use of any other remedies by the parties following a Mechanism decision . . . . However, reference within the written

Having ascertained the FTC's stance on arbitrability of warranty claims, the Fifth Circuit turned its attention to the two-prong *Chevron* test to determine whether deference should be given to the FTC promulgation.<sup>68</sup> The court's analysis ended after the first prong of *Chevron* when it found that Congress expressed clear intent in favor of arbitration of contractual claims.<sup>69</sup> Therefore, the FTC's regulation was moot.<sup>70</sup>

Finding that Congress had directly spoken to the issue of arbitrability of consumer claims,<sup>71</sup> the Fifth Circuit found the FTC regulation failed the first prong of *Chevron*<sup>72</sup> and reversed the district court's holding, granting the defendants' motion to compel arbitration.<sup>73</sup>

This interaction between the FTC's regulation (which bars mandatory arbitration provisions in warranty contracts) and Congress' support of the FAA (which favors arbitration) was also reviewed by the Eleventh Circuit in *Davis v. Southern Energy Homes, Inc.*<sup>74</sup> With facts almost identical to those in *Walton*, *Davis* involved plaintiffs who, after purchasing their mobile home from defendant Southern Energy Homes, found several defects with the new home.<sup>75</sup> The plaintiffs filed suit alleging, among other infringements, violation of the MMWA.<sup>76</sup> In response, the defendant filed a motion to compel arbitration pursuant to the binding arbitration agreement contained in the manufactured home's written warranty.<sup>77</sup>

The Eleventh Circuit began its analysis by evaluating the text of the MMWA and finding that while the MMWA did not define "informal dispute settlement procedure," it did provide that if a warrantor incorporates an informal dispute settlement procedure into the warranty, the provision needed to comply with the minimum requirements prescribed by the FTC.<sup>78</sup> The court proceeded to evaluate the FAA and its provisions, noting that if a party has signed an arbitration agreement,

the party should be held to [the agreement] unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue . . . . Thus, unless Congress has clearly expressed an intention to preclude arbitration of the statutory claim, a party is bound by its agreement to arbitrate.<sup>79</sup>

Like the *Walton* court, the Eleventh Circuit then turned to the *McMahon* test to determine whether Congress intended to preclude arbitration of MMWA

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warranty to any binding, non-judicial remedy is prohibited by the Rule and the Act."); FTC Informal Dispute Settlement Procedures, 16 C.F.R. 703.3 (2009).

68. *Walton*, 298 F.3d at 475.

69. *Id.*; see 9 U.S.C. § 2 (2006).

70. See *supra* note 44 and accompanying text.

71. *Walton*, 298 F.3d at 475

72. *Id.*

73. *Id.* at 478.

74. 305 F.3d 1268 (11th Cir. 2002).

75. *Id.* at 1270.

76. *Id.*

77. *Id.*

78. *Id.* at 1272; 15 U.S.C. § 2310(a)(2) (2006).

79. *Davis*, 305 F.3d at 1273 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

claims.<sup>80</sup> First, the Eleventh Circuit found that the text of the MMWA did not expressly proscribe arbitration.<sup>81</sup> Second, legislative history regarding the MMWA also failed to address arbitration and was ambiguous at best on the topic.<sup>82</sup> Finally, under the *McMahon* test, the court found that none of the three purposes of the MMWA conflicted with that of the FAA.<sup>83</sup> Thus, the court concluded that the plaintiffs had failed to show discernible congressional intent to bar the arbitrability of MMWA claims.<sup>84</sup>

Having found that the *McMahon* test did not bar arbitration, the Eleventh Circuit, as the Fifth Circuit did in *Walton*, subsequently turned to the *Chevron* test to determine whether the FTC's regulation barred arbitration of MMWA claims.<sup>85</sup> At this point the Fifth and Eleventh Circuits' reasoning parted ways. While the *Walton* court found that Congress had expressed a clear intention favoring arbitrability of MMWA claims, the Eleventh Circuit found that Congress had not expressed any clear intent on the issue.<sup>86</sup> Thus, while the Fifth Circuit concluded that the FTC's regulation failed *Chevron's* initial prong, the Eleventh Circuit decided the regulation survived.<sup>87</sup>

However, this distinction in reasoning did not cause opposing outcomes, because the *Davis* court found that the FTC regulation was unreasonable and, therefore, failed the second prong of the *Chevron* test.<sup>88</sup> The Eleventh Circuit found the FTC regulation barring arbitration of MMWA claims to be unreasonable because it conflicted with Supreme Court jurisprudence favoring arbitration, and therefore was not entitled to judicial deference.<sup>89</sup> Finding both that the FTC regulation barring arbitration of MMWA claims was unreasonable under the *Chevron* test and a lack of any Congressional intent to bar arbitration of MMWA claims under the *McMahon* test, the *Davis* court ultimately agreed with the Fifth Circuit and likewise granted defendant's motion to compel arbitration.<sup>90</sup>

While determining the proper interaction between the MMWA, FAA, *Chevron*, and *McMahon* has not been easy for courts, it did appear that the Fifth and Eleventh Circuits had resolved the issue and established firm pro-arbitration precedence regarding the MMWA.<sup>91</sup> Given that *Walton* and *Davis* not only reached the same conclusion but that each case did so in a similar manner seemed to have

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80. *Id.*; see also *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 227 (1987). The *McMahon* opinion spelled out the following sources of authority: 1) the statute's text; 2) its legislative history; and 3) whether there is an inherent conflict between arbitration and the statute's underlying purposes. *Id.*

81. *Davis*, 305 F.3d at 1274.

82. *Id.* at 1275-76.

83. *Id.* at 1276 ("The MMWA expressly states three purposes: 'to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products.' These purposes are not in conflict with the FAA. In fact, the Supreme Court has repeatedly enforced arbitration of statutory claims where the underlying purpose of the statutes is to protect and inform consumers."); 15 U.S.C. § 2302(a).

84. *Davis*, 305 F.3d at 1277.

85. See *supra* note 67.

86. *Davis*, 305 F.3d at 1278.

87. *Id.*; *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 475 (5th Cir. 2002).

88. *Davis*, 305 F.3d at 1280.

89. *Id.*

90. *Id.*

91. See generally *Walton*, 298 F.3d 470; *Davis*, 305 F.3d 1268.

put the issue to rest. However, a decade later the Ninth Circuit and *Kolev* have seemingly revived the issue.

#### IV. INSTANT DECISION

##### A. Majority Opinion

The U.S. Court of Appeals for the Ninth Circuit began its analysis in *Kolev* by stating that while the Magnuson-Moss Warranty Act (MMWA) does not specifically address arbitration, Congress had delegated rulemaking authority under the Act to the Federal Trade Commission (FTC).<sup>92</sup> The court further noted that the FTC, pursuant to its rulemaking authority, construed the MMWA as proscribing mandatory arbitration of claims brought under the Act.<sup>93</sup> Finding the MMWA ambiguous on the issue and the FTC regulation on point, the court invoked the *Chevron* test to determine whether deference should be granted to the administrative promulgation.<sup>94</sup>

Addressing the initial prong of *Chevron*, the court, citing *Walton* and *Davis*, noted that both the Fifth and Eleventh Circuits agreed Congress had not manifested an express intent over whether MMWA claims were arbitrable.<sup>95</sup> Finding that the regulation passed the first prong, the court subsequently turned to the second prong of *Chevron* to determine whether the regulation was reasonable.<sup>96</sup> In addressing this issue, the *Kolev* court cited to various provisions of the FTC promulgation constructing a framework whereby mechanisms under the MMWA are “informal dispute settlement procedure[s] which [are] incorporated into the terms of a written warranty,”<sup>97</sup> and that such mechanisms, including arbitration, are not binding on the consumer and do not prevent the consumer from pursuing other legal remedies such as litigation.<sup>98</sup> In evaluating whether the FTC regulation was a reasonable construction of the MMWA, the court noted the FTC’s explanation, purporting that Congress’ intent was to bar arbitration of MMWA claims.<sup>99</sup> Additionally, the FTC asserted that even if Congress had intended to allow arbitration of such claims, the FTC was not prepared to set out guidelines to address such a system.<sup>100</sup>

The Ninth Circuit found the FTC explanation persuasive for three reasons.<sup>101</sup> First, at least according to the FTC advisory note, the regulation was promulgated in accordance with Congress’ intent to bar arbitration under the MMWA.<sup>102</sup> Second, the court stated that in enacting the MMWA, Congress sought to address the inequality in bargaining power between merchants and consumers by providing

92. *Kolev v. Euromotors West/The Auto Gallery*, 658 F.3d 1024, 1026 (9th Cir. 2011), *opinion withdrawn*, 676 F.3d 867 (9th Cir. 2012); 15 U.S.C. § 2310(a)(2) (2006).

93. *Id.*; FTC Informal Dispute Settlement Procedures, 16 C.F.R. §§ 703.1, 703.5 (2009).

94. *Kolev*, 658 F.3d at 1025-27.

95. *Id.* at 1026 (citing *Walton*, 298 F.3d at 475; *Davis*, 305 F.3d at 1278).

96. *Id.*

97. *Id.* (citing FTC Informal Dispute Settlement Procedures, 16 C.F.R. § 703.1(e)).

98. *Id.* (citing FTC Informal Dispute Settlement Procedures, 16 C.F.R. § 703.5(g)(1)).

99. *Id.* (citing FTC Informal Dispute Settlement Procedures, 16 C.F.R. § 703.3)).

100. *Id.* at 1026-27.

101. *Id.* at 1027.

102. *Id.*

consumers with access to more reasonable and effective remedies.<sup>103</sup> Barring mandatory binding arbitration furthers that aim because it protects consumers from being forced into involuntary agreements they cannot negotiate.<sup>104</sup> Third, the court found that, according to Supreme Court precedent, the thirty-five year old regulations warranted deference because they represented a longstanding, consistent interpretation of the statute.<sup>105</sup> Determining that the FTC regulations barring mandatory arbitration of consumer contracts were reasonable, the Ninth Circuit concluded that deference to the regulation should be shown.<sup>106</sup> After resolving this issue, the Ninth Circuit immediately turned its attention to addressing possible attacks on its reasoning.<sup>107</sup>

In dicta, the *Kolev* court acknowledged the current Supreme Court's stance favoring a liberal policy of arbitration, but cited the *McMahon* test for the proposition that agreements to arbitrate may be overridden by contrary congressional command.<sup>108</sup> Applying this test, the court explained why the Fifth and Eleventh Circuits erred in holding that Congress had not expressed intent to bar mandatory arbitration of MMWA claims.<sup>109</sup> Addressing the *Walton* decision, the Ninth Circuit claimed it was unprecedented to discern Congress' intent for one statute, the MMWA, by looking at another previous statute, the FAA.<sup>110</sup> With respect to the *Davis* decision, the Ninth Circuit explained that the FTC regulation was reasonable for the aforementioned reasons,<sup>111</sup> but also because the FTC regulation differed from other administrative regulations which had failed to rebut the FAA's pro-arbitration assumption.<sup>112</sup>

Consequently, the Ninth Circuit reversed the district court's ruling to compel arbitration and remanded the case back to the district court, holding that mandatory arbitration provisions are invalid under the MMWA.<sup>113</sup>

103. *Id.* (citing H.R.REP. No. 93-1107, at 24 (1974), reprinted in 1974 U.S.C.C.A.N. 7702, 7702).

104. *Id.*

105. *Id.* at 1028 (citing *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 490 (5th Cir. 2002) (King, C.J., dissenting); *Smiley v. Citibank*, 517 U.S. 735, 740 (1996) ("A court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration . . . [because] agency interpretations that are of long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist.")).

106. *Kolev*, 658 F.3d at 1029.

107. *See id.* at 1029-31.

108. *Id.* at 1029; *see generally* *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 107 (1987). The FAA's mandate to enforce arbitration agreements, "[l]ike any statutory directive, may be overridden by a contrary congressional command." *Id.*

109. *Kolev*, 658 F.3d at 1029.

110. *Id.* (citing *Walton*, 298 F.3d at 483 (King, C.J., dissenting)).

111. *See supra* notes 98-102 and accompanying text.

112. *Kolev*, 658 F.3d at 1030-31. The court supported its conclusion with the following reasons: 1) "in none [of the rejected statutes] did an authorized agency construe the statute to bar pre-dispute mandatory arbitration"; 2) none of the rejected statutes had Congressional language relating to possibly barring mandatory arbitration whereas the MMWA does; and 3) Congress, in the MMWA, "explicitly preserve[d]" a consumer's right to pursue statutory claims in a judicial setting. *Id.* at 1030. *See generally* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (holding that the Sherman Antitrust Act invalidly conflicts with the FAA); *McMahon*, 482 U.S. at 227-38 (holding that the Securities Exchange Act invalidly conflicts with the FAA); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-35 (1991) (holding that the Age Discrimination in Employment Act invalidly conflicts with the FAA).

113. *Kolev*, 658 F.3d at 1031.

*B. Judge Smith's Dissent*

In his dissent, Judge Smith criticized the majority for misconstruing the FTC regulation and ignoring precedent.<sup>114</sup> Addressing the alleged flaws in the majority's statutory interpretation, Judge Smith cited FTC promulgations to bolster his argument, first noting that Congress made informal dispute resolution procedures, or mechanisms, a prerequisite to filing suit to encourage expeditious resolution of claims under the MMWA.<sup>115</sup> Second, Judge Smith asserted that the arbitration remedy at issue was not a mechanism in accordance with the FTC regulations because the arbitration agreement is an alternative, not a prerequisite, to litigation.<sup>116</sup> Third, Judge Smith stated that while the majority was correct in finding that the FTC regulation disapproves of binding non-judicial remedies in written warranties, the regulation only pertains to warranties that incorporate one of the defined mechanisms.<sup>117</sup> Expounding on his second point, Judge Smith found that because the arbitration agreement at issue was not a mechanism as defined by the FTC, it was outside the purview of the FTC regulations.<sup>118</sup>

The dissent then turned its attention to the majority's second holding: *Chevron* deference was appropriate in this case.<sup>119</sup> First, Smith argued the *Chevron* test was inappropriate because Congress never delegated authority to the FTC to regulate non-judicial remedies unless those remedies qualified as mechanisms.<sup>120</sup> Having found that the arbitration agreement at issue was not such a mechanism, Judge Smith stated that Congress delegated no authority to the FTC concerning the matter at issue and deference was patently incorrect.<sup>121</sup>

Finally, Judge Smith found that even if the FTC had the authority to regulate the arbitration agreement in this instance, and such regulations could be construed to bar that arbitration, it would be unreasonable to do so in light of contemporary principles and approaches to the FAA.<sup>122</sup> To find otherwise would create an unnecessary conflict between the federal circuits as well as between the Ninth Circuit and the Supreme Court.<sup>123</sup>

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114. *Id.* at 1031-32 (Smith, J., dissenting).

115. *Id.*; Final Action Concerning Review of Interpretations of MMWA, 64 Fed. Reg. 19,700, 19,701 (Apr. 22, 1999)

116. *Kolev*, 658 F.3d at 1031-32. ("The Agreement provides that (1) disputes will 'be resolved by neutral, binding arbitration and not by a court action;' (2) '[t]he arbitrator's award shall be final and binding on all parties'; and (3) 'any appeal, if permitted by the terms of the agreement, will be to a three-arbitrator panel, not to a court of law.'"); see 15 U.S.C. § 2310(a)(3) (2006).

117. *Kolev*, 658 F.3d at 1035.

118. *Id.*

119. *Id.*

120. *Id.* (quoting *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990) ("[A]n agency may not bootstrap itself into an area in which it has no jurisdiction . . . .") (citations omitted)).

121. *Id.* at 1036 (citing *Adams Fruit*, 494 U.S. at 650).

122. *Id.*

123. *Id.* at 1031 ("In a departure from Supreme Court precedent, the prevailing view of our sister circuits, and applicable statutes, the majority opinion nullifies nearly every binding, non-judicial warranty dispute remedy adopted by private parties in this circuit.").

## V. COMMENT

A. *The Ninth Circuit Incorrectly Decided Kolev*

The Ninth Circuit erred in four ways in reaching its decision that the MMWA bars mandatory pre-dispute arbitration. First, the court was incorrect in applying the *Chevron* test because the FTC promulgation did not apply to the mandatory arbitration agreement at issue. Second, even if the FTC promulgation applied to the arbitration agreement, the FTC did not have the required statutory authority to make its promulgation. Third, even if it was proper to apply the *Chevron* test, the facts of the case should not survive the *Chevron* test because Congress has spoken directly on the issue via the FAA. Finally, even if the FTC had the requisite statutory authority to make its promulgation, the promulgation is not a permissible interpretation of the MMWA because it conflicts both with the MMWA itself and Supreme Court precedent.

The most severe flaw in *Kolev* was the Ninth Circuit finding that the FTC regulation survived the *Chevron* test.<sup>124</sup> The MMWA “encourage[s] warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.”<sup>125</sup> The MMWA also delegates to the FTC the power to determine minimum requirements for such mechanisms.<sup>126</sup> At first glance, this would seem to afford the FTC the grounds with which to make its promulgation barring pre-dispute binding arbitration. However, the Ninth Circuit overlooked a congressional regulation accompanying the MMWA stating that nothing in the Act prevents parties from agreeing to some other avenue of redress other than a mechanism, if they choose to do so.<sup>127</sup> The regulation also explicitly states that such avenues of redress include binding arbitration.<sup>128</sup> The *Kolev* court was further misled by MMWA language stating a “consumer [may] resort to such [informal dispute mechanism] procedure before pursuing any legal remedy.”<sup>129</sup> The Ninth Circuit interprets this language to allow plaintiffs to first pursue an informal dispute mechanism, such as arbitration, and then later pursue litigation. Thus, the Ninth Circuit’s reasoning misconstrues the purpose of arbitration: it is an alternative to judicial proceedings, not a segue to them.<sup>130</sup> It may have been this policy pitfall that encouraged Congress to supplement the MMWA with a regulation reserving the right to binding arbitration, but regardless of Congress’ motive for the regulation, it explicitly announced that binding arbitration is not a mechanism but a procedure available under the MMWA.<sup>131</sup> For this reason, the Ninth Circuit erred in applying the *Chevron* test and, therefore, should have affirmed the district court’s order to compel arbitration.

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124. Born & Raviv, *supra* note 49.

125. 15 U.S.C. § 2310(a)(1) (2006).

126. *Id.* § 2310(a)(2).

127. FTC Informal Dispute Settlement Procedures, 16 C.F.R. § 703.3 (2009).

128. *Id.*

129. *Kolev*, 658 F.3d at 1030 (quoting 15 U.S.C. § 2310(a)(3)(C)).

130. Born & Raviv, *supra* note 49.

131. FTC Informal Dispute Settlement Procedures, 16 C.F.R. § 703.3; Born & Raviv, *supra* note 49.

The Ninth Circuit was also incorrect in evaluating whether the FTC promulgation warranted judicial deference in accordance with the *Chevron* test because the FTC never had the authority to make its promulgation in the first place. Congress did not delegate to the FTC the power to regulate all alternative dispute resolution avenues; it only empowered the FTC to regulate mechanisms.<sup>132</sup> As the dissent accurately noted, the arbitration remedy at issue in *Kolev* was not a mechanism as defined by the MMWA and was, therefore, outside the purview of the FTC's control.<sup>133</sup> Thus, Congress never delegated to the FTC the power to control the arbitration provision at issue and applying the *Chevron* test was error.<sup>134</sup>

In finding that Congress had not spoken directly on the issue of binding arbitration in accordance with step one of the *Chevron* test, the *Kolev* court overlooked the most obvious example of congressional intent, the FAA.<sup>135</sup> The Ninth Circuit was correct in noting that the MMWA, at least on its face, does not specifically address its stance on binding arbitration.<sup>136</sup> However, even in the absence of a federal regulation allowing or proscribing binding arbitration, the court should have acknowledged the FAA as evincing Congress' intent to permit binding arbitration.<sup>137</sup> Thus, *Kolev*'s conclusion that the FTC regulation survived the *Chevron* test is misguided.

Finally, the Ninth Circuit erred in finding that the FTC's regulation was a permissible construction of the MMWA. Not only does the regulation directly conflict with the FAA but it also flies in the face of recent Supreme Court precedent which has repeatedly taken a liberal approach to arbitration.<sup>138</sup> While the inaccurate resolution of complex legal issues such as the determination of agency deference and the construction of an ineptly written statute are understandable missteps, it is still hard to imagine how the Ninth Circuit could deliver an opinion so antithetical to Supreme Court jurisprudence.

## B. The Implications of *Kolev*

### 1. The Difficulty in Determining Whether MMWA Claims May Be Arbitrated

While the *Kolev* court was misguided in its reasoning, it is certainly not the only culprit. Congress' initial failure to properly define "mechanisms" left a major unresolved question in the application of the MMWA. The difficulty courts faced in resolving this issue increased exponentially with a legislative promulgation that

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132. FTC Informal Dispute Settlement Procedures, 16 C.F.R. § 703.3; Born & Raviv, *supra* note 49.

133. *Kolev*, 658 F.3d at 1033 (Smith, J., dissenting); 15 U.S.C. § 2310(a)(3)(B).

134. Born & Raviv, *supra* note 49.

135. *Id.*

136. See FTC Informal Dispute Settlement Procedures, 16 C.F.R. § 703.3.

137. *Kolev*, 658 F.3d at 1026; Born & Raviv, *supra* note 49.

138. Born & Raviv, *supra* note 49; Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987). If a party wants to show that another federal law limits the pro-arbitration scope of the FAA, "[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." *Id.* See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985) (noting that courts should recognize "subject-matter exceptions" to arbitrability only where Congress has "expressly directed the courts to do so").

advocated arbitration of MMWA claims as a prerequisite to litigation.<sup>139</sup> The issue with this is that one of the central features of arbitration is that it is a final award; it is by nature an alternative to the judicial process, not a precursor.<sup>140</sup> This language has “muddied the waters” and made MMWA analysis under the *McMahon* or *Chevron* tests very difficult for courts.<sup>141</sup>

Although the means used by the Ninth Circuit in *Kolev* appear flawed, questions over whether its end propagates good policy represent a more controversial topic.<sup>142</sup> Critics expounding on *Kolev*'s possible policy implications tend to fall into one of two factions: those who argue that the FAA should rule and MMWA claims should be arbitrable, and those who argue that consumer protection should rule and MMWA claims should not be arbitrable.<sup>143</sup>

The leaders of the pro-arbitrability sentiment have argued that the United States, as a signatory to the New York Convention<sup>144</sup> and other international arbitration conventions,<sup>145</sup> should be committed to recognizing and upholding arbitration agreements.<sup>146</sup> Allowing courts to defeat arbitration via contrary administrative regulations does not instill trust in other signatory countries which expect arbitration agreements to be honored.<sup>147</sup> Moreover, tainting the integrity of arbitration in the U.S. could have a substantial adverse effect on foreign investment and wealth creation.<sup>148</sup> Consistent enforcement of agreements to arbitrate provides assurance to investors from signatory countries that disputes arising from their transactions will be resolved by arbitration. Resolving issues through a transnational procedure like arbitration, with rules influenced by each signatory nation, establishes perceptions of fairness and reliability, thus reducing investors' risks

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139. H.R. REP. No. 93-1107, at 41 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7723 (“An adverse decision in any informal dispute settlement proceeding would not be a bar to a civil action on the warranty involved in the proceeding.”); *see Higgs v. The Warranty Group*, No. C2-02-1092, 2007 WL 2034376 (S.D. Ohio July 11, 2007); *Rickard v. Teynor's Homes, Inc.*, 279 F. Supp. 910 (N.D. Ohio 2003); *Browne v. Kine Tysons Imports, Inc.*, 190 F. Supp. 2d 827 (E.D. Va. 2002); *Koons Ford of Baltimore, Inc. v. Lobach*, 919 A.2d 722 (Md. 2007); *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (S.C. 2007); *Tucker v. Ford Motor Co.*, CL-2006-2827, 2007 Va. Cir. LEXIS 24 (Va. Cir. Ct. Feb. 1, 2007).

140. Born & Raviv, *supra* note 49.

141. *See generally Kolev*, 658 F.3d 1024; *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002); *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470 (5th Cir. 2002); *see also Boyd v. Homes of Legend, Inc.*, 981 F. Supp. 1423, 1437 (M.D. Ala. 1997) (“[Section] 2310 sets up alternative dispute resolution mechanisms or procedures, akin to arbitration, which consumers may be compelled to exhaust before resorting to a court lawsuit.”).

142. *See Daniel G. Lloyd, The Magnuson Moss Warranty Act v. The Federal Arbitration Act: The Quintessential Chevron Case*, 16 LOY. CONSUMER L. REV. 1 (2003); *but see Born & Raviv, supra* note 49.

143. *See infra* notes 146-56 and accompanying text.

144. *See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, 21 U.S.T. 2517 [hereinafter *New York Convention*].

145. *See UNCITRAL Arbitration Rules*, G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (Jan. 10, 2011), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>; *Inter-American Convention on International Commercial Arbitration of 1975*, Pub. L. No. 101-369, 104 Stat. 448 (1990).

146. Born & Raviv, *supra* note 49.

147. Guillermo A. Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 366 (2003).

148. *Id.* at 396 (“In today's heterogeneous world, cross-border investment will be chilled without a willingness of all countries to accept arbitration.”).

and increasing capital flow.<sup>149</sup> Conversely, litigation is controlled by a set of rules enacted solely by the situs' government, creating distrust as foreign litigants fear nationalist and ethnocentric biases.<sup>150</sup>

Arguments by those who oppose arbitrability of MMWA claims contend that consumers would be exploited if warrantors could compel arbitration.<sup>151</sup> Specifically, this constituency alleges that consumers frequently have bargaining power inferior to that of their warrantor; therefore, it is not realistic for consumers to bargain whether or not they will enter into an arbitration agreement and what the provisions of that agreement will be.<sup>152</sup> By allowing warrantors to dominate the terms and availability of arbitration, consumers may easily be exploited. For example, initial arbitration expenses and attorneys' fees may deter aggrieved consumers from bringing successful claims and receiving compensation.<sup>153</sup> Additionally, by compelling arbitration, warrantors will often be able to avoid larger payouts to aggrieved consumers.<sup>154</sup> This second problem for consumers may be further exacerbated by *AT&T Mobility LLC v. Concepcion*, a recent Supreme Court decision permitting warrantors to implement class action waivers in arbitration.<sup>155</sup>

Both factions present compelling arguments and articulate the various dangers that could result from siding against them. The concerns raised by this problem have prompted courts, commentators, and legislators to address the issue.<sup>156</sup> Unfortunately, attempts to resolve the issue have fallen short. Taking an economist's approach to the issue, this note argues that MMWA claims should be arbi-

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149. *See id.* at 366-69.

150. *See id.* at 369-70.

151. Guerin, *supra* note 4, at 20-21; Mace E. Gunter, *Can Warrantors Make an End Run? The Magnuson-Moss Warranty Act and Mandatory Arbitration in Written Warranties*, 34 GA. L. REV. 1483, 1508-09 (2000); Lloyd, *supra* note 4, at 1. Lloyd describes this preference:

Creditors and merchants prefer the arbitral forum due to the lower likelihood of exposure to large judgments, even in the wake of systematic misconduct. Additional reasons, perhaps equally as compelling, include losing the right to a jury, the unavailability of pursuing a class action, discovery limitations, filing fees, and the inability to appeal an erroneous interpretation of law—all hindering the consumer's pursuit of redress. One commentator even dubbed arbitration the 'death knell' of consumer protection. Currently, the effort to avoid arbitration in a consumer setting is one of the most frequently contested issues.

*Id.*

152. Guerin, *supra* note 4, at 4 ("The seller's boilerplate language becomes more like boilerplate armor, skillfully crafted by legal counsel. In contrast, the consumer has no negotiation rights and consequently, has no choice—the 'take it or leave it' theory—but to sign 'on the dotted line' and hope to be satisfied with the product.'").

153. Allan S. Kaplinsky & Mark J. Levin, *Anatomy of an Arbitration Clause: Drafting and Implementation Issues Which Should Be Considered By a Consumer Lender*, 1113 PRAC. L. INST. CORP. L. PRAC. COURSE HANDBOOK 655, 689 ("Because some arbitration organizations impose filing and hearing fees that exceed typical court fees, consumers sometimes contend that the arbitration clause is unconscionable because it imposes an unreasonable financial burden and effectively denies them an affordable forum."); *see also* 15 U.S.C. § 2310(d)(2) (2006) (providing provision for recovery of attorneys' fees and costs for prevailing plaintiffs in litigation).

154. 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, 64-65 (noting that one study found median verdict from jury is \$264,700 and mean verdict from jury is \$703,600, while arbitration garners median award of \$49,400 and mean award of \$124,500).

155. 131 S. Ct. 1740 (2011).

156. *See infra* notes 161-67 and accompanying text.

trable. Presumably, any money saved by manufacturers and warrantors via arbitration will be allocated to research, production, and product improvement, indirectly returning it to consumers. While consumers will theoretically suffer little to no injury, the integrity of arbitration will be preserved, promoting both domestic and international wealth creation.<sup>157</sup> Additionally, while allowing MMWA claims to be arbitrated hinders the purpose of the Act, it does not cripple it, as the MMWA would continue to be a viable weapon for consumers.<sup>158</sup> Skeptics may argue that manufacturers or warrantors will simply pocket any money saved and consumers truly will be aggrieved. To paraphrase Yogi Berra: in theory, theory and practice are the same thing, but in practice, they are not.

## 2. Attempted Solutions

In 1998, the American Arbitration Association acknowledged the difficulty in resolving this schism by promulgating a new protocol for arbitration of consumer contracts.<sup>159</sup> The protocol advocated greater disclosure of the presence and terms of arbitration agreements, notice of the opportunity to use small claims court as an alternative to arbitration, and the use of clearer contractual statements alerting consumers that they are submitting to arbitration.<sup>160</sup> While these efforts were commendable, they garnered little judicial support and have failed to materially impact merchant-consumer interactions.<sup>161</sup>

Another suggested solution is to force merchants and warrantors to advertise their arbitration agreements along with any advertisements they make for their warranties.<sup>162</sup> Greater exposure to arbitration agreements may help consumers educate themselves on the arbitral process before being confronted with a take-it-or-leave-it sales contract. However, this solution may have little effect as many such warnings have devolved into bouts of jargon being hurled at lay consumers.<sup>163</sup>

Congress has also made efforts to solve the issue it helped create. In 2009, committee hearings were held nine separate times to decide the fate of the Arbitration Fairness Act, which would have amended the FAA by adopting pre-dispute/post-dispute distinctions and barring all pre-dispute consumer arbitration agreements.<sup>164</sup> The bill never gained the support it needed as it was resubmitted again in 2011 and once again failed.<sup>165</sup> Should Congress pass such a bill, it would provide a clear answer to the *McMahon* and *Chevron* tests, vitiating any judicial

157. See *supra* notes 149-51 and accompanying text.

158. See *infra* notes 176-77 and accompanying text.

159. See American Arbitration Association, Consumer Due Process Protocol, [http://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_005014](http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_005014) (last visited Oct. 11, 2012).

160. See *id.*

161. Guerin, *supra* note 4, at 33 (“As demonstrated by the case law above, currently, the only state that is avidly pursuing the consumer contract arbitration issue is Alabama. Skeptically, one would assume that more than a protocol is needed to effect any change in industry.”).

162. *Id.* at 34.

163. *Id.*

164. H.R. 1020, 111th Cong. (2009). The bill was introduced on February 12, 2009, by Representative Henry Johnson and referred to the Subcommittee on Commercial and Administrative Law on March 16, 2009. Previous identical bills died on the table. See S. 1782, 110th Cong. (2007); H.R. 3010, 110th Cong. (2007).

165. H.R. 1873, 112th Cong. (2011).

difficulties. However, this could expose policy pitfalls articulated by those favoring arbitration of MMWA claims.<sup>166</sup>

Eventual resolution of this problem may require a Supreme Court decision, which would presumably provide the final word on the MMWA's statutory interpretation. The Court may be motivated to take the issue up now that *Kolev* has created a split between the circuits.<sup>167</sup> Given the Supreme Court's pro-arbitration stance, Congress' apparent intent to allow arbitration of MMWA claims, and a current lack of uniformity in the law, the Supreme Court should grant *certiorari* and overrule *Kolev*.<sup>168</sup> However, assuming that the Court does not preside over the issue, it is useful to evaluate the effect *Kolev* may have going forward.

### 3. *The Current Impact of Kolev*

While definitive resolution of the *Kolev* issue may one day be delivered, that day has not yet come. Given the labyrinthine difficulty of the case and the Ninth Circuit's potential to address this issue again, it is worth examining what *Kolev*'s impact on contemporaneous jurisprudence may have been. If *Kolev* stands as precedent, it may serve as a circumvention of the *Concepcion* decision allowing for class action waivers.<sup>169</sup> While the Ninth Circuit did not address class action waivers in *Kolev*, plaintiffs may begin to bring claims of MMWA infringement to avoid arbitral proceedings where class action waivers would be valid, and pursue litigation where such waivers would be invalid.<sup>170</sup> Additionally, *Kolev*'s interpretation of the MMWA could have a profound effect on products liability cases as many warrantors will have to plan ahead for litigation as opposed to an arbitral proceeding, which is often set up to advantage the warrantor.<sup>171</sup>

The decision in *Kolev* evinces the Ninth Circuit's continued preference favoring consumers and litigation over enforcement of the FAA.<sup>172</sup> Although *Kolev* will likely have a substantial impact in the Ninth Circuit, it is doubtful that impact will

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166. See *supra* notes 148-52 and accompanying text.

167. Rebekah Kaufman & Alexei Klestoff, *Concepcion May Not Reach Claims Under the Magnuson-Moss Act*, JDSUPRA (Sept. 29, 2011), <http://www.jdsupra.com/post/documentViewer.aspx?fid=c84ca573-fe78-4c5a-997a-c452053dbc98>.

168. Recent Case, *Arbitration--Fifth Circuit Holds Magnuson-Moss Warranty Act Claims Arbitrable Despite Contrary Agency Interpretation*, 116 HARV. L. REV. 1201, 1208 (2003) ("Instead, a court should conclude that the MMWA does not preclude arbitration; that given this lack of ambiguity, no deference need be accorded to the contrary FTC interpretation; and that the courts' pro-arbitration mandate requires the court to hold the claim arbitrable.").

169. Kaufman & Klestoff, *supra* note 167.

170. *Id.*

171. Ray Hartman et al., *Ninth Circuit Invalidates Pre-Dispute Mandatory Arbitration Clauses under Magnuson Moss Warranty Act*, DLA PIPER PUBLICATIONS (Sept. 29, 2011), <http://www.dlapiper.com/global/publications/Detail.aspx?pub=6394&RSS=true>; CURTIS R. REITZ, CONSUMER PROTECTION UNDER THE MAGNUSON-MOSS WARRANTY ACT 23 (1978) (noting that warrantor-created dispute mechanisms intended for binding arbitration are "flaw[ed], in that the unilateral establishment of a set of procedures for handling disputes by one of the disputing parties leaves much to be desired").

172. See *Jackson v. Rent-A-Center West, Inc.*, 581 F.3d 912, 917-18 (9th Cir. 2009) (holding that the unconscionability of an arbitration agreement should be decided by a court and not an arbitrator); *Hoffman v. Citibank, N.A.*, 546 F.3d 1078, 1084-85 (9th Cir. 2008) (noting Citibank's class action waiver would be substantively unconscionable under facts alleged, but remanding for more fact finding).

affect courts outside that jurisdiction as the Ninth Circuit has repeatedly delivered arbitration opinions disfavored by the Supreme Court.<sup>173</sup> If *Kolev* is not followed by other courts, it does not necessarily mean that the MMWA would perish along with it. The Fifth and Eleventh Circuits, as well as other courts, have held that while those bringing claims under the MMWA may be forced to arbitrate, they will only be forced to do so if the arbitration agreement was disclosed in the written warranty.<sup>174</sup> This is significant because arbitration clauses are rarely placed in the written warranty, often allowing those claims to be litigated.<sup>175</sup> So while *Kolev* may eventually be scrapped, the MMWA will remain a relevant, albeit redacted, part of warranty claims.

## VI. CONCLUSION

The problem faced in *Kolev* is a complex one that has troubled Congress, courts, and commentators, and no consensus has yet been reached. This issue may be attributed to poor legislative drafting, misguided administrative regulations, or lack of clear judicial precedent. Nonetheless, it cannot be said that *Kolev* has failed to make an impact; it has reopened the issue of MMWA arbitrability that the Fifth and Eleventh Circuits seemed to have settled, potentially ripening the issue for the Supreme Court.<sup>176</sup> If the issue is not resolved by the Supreme Court or a subsequent Ninth Circuit decision, legislators and commentators will likely continue to lobby their perspectives while warrantors will need to be wary of their warranty agreements and jurisdictional differences among courts. Ultimately, the intersection between the MMWA and FAA remains in limbo and *Kolev*'s withdrawal illustrates the ever-changing approach to that issue. Therefore, attorneys, courts, warrantors, and consumers should be advised to stay current on these developments as they continue to form the legal backdrop against which standard form warranties are written and consumer claims are handled.

TYLER BECKERLE

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173. See, e.g., *Jackson v. Rent-A-Center West, Inc.*, 581 F.3d 912 (9th Cir. 2009), *rev'd*, 130 S. Ct. 2772 (2010); *Laster v. AT&T Mobility, LLC*, 584 F.3d 849 (2009), *rev'd*, 131 S. Ct. 1740 (2010); *Greenwood v. CompuCredit*, 615 F.3d 1204 (2010), *rev'd*, 132 S.Ct. 665 (2011).

174. *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470 (5th Cir. 2002); *Cunningham v. Fleetwood Homes of Georgia, Inc.*, 253 F.3d 611, 622 (11th Cir. 2001); see also *Harnden v. Ford Motor Co.*, 408 F. Supp. 2d 300 (E.D. Mich. 2004); *DaimlerChrysler Corp. v. Mathews*, 848 A.2d 577 (Del. Ch. 2004); *Larrain v. Bengal Motor Co., Ltd.*, 976 So. 2d 12 (Fla. Dist. Ct. App. 2008); *Tropical Ford, Inc. v. Major*, 882 So. 2d 476 (Fla. Dist. Ct. App. 2004); *Manly v. Daimler Chrysler Corp.*, Clearinghouse No. 55,633 (Mich. Cir. Ct. Aug. 30, 2005).

175. Article, *12 Reasons to Love the Magnuson-Moss Warranty Act*, 11 J. CONSUMER & COM. L. 127, 128 (2008).

176. *Born & Raviv*, *supra* note 49.